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## BOMBAY SECTION

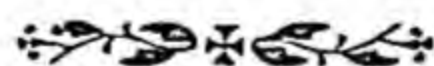
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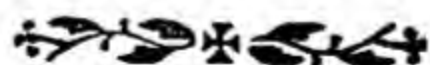


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# BOMBAY HIGH COURT

1946

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117	47	B L R	898		225	I C	142		47	Cr L J	721	423	48	B L R	90	
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159	47	B L R	867	212	47	B L R	825		226	I C	210		226	I C	579	
	223	I C	631		224	I C	18	350	48	B L R	52	481	226	I C	329	
163	47	B L R	862		ILR (1945) B	1038			(1946) 14	ITR	298		48	B L R	377	
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	ILR (1945) B	1080			47	Cr L J	591	356	48	B L R	110		226	I C	324	
168	47	B L R	861	266	FB	48	B L R	25	227	I C	515	495	47	Cr L J	900	
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169	47	B L R	857		ILR (1946) B	184			227	I C	411	499	227	I C	336	
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171	47	B L R	853		225	I C	304	363	48	B L R	193		227	I C	135	
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	224	I C	210		225	I C	229	365	227	I C	276	516	48	B L R	341	
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ILR	A I R			ILR	A I R			ILR	A I R			ILR	A I R			ILR	A I R		
702	1945	B	173	843	1945	B	207	938	1945	PC	137	1	1946	B	123	146	1946	B	304
711	"	"	489	855	1946	"	36	950	"	"	134	8	1945	"	442	159	"	PC	6
729	"	"	336	863	"	"	18	959	"	"	147	68	1946	"	51	173	"	B	315
734	1946	"	20	871	"	"	110	976	"	B	511	85	"	"	86	184	"	"	266
744	1945	"	478	885	"	"	207	1033	"	"	474	89	"	"	423	207	"	"	276
754	"	"	277	893	"	"	187	1038	1946	"	212	106	"	"	109	48	Bom	L R	
776	1943	"	177	899	"	"	102	1047	"	"	131	109	"	"	192	BLR	A I R		
783	1945	"	1	905	"	"	201	1056	"	"	7	113	1945	"	417	1	1945	PC	156
799	"	"	338	912	"	"	200	1068	"	"	105	119	"	"	352	13	"	"	89
819	1946	"	174	913	"	"	44	1080	"	"	167	143	1946	"	64	16	1946	B	272
				929	"	"	60	1084	"	"	154					25	"	"	266



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BLR	A I R			BLR	A I R			BLR	A I R			BLR	A I R			BLR	A I R		
41	1946	B	276	225	1946	B	365	430	1946	PC	59	594	1947	B	82	733	1947	B	185
46	"	"	315	244	"	"	452	434	"	"	53	598	"	"	119	737	"	"	204
52	"	"	350	246	"	"	396	439	"	"	75	604	"	"	78	740	1946	FC	27
56	"	"	328	252	"	"	361	443	"	"	66	608	"	"	86	746	1947	B	38
63	"	"	337	255	"	"	407	452	"	"	72	610	"	"	144	752	"	"	184
67	"	"	342	274	"	"	429	456	"	"	97	613	"	"	88	754	"	"	151
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76	"	"	309	287	1945	"	151	467	"	"	127	616	"	"	33	758	"	"	239
83	"	"	304	288	1946	"	38	473	"	"	82	622	"	"	96	761	"	"	163
90	"	"	423	293	"	"	24	482	"	FC	16	625	"	"	75	764	"	"	187
97	"	"	437	295	"	"	45	493	"	"	2	627	"	"	190	768	1946	PC	151
100	"	"	353	296	"	"	35	498	1947	B	30	629	"	"	152	775	1947	B	198
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110	"	"	356	308	"	"	477	513	"	"	15	635	"	"	87	788	"	"	140
116	1945	PC	147	313	"	"	469	517	"	"	54	636	"	"	72	795	"	"	255
123	1946	"	8	322	"	"	495	525	"	"	89	640	"	"	92	800	"	"	206
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159	"	"	333	379	"	"	492	548	"	"	36	686	"	"	268	828	"	"	217
163	"	"	446	382	"	"	465	551	"	"	42	691	"	"	108	864	"	"	272
171	"	"	319	387	"	"	533	565	"	"	46	698	"	"	169	882	"	"	209
177	"	"	439	393	"	"	482	571	"	"	18	717	"	"	153	893	"	"	251
185	"	"	454	404	1947	"	4	583	"	"	113	721	"	"	156	899	"	"	247
193	"	"	363	420	"	"	1	586	"	"	49	723	"	"	149	905	"	"	299
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Chamanlal Kevalchand v. Bai Ruxmani, Criminal Revn. Appln. No. 496 of 1943, Decided on 20th January 1944	Overruled in A. I. R. (33) 1946 Bom. 276 (F.B.).
Emperor v. Abala Isak, ('31) 55 Bom. 520 = 33 Bom. L. R. 349 = 1931 Cr. C. 565 = 33 Cr. L. J. 62 = 18 A. I. R. 1931 Bom. 309 = 134 I. C. 1219	Overruled in A.I.R. (33) 1946 Bom. 38 (F.B.).
Emperor v. Abdul Wahab Kamruddin, ('45) 46 Bom. L. R. 818 = 32 A. I. R. 1945 Bom. 110	Reversed in A.I.R. (33) 1946 Bom. 38 (F.B.).
Emperor v. Amritlal Manilal Shah, Ori. Rev. Appln. No. 303 of 1945, Decided on 12th July 1945	Overruled in A. I. R. (33) 1946 Bom. 533 (F.B.).
Governbha Ambar v. Kandanmal Shobhagchanda, Cri. Revn. Appln. No. 23 of 1945, Decided on 11th April 1945	Overruled in A. I. R. (33) 1946 Bom. 533 (F.B.).
Motichand Balubhai v. Dist. Magistrate, Surat, ('45) 32 A.I.R. 1945 Bom. 385 = 47 Bom.L.R. 357	Overruled in A. I. R. (33) 1946 Bom. 533 (F.B.).
New Mofussil Co., Ltd. v. Shankerlal Narayandas, ('41) I. L. R. (1941) Bom. 361 = 43 Bom. L. R. 293 = 28 A. I. R. 1941 Bom. 247 = 196 I.C. 146	Reversed in A. I. R. (33) 1946 P. C. 97.



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# THE ALL INDIA REPORTER

## 1946

### Bombay High Court

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[Case No. 1]

\* A. I. R. (33) 1946 Bombay 1

STONE C. J. AND CHAGLA J.

*Anandram Mangtaram and others —  
Defendants — Appellants*  
v.

*Bholaram Tanumal — Plaintiff —  
Respondent.*

O. C. J. Appeal No. 24 of 1944, Decided on 13th March 1945, from judgment of Kania J., in Suit No. 1404 of 1943, D/- 20th June 1944.

\* (a) Contract Act (1872), Ss. 55 and 63 — Extension of time fixed for performance of contract can be effected only by agreement between parties to contract — Unilateral act of promisee or his mere forbearance to sue or issue notice of rescission of contract does not amount to extension of time.

Under S. 55, the promisee is given the option to avoid the contract where the promisor fails to perform the contract at the time fixed in the contract. It is open to the promisee not to exercise the option or to exercise the option at any time, but the promisee cannot by the mere fact of not exercising the option change or alter the date of performance fixed under the contract itself. Under S. 63 the promisee may make certain concessions to the promisor which are advantageous to the promisor, and one of them is that he may extend the time for such performance. But such an extension of time cannot be a unilateral extension on the part of the promisee. It is only at the request of the promisor that the promisee may agree to extend the time of performance and thereby bring about an agreement for extension of time. Therefore it is only as a result of the operation of S. 63 that the time for the performance of the contract can be extended and that time can only be extended by an agreement arrived at between the promisor and the promisee. The fact that the contract is not put an end to does not entail the further consequence that the time for the performance of the contract is automatically extended. Forbearance to sue or to give notice of rescission cannot be an extension of time for the performance of the contract within the meaning of S. 63 : ('43) 30 A.I.R. 1943 Bom. 229, *Not approved* ; ('14) 1 A. I. R. 1914 Mad. 573 and ('22) 9 A. I. R. 1922 P. C. 178, *Rel. on* ; 69 I. C. 9 (Bom.) and ('25) 12 A. I. R. 1925 Bom. 547, *Expl.* [P 4 C 2; P 5 C 1, 2; P 6 C 2]

1946 B/1 & 2

Under the contract between the parties the defendant had to deliver to the plaintiff 41 bales of cloth by the end of February 1943. The defendant did deliver to the plaintiff 5 bales of the contract goods on 27th February but failed to deliver the balance of 36 bales and thereby committed a breach of the contract. Thereafter correspondence followed between the parties in which the plaintiff insisted that the defendant should satisfy him that he was doing his best to obtain the goods from his suppliers and then the plaintiff would consider fixing a new date for delivery of the goods. On the other hand the defendant asserted his right not to be bound to give delivery until he received the goods from his suppliers. Ultimately the plaintiff insisted that if the goods were not delivered within a short time he would file suit for damages for breach of contract and repudiated the contract on 28th July 1943. In the suit by the plaintiff for damages for breach of contract the question was what was the date on which damages could be assessed :

*Held* that the correspondence clearly indicated that the parties were never ad idem and no agreement was arrived at between them for the extension of time for delivery of the goods and that the date of the breach, therefore, was 28th February 1943 and damages should be assessed as of that date. [P 5 C 1, 2]

(b) Civil P. C. (1908), S. 34 — Damages — Suit for — Interest on damages from date of suit if can be allowed.

Under S. 34 it is entirely a matter for the Court's discretion whether to award interest from the date of the filing of the suit where the decree is for the payment of money. [In this case the plaintiff was awarded interest on damages from the date of the filing of the suit]: ('31) 18 A.I.R. 1931 Bom. 386, *Dissent.* ; ('25) 12 A. I. R. 1925 Bom. 547, *Approved.* [P 7 C 1, 2]

C. P. C. —

('44) Chitaley, S. 34, N. 3, Pts. 1, 15; N. 2, Pts. 1, 2.

('41) Mulla, Page 143, Pt. (y); Page 144, Pt. (h); Page 145, Pt. (n).

K. M. Munshi and R. J. Kolah — for Appellants.  
M. V. Desai and K. T. Desai — for Respondent.

**Stone C. J.** — This is an appeal from the judgment of Kania J. dated 20th June 1944. The action is by a purchaser of certain goods against the vendors, who are the



appellants in this Court, for damages for breach of contract. The breach which is now admitted was the failure of the appellants to deliver thirty-six bales of cloth, the balance of forty-one bales, the subject-matter of the contract, before the expiry of the month of February 1943. The only question in dispute is the date on which damages are to be assessed which becomes very material by virtue of the somewhat violent fluctuations in the market prices. Four different dates have been suggested, and the difference in the quantum of damages is substantial. The first date is 28th February 1943, resulting in damages of approximately Rs. 7,000; the second date is 5th May 1943, resulting in damages of approximately Rs. 19,000; the third date is 19th June 1943, resulting in damages of approximately Rs. 14,000; and the last date is 28th July 1943, resulting in damages of approximately Rs. 1,400. It is common ground that unless the date of the performance of the contract was in some way or other extended, the time of the breach must be on 28th February 1943. Mr. Munshi on behalf of the appellants contends that the relevant date is 28th July, alternatively that it is 1st March. Mr. M. V. Desai for the respondent-purchaser claims that the date is 5th May and the learned Judge in the Court below has decided in favour of 19th June 1943. The answer to this problem is to be found by determining what is the construction to be put upon certain correspondence which passed between the legal advisers of the parties after the purchase and up to 28th July, having regard to two sections of the Contract Act, that is to say, ss. 55 and 63. Section 55, so far as material, is as follows :

"When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract." Section 63 is in these terms :

"Every promisee may dispense with or remit, wholly, or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit."

So that the question is : Did the respondent-purchaser extend the time for the performance of the contract? We have in this Court been referred to certain authorities which can be conveniently examined before considering what took place in this case. In the order of date, the first authority is 37 Mad.

412.<sup>1</sup> That was a case of a breach of contract for the delivery of certain goods by a specified date, and at p. 413 Sir Charles White, the Chief Justice, says this :

"I am unable to agree with the Subordinate Judge that the plaintiffs are entitled to damages on this footing. The Judge refers to S. 63, Contract Act, which empowers a promisee to extend the time for the performance of the promise. Of course it would have been open to the parties to extend the time by agreement, but there is no evidence of any consent by the defendant to any extension of the time and this is not a case in which it can be said that silence gives consent. In my opinion, it is clear that S. 63 does not entitle a promisee, for his own purposes and without the consent of the promisor to extend the time for performance which had been agreed to by the parties to the contract. The view of the learned Subordinate Judge was that at the time the suit was instituted the contract of 12th May was a subsisting contract. In support of this view Mr. Seshagiri Ayyar relied strongly on the terms of S. 55, Contract Act. He contended that under that section the contract was voidable at the option of the promisee, that is the plaintiffs, and as they had not avoided the contract, they were entitled to treat it as a subsisting contract at the date of the institution of the suit.

"Now, in my opinion, S. 55 entitles a party to a contract, where time (as in this case) is of the essence of the contract, to say if he is sued upon the contract : 'Time is of the essence of this contract, you have failed to comply with the stipulation as to time, I repudiate the contract.' It does not enable the promisee to say : 'I elect to keep alive this broken contract in the hopes that I may hereafter recover heavier damages for the breach of the contract than I should be entitled to recover at the time of the breach of the contract.' Mr. Seshagiri Ayyar contended that the only way by which a promisor who had broken his stipulation as to time could protect himself if the promisee did not avoid the contract would be to give notice that the contract was at an end. It seems altogether unreasonable to place any such obligation on a promisee when ex consensus the contract has been broken with reference to a matter which goes to the root of the contract."

Then comes the case in the Privy Council in 24 Bom. L. R. 687.<sup>2</sup> Lord Dunedin delivering the judgment of the Board says this (p. 690) :

"Now apart from the terms of the Indian Contract Act, the law is as laid down in (1875) 10 Ex. 195.<sup>3</sup> Baron Martin in that case said :

"The second question is one of law, and is a most important one—it arises over and over again every day in the ordinary transactions of mankind. It is this : There is a contract for the sale of goods to be delivered, say, in January or upon a day of January. On the day before the delivery is to take place the vendor meets the vendee and says : 'It

1. (14) 1 A. I. R. 1914 Mad. 573 : 37 Mad. 412 : 14 I. C. 255, *Muthaya Maniagan v. Lekku Reddiar*.

2. (22) 9 A. I. R. 1922 P. C. 178 : 43 All 257 : 48 I. A. 175 : 24 Bom. L. R. 687 (P.C.), *Muhamad Habidullah v. Bird & Co.*

3. (1875) 10 Ex. 195 : 44 L. J. Ex. 130 : 33 L.T. 56 : 23 W. R. 871, *Tyers v. Rosedale & Ferryhill Iron Co.*



is not convenient for me to deliver the goods . . . upon the day named, and I will be obliged if you will agree that the goods shall be delivered at a later period,' and the vendee assents; or the vendee goes to the vendor, and says: 'It is not convenient for me to receive the goods in January, or upon the day named, and will you agree that the delivery shall be postponed', and the vendor assents: the latter is the present case, and the contention on the part of the defendants is that this puts an end to the contract, and that the defendants are not bound to deliver upon the later day. In my opinion, the contention is not well founded . . . It is impossible to distinguish the case of the application . . . coming from the vendors and one coming from the vendee'."

That opinion was affirmed in the Exchequer Chamber. The effect of S. 55, Contract Act, above quoted is, where the party having the option elects not to avoid, to put agreement after the original date on the same footing as an agreement, as put by Baron Martin, just before the original date."

Be it observed that what is said is that S. 55, Contract Act, is to put an agreement after the original date on the same footing as the agreement mentioned in the quotation in Baron Martin's judgment. But it must be an agreement. Mere forbearance from suing or giving a formal notice is not enough. Then comes the case in 45 Bom. L.R. 405.<sup>4</sup> The head-note in that case is as follows:

"A party to a contract may, at the request of the other party, forbear from insisting upon delivery at the contract time and allow time to be extended without binding himself to do so, or may expressly contract for an extension of time, and claim damages for non-performance at the extended time."

In his judgment at p. 413 Blackwell J. says this:

"It is well established that a party to a contract may at the request of the other party forbear from insisting upon delivery at the contract time and may allow time to be extended, without binding himself to do so, or may expressly contract for an extension of time, and that he may claim damages for non-performance at the extended time."

With great respect to the learned Judge, in my opinion, the first of those propositions, namely, that the other party may forbear from insisting upon delivery at the contract time and may allow time to be extended without binding himself to do so, is not in accordance either with the Privy Council decision or with the decision of the Madras High Court in 37 Mad. 412,<sup>1</sup> to which I have already referred, if it means that damages for non-performance are to be claimed as at the extended time. Certain English cases were also referred to. But I would prefer not to rely on any of them, as in England there is no such statutory provision of ss. 55 and 63, Contract Act,

and the position in England is complicated by the introduction of the Statute of Frauds. After 28th February 1943, there appears to have been no communication between the parties until 3rd April 1943. On that day the legal adviser of the purchaser wrote a letter to the vendors of which the material passage is as follows:

"As you cannot expect my clients to wait indefinitely like this I am instructed to call upon you to arrange to deliver the same and in that respect to forward your invoice when my clients will pay the requisite amount in cash against delivery or in the alternative to let me know as to the reason of so much undue delay and as to when you expect to deliver the same and what efforts, if any, you have made in that behalf to obtain delivery from your vendors and the reason, if any, they have assigned for such delay. Awaiting your reply by return and thanking you."

Now the vendors did not immediately reply, and on 10th April 1943, the legal adviser of the purchaser again wrote a letter of reminder to the vendors; and on 17th April 1943, comes the reply from the vendors' solicitors in which they state as follows:

"Your clients are also well aware of the fact that our clients have not received the goods from Messrs. Vanraj Vallabhdas. No sooner our clients receive the goods from Messrs. Vanraj Vallabhdas our clients will deliver the same to your clients. It was because they did not receive the goods from Messrs. Vanraj Vallabhdas that they did not send you a reply to your letter of the 3rd instant. We may assure your clients through you that no sooner our clients receive the goods from Messrs. Vanraj Vallabhdas they will at once deliver the said goods to your clients."

Pausing there, it is to be observed that that is not an answer to the demand of the purchaser. They asked, in the first place, for immediate delivery; or, in the alternative: "To let me (that is, the purchaser's legal adviser) know as to the reason for the undue delay and as to when you expect to deliver the goods and as to what efforts, if any, you have made in that behalf to obtain delivery." Accordingly on 21st April 1943, the purchaser's legal adviser wrote this:

"I am instructed to inquire of your clients through you as to the reason for such undue delay for delivery from Messrs. Vanraj Vallabhdas and as to whether your clients had made any inquiries and attempts for obtaining delivery thereof."

The reply of the vendors' solicitors dated 28th April 1943 is as follows:

"Our clients have been writing to Messrs. Vanraj Vallabhdas but have not received the goods. No sooner they receive the goods from Messrs. Vanraj Vallabhdas, our clients would deliver the same to your clients."

To this the purchaser's legal adviser replied on 1st May 1943:

"I am now instructed to finally call upon your clients to give delivery within two days from the receipt hereof by you or in the alternative to defi-

4. (1943) 30 A.I.R. 1943 Bom. 229 : 208 I. C. 301 : 45 Bom. L. R. 405, Ratilall Parikh v. Dalmia Cement & Paper Marketing Co., Ltd.



nitely state as to when they expect to deliver the same as my clients are otherwise not willing to wait indefinitely like this for ever. Failing receipt of your reply within two days from receipt hereof by you as stated hereabove my clients will proceed further with the matter as may be advised for the costs and consequences whereof your clients will have to thank themselves."

Now be it noted the date 5th May, as one of the critical dates, is arrived at from the letter which is dated 1st May and which gave two days' time and which in fact took two days to deliver; thus the date 5th May is fixed. On 6th May 1943, the vendors' solicitors replied:

"We have already written to you and repeat that our clients have to deliver the goods to your clients as and when they receive the same from Messrs. Vanraj Vallabhdas. They have not received the goods. Our clients are carrying on correspondence with them."

On 10th May 1943, the purchaser's legal adviser sent a reply as follows:

"It is really surprising that your clients should not reply to the point of the reason of so much delay or what efforts if any they have made so far to obtain delivery from their vendors, Messrs. Vanraj Vallabhdas. In this connexion my clients note that your clients are now carrying on correspondence with their vendor. I am instructed to request your clients through you to give me inspection of their contract of purchase from the said Messrs. Vanraj Vallabhdas as also the correspondence exchanged between the parties."

That letter was followed up by another letter from the legal advisers of the purchaser dated 25th May 1943:

"We are now instructed to finally call upon your clients, through you, to carry out the requisition contained therein and thereby prove their bona fides within 24 hours from receipt hereof by you failing which our client will be compelled to proceed further with the matter as may be advised holding them liable for all the costs and consequences, which please convey to yours."

The vendors' solicitors replied on 26th May 1943, that there was nothing in that letter to be mentioned to their clients. On 29th May 1943, the legal advisers of the purchaser again wrote:

"We shall therefore thank you to kindly do the needful without further loss of time and in that respect we fix Monday the 31st instant at 5 p. m. at your office when you are requested to produce the same for our inspection."

On 16th June 1943, the purchaser's legal advisers again wrote as follows:

"We are instructed to finally call upon you to give us inspection within two days from receipt hereof by you, failing which our clients shall consider their position and proceed further in the matter as best advised, holding your clients liable for all the costs and consequences."

Again, it is to be observed that it is this letter which fixes the date 19th June 1943, which the learned Judge in the Court below has held to be the relevant date. The letter is dated 16th June. It gives two days and

apparently another one day for its delivery. Then comes the final letter of the purchaser's legal advisers dated 28th July 1943, giving the fourth and final date. In that letter the purchaser's legal advisers wrote:

"In view of the attitude adopted by your clients and their having committed breach of the contract, our clients, as already intimated to yours, have fixed their damages on the then prevailing market rate of Rs. 38-6-0 per piece. Your clients are accordingly liable to pay to our clients the sum of Rs. 19,237-8-0, being the damages sustained by our clients, based on the difference between the contract price and the then prevailing market rate, viz. Rs. 38-6-0."

The then prevailing market rate is taken as on 5th May 1943, which apparently was not only the time fixed by the letter of 1st May 1943, but was the time when the market appears to have been at or near its highest. In my judgment, reading the correspondence as a whole, it at no stage passed from the melting pot of negotiations to crystallize as an agreement to extend the time for the performance of the contract. The attitude of the purchaser throughout the correspondence was: "Satisfy us that you are doing your best to obtain the goods from your suppliers and we will then consider fixing a new date for delivery of the goods to us." On the other hand the attitude of the vendors throughout the correspondence was to avoid the purchaser's demand and to simply say: "You know that we cannot effect delivery from our suppliers and until we do so we cannot deliver the goods to you." There was never in my judgment any *consensus ad idem*, no agreement, express or implied, to extend the time either to any particular date or to the happening of some future event. Mere forbearance in my opinion to institute proceedings or to give notice of rescission cannot be an extension of the time for the performance of a contract within the meaning of S. 63, Contract Act. The learned Judge in the Court below does not appear to have had the advantage of having the matter argued before him in the way it has been argued in this Court. In his judgment the learned Judge says this:

"In my opinion, the correspondence only shows that the plaintiffs were willing to consider the situation if in fact the defendants had protested that their vendors had not given delivery of the goods. As no satisfaction on this point was offered no question of the plaintiffs considering the delay in delivery by the defendants remained. The effect of the letter of 16th June 1943, in my opinion, is that the plaintiffs conveyed to the defendants that although, till then, they were willing to consider the position, if correspondence was shown, if no correspondence was shown within two days after the receipt of that letter the plaintiffs would



consider that a default had been committed on the part of the defendants. In my opinion, it was not necessary thereafter to give express notice that the defendants had committed a breach. The previous correspondence had already disclosed that the plaintiffs had not accepted the plea that the plaintiffs were bound to wait till delivery was given by the defendants' vendors. They only showed a businesslike desire to consider the situation if the defendants proved their bona fides. When that was not proved, in spite of reasonable opportunities being given, the plaintiffs were entitled to consider the contract as broken by the defendants. In law one-sided demand for disclosure or inspection of documents cannot extend time. The only reason why I think the breach should be considered to have taken place on 19th June is that in the correspondence till 16th June the contract appears to be treated as alive and subsisting. The peremptory tone of the letter of 16th June shows that they were not willing to wait any longer after 19th June. Therefore, in my opinion, the contract was kept alive till 19th June, and when the defendants' attorneys failed to give inspection of the contract and correspondence as called for by the plaintiffs, the defendants committed a breach of the contract. Damages will be assessed on that basis."

With great respect to the learned Judge, the correspondence, as it seems to me, discloses negotiations and negotiations implemented by threats contained in some of the letters to the effect that if a new date satisfactory to the purchaser was not soon fixed, proceedings would ensue. In my opinion there was never any agreement to extend the time for the performance of the contract and there is no suggestion that in this case any question of estoppel could arise. This results in the correct date for assessment of the damages being 28th February 1943. Mr. Kolah on behalf of the appellants says that as on that date the damages were a sum of Rs. 7000 and his clients are prepared to submit to a decree for that amount. Mr. Desai's clients want time to consider the matter and accordingly we refer the question as to the amount of damages to the Commissioner with this direction that if the damages are quantified at Rs. 7000 or less, Mr. Desai's clients will pay the costs of the reference; if more than Rs. 7000, then the appellants will pay the costs of the reference. As regards costs, as in the Court below the breach of the contract was contested, the costs in the Court below must, in our opinion, be paid by the appellants. As to the costs of this appeal, both parties have partly failed and partly succeeded; and on balance the appellants have succeeded more than they have failed. In our opinion, a fair order as to costs would be that the respondent should pay half the costs of this appeal to the appellants. There will be no order as to costs of

the cross-objections. Interest on the sum decreed will run from the date of the suit.

**Chagla J.**—I agree. Under the contract between the parties the defendants had to deliver to the plaintiff 41 bales of Edsu Cloth No. 4488 by the end of February 1943. The defendants did deliver to the plaintiff five bales of the contract goods on 27th February 1943, but failed to deliver the balance of 36 bales and thereby committed a breach of the contract. Now unless the plaintiff can show that something transpired after 28th February 1943, it is clear that the date of breach would be 28th February 1943, and damages must be assessed as of that date. Under S. 55, Contract Act, the promisee is given the option to avoid the contract where the promisor fails to perform the contract at the time fixed in the contract. It is open to the promisee not to exercise the option or to exercise the option at any time, but it is clear to my mind that the promisee cannot by the mere fact of not exercising the option change or alter the date of performance fixed under the contract itself. Under S. 63, Contract Act, the promisee may make certain concessions to the promisor which are advantageous to the promisor, and one of them is that he may extend the time for such performance. But it is clear again that such an extension of time cannot be a unilateral extension on the part of the promisee. It is only at the request of the promisor that the promisee may agree to extend the time of performance and thereby bring about an agreement for extension of time. Therefore it is only as a result of the operation of S. 63, Contract Act, that the time for the performance of the contract can be extended and that time can only be extended by an agreement arrived at between the promisor and the promisee.

Now I agree with the learned Chief Justice that on a perusal of the correspondence it is perfectly patent that the parties were never *ad idem* and no agreement was arrived at between them as to the extension of time. As a matter of fact, Mr. M. V. Desai for the respondent concedes that there was no agreement for extension of time; but what he urges is that his client forbore from insisting upon delivery at the contract time at the request of the appellants and the result of that forbearance was that although there was no agreement to extend time, the time was extended so long as that forbearance continued. It is a proposition difficult to accept that under the Indian law and under S. 63, Contract Act, time for the



performance of a contract can be extended otherwise than by an agreement.

Mr. M. V. Desai has relied on a decision of Blackwell J. in 45 Bom. L. R. 405.<sup>4</sup> The learned Judge in that case held that a party to a contract may, at the request of the other party, forbear from insisting upon delivery at the contract time and allow time to be extended without binding himself to do so, or may expressly contract for an extension of time, and claim damages for non-performance at the extended time. I can well understand the decision if it only means that at the request of the promisor the promisee agrees to extend the time. Then it is nothing more than an agreement to extend time. But the learned Judge expresses his opinion that time can be extended even though the promisee may not bind himself to do so. With great respect to the learned Judge, I cannot accept that part of the statement of the law. The learned Judge's judgment is based on English decisions to which he has referred in his judgment. The Privy Council has repeatedly warned Courts in India not to import doctrines of Common Law when construing the plain sections of the Contract Act and the danger of relying on principles of Common Law is all the greater in this case when one remembers that S. 63, Contract Act, constitutes a wide departure from the principles of the English Common Law. The English cases relied on by Blackwell J. are based on the principles of the English Common Law which principles are further complicated by the fact that in England an oral agreement to extend time is kept out by the Statute of Frauds and therefore, with respect to the learned Judges in England, one often finds that the Judges there have to strain the letter of the law in order to do equity and hold that a particular arrangement arrived at between the parties was not an oral agreement in order that it should not be kept out by reason of the provisions of the Statute of Frauds.

In this case, in my opinion, there is not even a basis of facts to support the argument of Mr. Desai, because at no time did the defendants request the plaintiff to forbear from exercising his rights and asking for delivery under the contract; on the contrary, their whole attitude has been that they were only bound to deliver the goods as and when they received them from their vendors. Therefore really throughout the correspondence they were asserting their right not to be bound to give delivery of the contract goods until they had received them

from their vendors. Assuming that there was a request by the defendants to the plaintiff to forbear, I do not find in the correspondence at any stage or at any time any compliance with that request. Assuming this was a request to forbear, what the defendants wanted was a forbearance till they received the goods from their vendors, and the emphatic and categorical answer given by the plaintiff was that he wanted the goods to be delivered within a short time. Therefore it seems to me impossible to hold that having turned down the request of the defendants to forbear, it was open to the plaintiff by his unilateral act to extend time for performance and come to Court and say: "I have now repudiated the contract and I shall fix the time according to my choice."

Mr. Desai has argued that if there is one thing that the correspondence showed it is that both the parties considered the contract alive and subsisting. If by that expression is meant that the plaintiff had not exercised his option under S. 55, Contract Act, to put an end to the contract Mr. Desai is right; but the mere fact that the contract was not put an end to did not entail the further consequence that the time for the performance of the contract was automatically extended. There were two further cases cited at the bar to which I should like to refer. One is the judgment of Macleod J. which is a very instructive case, 24 Bom. L. R. 142.<sup>5</sup> In that case the time for performance was October-November 1913. After the time elapsed, nothing further happened; and in July 1914, the plaintiffs wrote to the defendants to arrange to take immediate delivery of the balance of ninety-two bales and delivery was taken; and Macleod J. held that the original contract had come to an end at the end of November 1913, and these deliveries were referable to separate transactions and not to the original contract. Mr. M. V. Desai has also relied on the judgment of Marten J., as he then was, in 27 Bom. L. R. 1168.<sup>6</sup> Before the learned Judge the question did arise as to whether the time for the performance of the contract had been extended. Originally it was 28th February 1921, and Marten J. held that there was an extension of time. Now if one looks at the judgment of the learned Judge, it is clear that he held as a

5. ('22) 69 I. C. 9 : 24 Bom. L. R. 142, *Phoenix Mills Ltd. v. Madhavdas Rupchand*.

6. ('25) 12 A. I. R. 1925 Bom. 547 : 94 I. C. 575; 27 Bom. L. R. 1168, *Coorla Spinning & Weaving Mills Co. v. Vallabhdas Kalkianji*.



fact that the representatives of the defendant and of the plaintiffs met several times and that the plaintiffs at the request of the defendant agreed to withhold delivery (*see* p. 1179). So there was a proposal and a definite acceptance; and on that the learned Judge came to the conclusion that there was an agreement to extend time.

Unfortunately, in this case, the learned Judge below has proceeded in his judgment on the assumption that it was common ground between the parties that there was an agreement to extend time, and the only question that remained for the learned Judge's determination was the date up to which the time for performance of the contract had been extended. Mr. Desai at one stage did strenuously argue that it was not open to Mr. Munshi to contend that there was no agreement to extend time. But a specific issue as to the agreement was raised before the learned Judge which is issue 1: Whether the time for delivery of contract goods was extended; and if so, to what date? Unfortunately the learned Judge has not recorded his finding on that issue. But it is impossible to contend that in the face of this state of the record it is not open to Mr. Munshi before this Court to urge that there was no agreement to extend time. I should like to say a word about the decision relied on by Mr. Kolah in 33 Bom. L. R. 703<sup>7</sup> with regard to the giving of interest on the damages awarded from the date of the filing of the suit. In that case a Bench of our Court consisting of Sir John Beaumont, Chief Justice, and Mirza J. took the view that if the claim in the suit was one for damages, the plaintiffs were not entitled to interest before judgment. Mr. Desai has drawn our attention to the judgment of Marten J. in 27 Bom. L. R. 1168<sup>6</sup> (at p. 1187), where he takes the contrary view and where he relies on an unreported judgment also of the Court of Appeal. I really think that the matter is clear beyond any doubt because under S. 34, Civil P. C., it is entirely a matter for the Court's discretion whether to award interest from the date of the filing of the suit where the decree is for the payment of money. With great respect, I cannot understand why Sir John Beaumont, the learned Chief Justice, took the view that the Court could not award interest from the date of the filing of the suit. It is all a matter of discretion whether under the circumstances of each particular case interest should be awarded

or not. I, therefore, agree with the learned Chief Justice that we must hold in this case that there was no agreement to extend time, that the date of the breach was 28th February 1943, that damages should be assessed as of that date, and that in this particular case the plaintiff is entitled to interest on damages from the date of the filing of the suit.

**Stone C. J.**—I should like to add that I entirely agree with what has been said by my learned brother with regard to the awarding of interest.

G.N/V.S.

*Order accordingly.*

[Case No. 2]

**A. I. R. (33) 1946 Bombay 7**

LOKUR AND WESTON JJ.

*Bajaji Appaji Kote — Accused*

v.

*Emperor.*

Cri. Revn. Appln. No. 557 of 1944, D/-16-1-1945.

(a) Criminal P. C. (1898), S. 195 (1) (b)—False information given first to police then to Court — Without complaint of Court prosecution under S. 211, Penal Code, cannot be started.

Section 195 (1) (b) applies if a judicial proceeding is in existence at the time when it is sought to prosecute the offender for the offence in question. The crucial date for the purpose of S. 195 is the date when the Court takes cognisance of the offence. Where an alleged false complaint is first made by A to the police and then to a Court, a complaint under S. 211, Penal Code, subsequently filed by the police against A is a complaint of an offence alleged to have been committed in, or in relation to, a proceeding in Court and cannot be taken cognisance of except on the complaint of the Court: ('24) 11 A. I. R. 1924 All. 779 and ('28) 15 A. I. R. 1921 All. 765, *Dissent.*; *Case law discussed.*

[P 9 C 2; P 10 C 1]

(b) Criminal P. C. (1898), S. 195 (1) (b) — False information to police—Information forwarded to Magistrate and B summary issued — Order passed by Magistrate is not administrative but judicial order — Section 195 (1) (b) applies.

Where information relating to the commission of a cognisable offence is given to an officer in charge of a police station under S. 154, Criminal P. C., and is followed by an investigation by him, he is bound under S. 173 (1) to complete it without any unnecessary delay. If the complaint be held to be false and a B summary is issued, the offence under S. 211, Penal Code, will have to be alleged to have been committed by the complainant in relation to the proceedings in the Magistrate's Court. The issue of a B summary on a final report by the police is a judicial order passed under the Code of Criminal Procedure and not a mere administrative order. The word "Court" in the Criminal Procedure Code has a wider meaning than the words "Court of Justice," as defined in Penal Code. Hence the Magistrate passing an order on a final report of the police sent after the investigation under S. 173 should be deemed to be a

7. ('31) 18 A. I. R. 1931 Bom. 386 : 133 I. C. 861;  
33 Bom. L. R. 703, *Ratanlal v. Brijmohan.*



Court passing a judicial order disposing of the information given to the police. [P 11 C 1,2]

(c) Criminal P. C. (1898), S. 195 (1) (b) — Offence disclosed under S. 211, Penal Code — S. 195 cannot be evaded by taking it under S. 182, Penal Code.

Where the graver offence under S. 211, Penal Code, is disclosed from the facts stated in a complaint, the condition laid down under S. 195 (1) (b), Criminal P.C., for taking cognisance of such a case cannot be evaded by electing to name the offence under another section (S. 182, Penal Code) which is more general and less grave : ('25) 12 A.I.R. 1925 Pat. 717, *Dissent.*; ('31) 18 A. I. R. 1931 Mad. 702 and ('28) 15 A.I.R. 1928 All. 765, *Foll.*

[P 11 C 2; P 12 C 1]

*J. C. Shah and N. C. Shah* — for Accused.

*B. G. Rao, Government Pleader* — for the Crown.

**Lokur J.** — In this revision application the petitioner, Bayaji Appaji, asks us to quash the proceedings under S. 211, Penal Code, pending against him before the Sub-Divisional Magistrate, N. D., Ahmednagar. On 13th October 1942, he gave information to the Police Patil of Shirdi that one Amolak Khushal was in possession of wheat stolen from his house. This complaint was investigated by the police and found to be false. So on a report made under S. 173, Criminal P. C., the Sub-Divisional Magistrate granted a "B" summary and the police then sent a charge sheet against the petitioner under S. 211, Penal Code. But before that, the petitioner had filed a regular complaint on the same facts before the Resident Magistrate, Belapur Road, and that complaint eventually ended in the discharge of the accused. The case against the petitioner under S. 211, Penal Code, which had been sent up by the police, but had been kept pending till then, was taken up for trial and the petitioner contended that the trial could not go on without a complaint from the Resident Magistrate, Belapur Road, under S. 195 (1) (b), Criminal Procedure Code. That contention was disallowed, and the trial was proceeded with. The learned Sessions Judge of Ahmednagar having declined to interfere, the petitioner has now made this application for revision.

Where information of an offence given to the police is followed by a complaint to a Magistrate's Court based on the same allegations, there is a conflict of judicial opinion as to whether the complaint of the Court itself is necessary under S. 195 (1) (b) for taking cognisance of an offence punishable under S. 211, Penal Code, in respect of the false charge made to the police. In the present case, the learned Magistrate avoided the difficulty by holding that the theft about which the petitioner gave informa-

tion to the police was different from the theft about which he lodged his complaint before the Magistrate. He says that in the complaint to the police Bayaji charged his own son and Amolak Khushal with a theft which had taken place 14 days before 13th October 1942, whereas in his complaint before the Magistrate he alleged that the property was stolen on 13th October 1942. The learned Sessions Judge has rightly pointed out that in fact both the complaints related to the same theft. What was stated in substance in both the complaints was that the stolen wheat was discovered in Amolak's hut on 13th October 1942, and it had been stolen 14 days previously. The Sessions Judge, however, says that Bayaji's complaint to the Police Patil related to the dishonest possession of wheat stolen from his own house and also from the house of Nanibai, while the subsequent complaint was only with regard to the wheat which had been stolen from his own house. He, therefore, thought that no complaint from the Magistrate was necessary under S. 195 (1) (b), Criminal P. C., for taking cognisance of the offence under S. 211, Penal Code, in respect of the dishonest possession of wheat stolen from Nanibai's house. The reference to that theft was made in his complaint only to explain how he came to discover in Amolak's house wheat stolen from his own house. He never wanted the police to investigate the theft of wheat from Nanibai's house. He mentioned that theft only in the course of his narrative regarding the finding of his stolen wheat.

It is not disputed here that the petitioner's complaint before the Police Patil of Shirdi and that before the Resident Magistrate at Belapur Road related to the same incident and the identical offence. In both he charged Amolak Khushal with dishonestly receiving wheat stolen from his house knowing or having reason to believe that it was stolen property. The police found the complaint to be false and the complaint before the Magistrate ended in the discharge of Amolak. Can Bayaji be prosecuted by the police under S. 211, Penal Code, in respect of the information given to the Police Patil, in the absence of a complaint from the Magistrate? According to Allahabad High Court he can be, but according to other High Courts he cannot be. No decided case of this High Court exactly bearing on this point is brought to our notice. In 43 Cal. 1152<sup>1</sup>

1. ('17) 4 A. I. R. 1917 Cal. 593 : 43 Cal. 1152 : 36 I. C. 845, *Tayebulla v. Emperor*.



and 44 Cal. 650<sup>2</sup> the Calcutta High Court held that where an information to the police was followed by a complaint to the Court, based on the same allegations and on the same charge, and such complaint was investigated by the Court, the sanction or complaint of the Court itself was necessary for a prosecution of the informant, under S. 211, Penal Code, even in respect of the false charge made to the police. After the amendment of the Criminal Procedure Code in 1923, instead of the sanction of the Court a complaint in writing by the Court or some Court to which it is subordinate is required. So in 53 Cal. 824<sup>3</sup> it was held that where a complaint to the Police was followed by a complaint to the Court, the person who made the complaint could not be prosecuted under S. 211, Penal Code, except on a complaint of the Court. The Madras High Court has taken the same view in 39 Mad. 677<sup>4</sup> and 54 Mad. 1018.<sup>5</sup> The Patna High Court has gone even a step further and has laid down in 4 Pat. 323<sup>6</sup> that in respect of a false charge made to the police, which alone is the subject-matter of the complaint under S. 211, Penal Code, the complaint of the Court itself would be necessary for taking cognisance of it if a complaint was preferred to a Magistrate for a judicial investigation, even though that Magistrate did not in fact investigate the complaint. This was followed in 5 Pat. 33<sup>7</sup> and 11 Pat. 155.<sup>8</sup> A similar view has been taken in A. I. R. 1939 Nag. 226,<sup>9</sup> 6 Rang. 578<sup>10</sup> and A.I.R. 1929 Sind 132.<sup>11</sup> The Allahabad High Court has taken a contrary view in 46 ALL. 906<sup>12</sup> and 51 ALL. 382.<sup>13</sup> In the former case it was held that an offence under S. 211, Penal Code, was complete

when the charge was made, that is when a particular person was charged, before the police and that the mere fact that subsequent proceedings were taken against the person who was originally charged could not affect what was done when the original charge was made. That case was first heard by Boys J. who disagreed with the view of the other High Courts and thought that a false report or a false charge made outside Court, i. e., an offence under S. 211, Penal Code, committed outside the Court, could not be held to have been committed "in relation to a proceeding in a Court," if subsequently the case went into Court. He, therefore, referred the case to a bench of two Judges who fully agreed with the view expressed by him. That case was followed by Dalal J. (sitting singly) in 51 ALL. 382.<sup>13</sup> The learned Sessions Judge in this case seems to prefer the view of the Allahabad High Court. Under S. 195 (1) (b), Criminal P. C., no Court shall take cognisance of any offence punishable under S. 211 and certain other specified sections of the Indian Penal Code,

"when such offence is alleged to have been committed in, or in relation to any proceeding in any Court, except on the complaint in writing of such Court or of some other Court to which such Court is subordinate."

The learned Judges of the Allahabad High Court found it impossible to hold that an offence was committed "in relation to a proceeding" when in fact there had been no proceeding, or to hold it to be "in relation to" the proceeding in a Court merely because some proceedings did subsequently come into Court. With all respect, we are unable to agree with that view. The words of S. 195 (1) (b) should be given as wide an application as possible, and as pointed out by Mullick J. in 5 Pat. 33<sup>7</sup> some of the offences enumerated in the clause are capable of being committed in relation to a judicial proceeding which did not exist. False evidence, for instance, may be fabricated for a contemplated suit, or property may be fraudulently concealed in contemplation of an execution proceeding. The clause applies if a judicial proceeding is in existence at the time when it is sought to prosecute the offender for the offence in question. As held in 56 Bom. 213<sup>14</sup> the crucial date for the purpose of S. 195, Criminal P. C., is the date when the Court takes cognisance of the

2. ('17) 4 A. I. R. 1917 Cal. 596 : 44 Cal. 650 : 36 I. C. 857, *Brown v. Ananda Lal*.

3. ('27) 14 A. I. R. 1927 Cal. 95 : 53 Cal. 824 : 99 I. C. 118, *Samir v. Sajidar Rahman*.

4. ('16) 3 A. I. R. 1916 Mad. 72 : 39 Mad. 677 : 31 I. C. 161, *In re Parmeshwaran Nambudri*.

5. ('31) 18 A. I. R. 1931 Mad. 702 : 54 Mad. 1018 : 134 I. C. 813, *Dholiah v. Emperor*.

6. ('25) 12 A. I. R. 1925 Pat. 483 : 4 Pat. 323 : 86 I. C. 825, *Sk. Muhammad Yassin v. Emperor*.

7. ('25) 12 A. I. R. 1925 Pat. 717 : 5 Pat. 33 : 88 I. C. 1045, *Daroga Gope v. Emperor*.

8. ('32) 19 A. I. R. 1932 Pat. 152 : 11 Pat. 155 : 135 I. C. 520, *Subhag Ahir v. Emperor*.

9. ('39) 26 A. I. R. 1939 Nag. 226 : 181 I. C. 928, *Sarup Singh v. Emperor*.

10. ('28) 15 A. I. R. 1928 Rang. 254 : 6 Rang. 578 : 114 I. C. 685, *Rambrose v. Emperor*.

11. ('29) 16 A. I. R. 1929 Sind 132 : 23 S. L. R. 285 : 117 I. C. 147, *Chuhermal v. Emperor*.

12. ('24) 11 A. I. R. 1924 All. 779 : 46 All. 906 : 82 I. C. 167, *Emperor v. Kashi Ram*.

13. ('28) 15 A. I. R. 1928 All. 765 : 51 All. 382 : 111 I. C. 858, *Emperor v. Prag Datt*.

14. ('32) 19 A. I. R. 1932 Bom. 185 : 56 Bom. 213 : 137 I. C. 134, *Indrachand Bachraj v. Emperor*.



offence. In 24 Bom. L. R. 1153<sup>15</sup> Crump J. observed (page 1156):

"The words ('in relation to' in S. 195 (1) (b), Criminal P. C.) are very general and are wide enough to cover a proceeding in contemplation before a criminal Court, though it may not have begun at the date when the offence was committed."

This is in consonance with the preponderance of judicial opinion. Two other reasons are given for that view. According to the Calcutta High Court, the complaint before the police becomes merged in the subsequent complaint in Court. According to Ross J. in 4 Pat. 323,<sup>6</sup> by making a complaint to the Court the informant has withdrawn the information from the category of mere police proceedings and has raised it to the category of a proceeding in Court. Both these reasons are practically the same and show the necessity of a complaint by the Court if the informant is to be proceeded against. We are, therefore, clearly of opinion that where an alleged false complaint is first made to the police and then to a Court, a complaint under S. 211, Penal Code, subsequently filed is a complaint of an offence alleged to have been committed in, or in relation to a proceeding in Court and cannot be taken cognisance of except on the complaint of the Court. This view does not in any way conflict with the decision in 29 Bom. L. R. 1590,<sup>16</sup> where the case against the informant under S. 211, Penal Code, had been committed to the Sessions before he filed a complaint to the Court. After referring to the rulings of the Calcutta and Patna High Courts, Fawcett J. observed (p. 1592):

"The committal order, when it was passed, was perfectly valid, because (even adopting the view taken by the Calcutta and Patna High Courts) there had been no complaint made to a Magistrate, which could supersede the complaint to the Police . . . In our opinion it was not open to the accused in this case to make the committal order invalid by merely making a subsequent complaint to the Magistrate."

This is in consonance with the principle laid down in 11 Pat. 155<sup>8</sup> that where a Magistrate takes cognisance of an offence under S. 211, Penal Code, nothing that happens subsequently can bring into operation the provisions of S. 195 (1) (b) so as to deprive him of his jurisdiction to proceed with the complaint of that offence and dispose of it according to law. This question, however, does not arise in the present case as the complaint under S. 211, Penal Code, against

the petitioner was filed by the police after his complaint to the Resident Magistrate, Belapur, had been filed by him.

We further think that in view of the very wide meaning given to the words "in relation to" appearing in S. 195 (1) (b), Criminal P. C., by this Court we may have to go a step further and hold that even if the petitioner had not filed a complaint before the Resident Magistrate, Belapur Road, a complaint from the Sub-divisional Magistrate was necessary for the prosecution of the petitioner under S. 211, Penal Code. In 43 Bom. L. R. 529<sup>17</sup> the applicant had made a complaint to the police against the opponent for an offence under S. 420, Penal Code, on which the police started investigation, arrested the opponent, and released him on bail. Subsequently, the police applied to a Magistrate to have the bail enlarged, which was done. After further investigation into the matter, the police reported to the Magistrate that no offence was disclosed against the opponent, whereupon the Magistrate discharged the opponent, and cancelled his bail-bond. The opponent then filed a case against the applicant for an offence under S. 211, Penal Code. It was held that in doing what he had done the Magistrate had taken cognisance of the case under S. 420, Penal Code, and that therefore, under the provisions of S. 195 (1) (b), Criminal P. C., it was that Magistrate alone who could lodge complaint against the applicant for an offence punishable under S. 211, Penal Code. It was contended in that case on behalf of the opponent that the order made by the learned Magistrate extending bail, and subsequently discharging the accused and cancelling his bail-bond, was an administrative order, and not a judicial order, since the Magistrate never considered the merits of the case. But Beaumont C. J. refused to accept that argument and held that the order passed by the Magistrate was not an administrative order but an order made in a judicial capacity. In A. I. R. 1936 Lah. 238<sup>18</sup> Blacker J. held that even if the person who laid false information before the police had not filed any complaint before a Magistrate after the police had refused to take any action, he could not be prosecuted by the police under S. 211, Penal Code, without the complaint of the Magistrate under whose orders the case

15. ('23) 10 A. I. R. 1923 Bom. 105:71 I. C. 523: 24 Bom. L. R. 1153, *In re Vasudeo Ramchandrar*.

16. ('28) 15 A. I. R. 1928 Bom. 22: 107 I. C. 54: 29 Bom. L. R. 1590, *Emperor v. Ukha Mahadu*.

17. ('41) 28 A. I. R. 1941 Bom. 294: 196 I. C. 104: 43 Bom. L. R. 529, *Boywalla v. Sorab Rustomji Engineer*.

18. ('36) 23 A. I. R. 1936 Lah. 238: 161 I. C. 288, *Ghulam Rasul v. Emperor*.



was struck off. This was cited with approval by Bhide J. in A.I.R. 1941 Lah. 216.<sup>19</sup>

This view is quite in keeping with the natural interpretation of the words "in relation to any proceeding in any Court." Where information relating to the commission of a cognisable offence is given to an officer in charge of a Police Station under S. 154, Criminal P. C., and is followed by an investigation by him, he is bound under S. 173 (1) to complete it without any unnecessary delay, and, as soon as it is completed, to forward his final report to a Magistrate empowered to take cognisance of the offence on a police report, in the form prescribed by the Local Government. That report may be in the form A when the complaint is true, or in the form B when the information is found to be false, or in the form C when the information is neither true nor false and no case is sought to be sent up. An order passed by the said Magistrate on such report would dispose of the complaint made to the police. That order, as pointed out by Beaumont C. J., is not merely an administrative order but a judicial order of the Court. Hence if the complaint be held to be false and a B summary is issued, the offence under S. 211, Penal Code, will have to be alleged to have been committed by the complainant in relation to the proceedings in the Magistrate's Court which ended in an issue of the B summary. In 14 Bom. L. R. 1160<sup>20</sup> a contrary view was taken and it was held that the issue of a B summary on a final report by the police was not an order passed under the Criminal Procedure Code at all, but was a mere administrative order made by the Magistrate for the purpose of facilitating police work and police statistics. Before the amendment of S. 195, Criminal P. C., in 1923, the sanction of the Court was sufficient and no complaint by the Court was required and in that case the question under consideration was whether the issue of a B summary amounted to the granting of a sanction under S. 195 (1) (b), Criminal P. C., and it was held that it was not. The same view was taken in 14 Bom. L. R. 960<sup>21</sup> and it was held that the order passed by a Magistrate issuing a B summary could not be accepted as a sanction under S. 195, Criminal P. C. The word 'Court' is not defined in the Crimi-

nal Procedure Code. But as pointed out in 37 Bom. 365,<sup>22</sup> (p. 368) the word 'Court' in the Criminal Procedure Code certainly has a wider meaning than the words "Court of Justice" as defined in the Penal Code. In view of the obvious purpose for which S. 195 was enacted, the widest possible meaning should be given to the word 'Court' as occurring in that section. Having regard to the object of amending S. 195, Criminal P. C., requiring a complaint from a Court, instead of its mere sanction for the prosecution of any offence committed in relation to that Court, we think that the Magistrate passing an order on a final report of the police sent after the investigation under S. 173, Criminal P. C., should be deemed to be a Court passing a judicial order disposing of the information given to the police. In this view the theory of merger would be inapplicable where the information given to the police is followed by a judicial order by a Magistrate on the final report of the police under S. 173, Criminal P. C., and a separate complaint on the same allegations is made before a different Magistrate. In such a case if the complainant is to be prosecuted under S. 211 for giving false information to the police, then a complaint from the Magistrate who passed the order on the final report of the police is required. Whereas if he is to be prosecuted for a subsequent false complaint before another Magistrate on the same allegations, then a complaint from the latter is necessary. The question does not arise in the present case since there is no complaint either by the Sub-divisional Magistrate who issued the B summary on the police report or by the Resident Magistrate, Belapur Road, before whom the petitioner filed a complaint subsequently. In the absence of either complaint, the proceedings before the Magistrate pending against the petitioner are without jurisdiction and must be quashed.

One other aspect of the case has also been placed before us. In 5 Pat. 33<sup>7</sup> it was held that although a complaint under S. 211, Penal Code, might require a complaint of the Magistrate under S. 195 (1) (b), Criminal P. C., yet the police might file a complaint under S. 182, Penal Code, which is covered by S. 195 (1) (a), Criminal P. C. On this question also there is a conflict of judicial opinion. The Patna decision was based on the ruling in 5 Cal. 184<sup>23</sup> that it was open to

19. ('41) 28 A.I.R. 1941 Lah. 216 : 195 I.C. 102, Shah Mohammad v. Emperor.

20. ('12) 17 I. C. 1000 : 14 Bom. L. R. 1160 Emperor v. Chandabhai.

21. ('12) 17 I. C. 791 : 14 Bom. L. R. 960, Emperor v. Lallubhai.

22. ('13) 37 Bom. 365 : 18 I. C. 408, In re Nanchand Shivechand.

23. ('80) 5 Cal. 184, Bhokteram v. Heera Kolita.



the Court to convict the accused under S. 182, Penal Code, even though the major offence under S. 211, Penal Code, had been committed. But this Court has taken a different view in 7 Bom. 184.<sup>24</sup> It is a well established principle that a prosecution for a lesser offence should not be launched when the facts alleged constitute a graver offence. In several cases like 51 ALL. 382<sup>13</sup> and 54 Mad. 1018,<sup>5</sup> it has been definitely laid down after a review of the case law on the subject, that if the graver offence is disclosed from the facts stated in a complaint the condition laid down under S. 195 (1) (b) for taking cognisance of such a case cannot be evaded by electing to name the offence under another section which is more general and less grave. We respectfully agree with this view. It would be highly improper to allow such a device to be used to defeat the statutory provisions of S. 195, Criminal P. C. We, therefore, make the rule absolute and order the proceedings before the Magistrate against the petitioner to be quashed as being without jurisdiction by reason of the want of a complaint under S. 195 (1) (b), Criminal P. C.

R.K./V.S. *Rule made absolute.*

24. ('83) 7 Bom. 184, *Empress v. Arjun.*

[*Case No. 3*]

**A. I. R. (33) 1946 Bombay 12**

STONE C. J. AND DIVATIA J.

*Roda Framroze Mody—Appellant*  
v.

*Kanta Varjivandas Saraiya—*

*Respondent.*

O. C. J. Appeal No. 2 of 1945, Decided on 5th February 1945, from judgment of Kania J., in Testamentary Suit No. 14 of 1943, D/- 7th December 1944.

(a) Succession Act (1925), S. 63 (c) — Will—Execution of—Proof—Evidence of both attesting witnesses if necessary — Effect of S. 68, Evidence Act.

Section 68, Evidence Act, does not say that a document required to be attested by two witnesses shall be proved by the evidence of one of them. All that the section provides is that such a document shall not be accepted in evidence unless the evidence of at least one of the attesting witnesses is called. The words 'at least' presuppose that more evidence may be required, and it can only be by reference to the circumstances of each case that the quantum of evidence necessary to discharge the onus of proof can be measured. Section 68, Evidence Act, lays down only the mode of proving and it does not define what is required to be proved under S. 63 (c), Succession Act. Section 63 (c), Succession Act, requires that the will should be attested by two or more witnesses, each of whom had either seen the testator sign or affix his mark, or had received from the testator a personal acknow-

ledgment of his signature or mark on the will. The combined effect of S. 63 (c), Succession Act, and S. 68, Evidence Act, is that what the person propounding the will has got to prove is that the will was duly and validly executed and that must be done by not simply proving that the signature on the will was that of the testator but that the attestations were also properly made as required by S. 63 (c). No doubt S. 68, Evidence Act, says that it is not necessary to examine both or all the attesting witnesses, but it does not follow therefrom that if one attesting witness only proves that the testator had acknowledged his signature to him it is not necessary that the acknowledgment by the testator before the other attesting witness need be proved. All that it means is that if two attesting witnesses had signed in each other's presence, it is not necessary to examine both of them to prove that they had received the acknowledgment from the testator. But if, as allowed under S. 63 the attestations to the testator's signature were not made at the same time, it is necessary to prove that both the persons, who put down their attesting signatures on different occasions, had done so on the acknowledgment of the testator. Accordingly where a will duly signed by the testator was attested by two witnesses not in the presence of each other but at different times on the acknowledgment by the testator of his own signature the evidence of one of the attesting witnesses is not sufficient to prove execution of the will : *Case law discussed.* [P 16 C 1,2; P 17 C 1]

(b) Costs—Probate proceedings.

When the litigation in respect of a will has been caused in effect by the testator, the usual rule is that the costs may properly be paid out of the estate. [P 17 C 1]

C. P. C. —

('44) Chitaley, S. 35, N. 18, pts. 2, 3.

('41) Mulla, page 152, N. "20. Costs of proceedings in Probate Court".

P. P. Khambata and B. G. Mistry —

for Appellant.

F. J. Collman and S. R. Tendulkar —

for Respondent.

**Stone C. J.**—This is an appeal from the judgment of Kania J. dated 7th December 1944. The appeal raises a short though interesting question with regard to the proof necessary to establish due execution of a will on a petition for probate which is contested. The deceased in this case was Dr. H. M. Mody, who died on 21st October 1942. He had married his second wife Manorama-bai in September 1942, and on 6th October 1942, he executed a testamentary document in her favour which purports to be attested by a solicitor and his clerk. On 15th October 1942, it is alleged that he executed a second testamentary document and this purports to be attested by Mr. Somne and one Choudhari Mohammed Mustaqueem Khan. This document of 15th October is the one in respect of which the petitioner asks for probate, and except for the signatures, it is type-written on a sheet of the Doctor's note-paper and is in the following terms:



## Last Will

"I hereby cancel all my wills and bequeath all my estate to Mrs. Roda Framroze Mody, whom I direct to pay 1/10th of the estate to Petit Memorial Library, and spend a sum of Rs. 1000 towards my funeral and other ceremonies, and utilise a sum of Rs. 100 annually towards anniversary ceremony of my wife Urmila."

Then in typescript is "1. Witness" and under that "2. Witness" and in ink the signature which purports to be that of Dr. Mody and under the "1 Witness" the signature in ink of Mr. Somne and then under the "2 Witness" the signature in Urdu which purports to be that of Chowdhari Mohammed Mustaqueem Khan. The document is dated 15th October 1942. If it is a valid testamentary disposition, the question of the validity of the previous will of 6th October would not arise. The parties went to trial on the sworn caveats in lieu of statements of defence and the caveat of Manoramabai contained the following statement:

"I say that I have taken inspection of the will dated 15th October 1942 alleged to have been executed by my late husband and filed in Court by the petitioner abovenamed. From such inspection, I deny that the signature on the said will is that of my husband. In this respect I have also compared the signature of my husband on his last will and testament dated 6th October 1942 with the alleged signature on the alleged will dated 15th October 1942 and I say that the signature on the alleged will dated 15th October 1942 is not that of my husband. I have further found on such inspection that the said alleged will is attested by two witnesses, the first witness of whom is one Mr. Khanderao Bhagwantrao Somne who had, to my knowledge, never visited my husband during his lifetime. The signature of the second witness is in Urdu and from the office translation thereof, it appears that the said signature is that of one Pathan who had also, to my knowledge, never visited my husband during his lifetime. I, therefore, say that the said signature on the said alleged will dated 15th October 1942 is not that of my husband and that it is a forgery."

That is not an artistic form of pleading, but no objection was taken to proceeding to trial in this way. Before referring to S. 63(c) Succession Act, and to S. 68, Evidence Act, the observations of the Privy Council in 30 Bom. L.R. 227,<sup>1</sup> which refer to the procedure to be adopted in revocation of a grant of probate, must be borne in mind. Those observations, in my opinion, equally apply in principle to the proof of a will in a contentious matter. Lord Sinha delivering the judgment of the Board said this (p. 231):

"There has been some divergence of opinion in the Courts in India as regards the law and procedure governing cases for revocation of probate, due in part to the introduction into Indian practice of

the difference in English law between the grant of probate in common form and probate in solemn form. It is worse than unprofitable to consider how far, if at all, that distinction has been incorporated into Indian law. It has often been pointed out by this Board that where there is a positive enactment of the Indian Legislature the proper course is to examine the language of that statute and to ascertain its proper meaning, uninfluenced by any consideration derived from the previous state of the law—or of the English law upon which it may be founded."

The formalities to be observed in the execution of a will so far as material are contained in S. 63 (c), Succession Act of 1925. That sub-section is as follows:

"The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

Mr. Khambata in an able argument on behalf of the appellant refers the Court to S. 68, Evidence Act, which provides that:

"If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence."

And then there is a proviso which is not material.

The alleged signatures to the document of 15th October 1942, are, as I have already mentioned, three. Mr. Somne, one of the alleged attesting witnesses, alone was called and he states that he visited the deceased who was a doctor with reference to the repair of some medical syringes. He says:

"On 15th October 1942 I had been to Dr. Mody's consulting room at about 4 p. m. I asked him if he wanted any syringes. He said that he did not want any. He was alone. Dr. Mody then took out a letter from his table. It was typewritten. He asked me to attest it. With his permission I read what was typed. I showed my unwillingness to attest the document and asked him to get the attestation of some other person he knew. He told me that he wanted the attestation of a stranger and pressed me to sign it. When he showed me the paper it was already signed by him. He told me that he had signed it. I attested my signature and put the date below my signature. Below my signature '2. Witness' was typed. No one had written below that. Dr. Mody told me that he would get the signature of someone else afterwards."

Then in cross-examination Mr. Somne said this:

"On no occasion whatsoever I had talk with him about his relations, friends, or family affairs. I did not know if he was married. I do not claim

1. (28) 15 A.I.R. 1928 P.C. 2 : 7 Pat. 221 : 55 I.A. 18 : 107 I.C. 14 : 30 Bom. L.R. 227 (P.C.), Ramanandi Kuer v. Kalawati Kuer.



friendship with him. . . I do not put my signature, even as an attesting witness, without reading the document. I do not remember if, except the insurance proposal forms, I have ever attested any document in my life. I did not ask who Mrs. Roda Framroze Mody was. I did not know her. After I read the document I attested it. I had no conversation at all with the doctor thereafter."

Therefore, if Somne's evidence is accepted, he proves that the deceased acknowledged his own signature to him and that he himself signed as a witness. He cannot say, because he was not present, anything about the acknowledgment of the document to the second witness. Referring to this evidence the learned trial Judge said this:

"If necessary, I am not prepared to act on the oral evidence of that witness (meaning Mr. Somne). In my opinion, the Court's conscience cannot be considered satisfied on that evidence about the due execution of Ex. A as the last will and testament of the deceased. The petition thus fails and is dismissed with costs."

The learned Judge does not say that he disbelieves the witness. He says he is not prepared in effect to act on that evidence alone; and he has dealt with the case on the question of law. What the learned Judge has said is this:

"Section 63 (c), Succession Act, requires that the will should be attested by two or more witnesses, each of whom had either seen the testator sign or affix his mark, or had received from the testator a personal acknowledgment of his signature or mark on the will. According to that subsection it is not necessary for all the three, viz., the testator and the two witnesses, to be present at one and the same time, but, it is clear that the section requires that there must be two witnesses who have attested the execution, and to each of them the testator had either given his personal acknowledgment of his signature or who were present when the testator executed the document. In the present case, on the evidence, it is clear that even if it is accepted fully, the requirements of S. 63 (c) of the Act were not fulfilled. There is no evidence that the alleged second witness was present when the testator executed the document, or had received from the testator a personal acknowledgment of his signature. Mr. Khambata urged that by reason of S. 68, Evidence Act, it was sufficient to call only one witness. That argument mixes up the two questions. The Evidence Act lays down the mode of proof, it does not define what is required to be proved. That is stated in S. 63 (c), Succession Act. If one witness, who is called, is in a position to depose to all that is required by S. 63 (c), the law permits that to be done. But by S. 68, Evidence Act, the law does not alter what is required to be proved by S. 63(c), Succession Act. On that ground alone the petition must fail."

I respectfully agree that the evidence which may be given by at least one witness is to prove execution of the will and that means, in my judgment, proving execution of the document according to the requirements of the statute. That Mr. Somne was unable to do in this case and the document

has, therefore, not been proved to have been executed according to law. But Mr. Khambata submits that a presumption ought to be raised in his favour that the testator acknowledged the document to the second witness and he says that accordingly he proposed to call a Mr. Bhagat to show that the person to whom it is alleged that the deceased secondly acknowledged his signature had gone to Tulsipur. The following is a record of what happened immediately after the appellant had left the witness-box:

"*Khambata* : — I want to call Mr. Bhagat to show that the deceased knew one Mahomedmiya who used to sit in the office of Bhagat and that at the instance of Dr. Mody Bhagat allowed him to sit in his (Bhagat's) office. Bhagat will further depose to the fact that Mahomedmiya had left for a place called Tulsipur and he gave that address to petitioner's husband. Khambata further wants to call petitioner's husband to show he made inquiries at the address given but is unable to trace that Mahomedmiya.

*P. C.* This evidence is not useful at all. It does not establish that the man who is alleged to be the second witness was this Mahomedmiya, about whose whereabouts the inquiry was made. Mahomedmiya is a common name and there may be hundreds of persons of that name. There is nothing to connect the Mahomedmiya sitting in Bhagat's office with the attesting witness. Khambata says that the name is Chowdhary Mahomed Mustakiakhan."

The matter was not pressed further and Mr. Khambata closed his case. In fact Mr. Khambata relies on certain reported decisions to support his proposition that it is only necessary to call one witness to prove one attestation and that once this has been done, either the will is proved or a presumption of the validity arises in his favour which shifts the onus to those who contest the will to show that it was not properly executed. The first case relied upon is 22 C. W. N. 315.<sup>2</sup> In that case Fletcher J., with whom Chatterjea J., agreed, said this (page 316):

Under S. 68, Evidence Act, it is quite clear that a will can be proved by one of the attesting witnesses. The same view has obtained in England for many years. I quote from a most recent Text-book—Mortimer on Probate Practice, p. 302, where the learned author observes : 'To prove the attestation of a will in the Court of Probate, it is not necessary to examine both the attesting witnesses.' The learned Judge was clearly wrong when he rejected the will on the ground that only one of the attesting witnesses had proved the will."

Now it nowhere appears from the facts of that case whether the single attesting witness who was called was able to give

2. (18) 5 A. I. R. 1918 Cal. 78 : 43 I. C. 208 : 22 C. W. N. 315, Rammal Das v. Kakal Koli Kochini.



evidence as to the attestation of the other attesting witness, that is to say, that both the attesting witnesses were present at the same time. It appears that this may well have been the case, since the learned Judge in the passage I have read, quotes a passage from Mortimer on Probate to the effect that in England one attesting witness can prove a will. But there is this material difference between the law of England and the law of India in this respect, viz., that in England it is by the Wills Act obligatory for both the attesting witnesses to be present at the same time in order to witness due execution of the will, whereas in India the testator may acknowledge his signature to the witnesses at different times and not in each other's presence. In my opinion, therefore, this Calcutta case is distinguishable and cannot be treated as an authority for the proposition that only one attestation need be proved. The other cases are all with regard to the execution of mortgages. The relevant section is S. 59, T. P. Act, which is as follows :

"Where the principal money secured is Rs. 100 or upwards, a mortgage other than mortgage by deposit of title-deeds can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses."

There is a difference of opinion as shown by the reported cases of the other High Courts on this point. The Allahabad cases are 39 ALL 109,<sup>3</sup> 39 ALL. 241<sup>4</sup> and 54 ALL. 1051.<sup>5</sup> The first two cases in effect hold that you can prove due execution of a mortgage by calling one attesting witness, so that it matters not whether that witness can give any evidence of the attestation of the other witnesses or not. The case in 54 ALL. 1051<sup>5</sup> is a decision of a Full Bench of that High Court and in answer to the question raising this very point with regard to a mortgage, the judgment of the Court is as follows (page 1058) :

"Where a mortgagee sues to enforce his mortgage and the execution and attestation of the deed are not admitted, the mortgagee need prove only this much that the mortgagor signed the document in the presence of an attesting witness and one man attested the document, provided the document on the face of it bears the attestation of more than one person; but if the validity of the mortgage be specifically denied, in the sense that the document did not effect a mortgage in law, then it must be proved

3. ('17) 4 A. I. R. 1917 All. 27 : 39 All. 109 : 38 I. C. 175, *Ram Dei v. Munna Lal*.

4. ('17) 4 A. I. R. 1917 All. 103 : 39 All. 241 : 38 I. C. 694, *Shib Dayal v. Sheo Ghulam*.

5. ('32) 19 A. I. R. 1932 All. 527 : 54 All. 1051 : 139 I. C. 1 (F.B.), *Lachman Singh v. Surendra Bahadur Singh*.

by the mortgagee that the mortgage deed was attested by at least two witnesses."

That case, so far as it deals with contested matters, is inconsistent with the two earlier Allahabad cases. Then comes a case in the Privy Council which has been relied upon, viz., 41 Bom. L. R. 1047.<sup>6</sup> When that case is examined, it will be found that the point we have to consider was not expressly determined by their Lordships, since, as appears from the judgment delivered by Sir Lancelot Sanderson, a single attesting witness who was called was not believed. At page 1051 appears this passage :

"Then it was urged that at least one attesting witness, viz., Badri Prasad, was called at the trial and therefore the provisions of S. 68, Evidence Act, were complied with, and no further evidence of the due execution and attestation of the mortgage deed was necessary.

This further contention cannot be accepted by their Lordships, for although Badri Prasad purported to have been an attesting witness, and although he was called at the trial for the purpose of proving the execution of the mortgage deed, his evidence has not been accepted as evidence upon which any reliance could be placed."

The next case comes from Rangoon, A. I. R. 1941 Rang. 122.<sup>7</sup> Referring to the judgment in the Privy Council in 41 Bom. L. R. 1047,<sup>6</sup> Mosley J. says this (page 125) :

"It is clear from this judgment that the evidence of one attesting witness would in such case only be good evidence if he proved that the mortgage was duly attested (i. e., attested by two witnesses). It must be held, then, that this mortgage was not duly attested and is not valid. It will more briefly dispose of the other two findings of the District Judge, both of which I think are clearly unwarranted."

With great respect to the learned Judge, the Privy Council decision cannot be said to so hold, since no reliance could be placed upon the evidence of the only witness. Some of the surrounding circumstances in the case before us, such as the marriage in September 1942, the alleged testamentary document of 6th September (October?) 1942, conferring benefits on the new wife and the absence of any benefit for the wife in the document of 15th October 1942, and that the person propounding the will claims a large benefit under it are such that any person, who seeks to uphold this document must have realised that the minimum proof permissible to admit an attested document in evidence in uncontested matters would not be sufficient to prove it as a duly executed

6. ('39) 26 A. I. R. 1939 P. C. 117 : I.L.R. (1939) Kar. P. C. 222 : 181 I. C. 216 : 41 Bom. L. R. 1047 (P.C.), *Surendra Bahadur Singh v. Behari Singh*.

7. ('41) 28 A. I. R. 1941 Rang. 122 : 195 I. C. 221, *Mirza Mohamed v. Jambulingam Chettyar*.



will of the deceased which ought to be admitted to probate. In fact, as appears from the original petition, an official in the Testamentary Department of this Court endorsed it as follows :

"As the will was attested by witnesses at different times, the affidavit of the second attesting witness also should be filed."

Rule 652 of this High Court provides :

"Upon the affidavit in support of the caveat being filed, the petitioner for probate or letters of administration shall be called upon by notice to take out a summons, and the proceedings shall be numbered as a suit in which the petitioner shall be the plaintiff and the caveator shall be the defendant. The procedure in such suit shall, as nearly as may be, be according to the provisions of the Code of Civil Procedure."

I think it most undesirable in a contested matter especially when fraud is alleged that it should have been allowed to go to trial without pleadings and issues defined. The result to be expected, when this is not done, could not be better illustrated than this case, in which considerable time in this Court has been taken up in debating whether the petitioner was taken by surprise at the trial or ought to have known that, besides meeting the allegation of forgery, she had to prove due execution of the will. We have examined the whole position carefully and we are satisfied that the petitioner was not taken by surprise. The presence of the petitioner's witness Mr. Bhagat in Court in itself negatives any such contention. In my judgment the petitioner has failed to prove that the document of 15th October 1942, was duly executed according to law.

The reported cases in the other High Courts are conflicting, and except for the case from Calcutta they all deal with mortgages and not with wills. I am certainly not prepared to say that what is required to prove due execution of a will is the same as that which is required to prove due execution of a mortgage. Section 63 (c), Succession Act and S. 59, T. P. Act, are very different in terms. However, it should be observed that S. 68, Evidence Act, does not say that a document required to be attested by two witnesses shall be proved by the evidence of one of them. All that the section provides is that such a document shall not be accepted in evidence unless the evidence of at least one of the attesting witnesses is called. The words "at least" are of the utmost importance. They presuppose that more evidence may be required, and it can only be by reference to the circumstances of each case that the quantum of evidence necessary to discharge the onus of proof can be measured.

In the circumstances of this case, the learned Judge in the Court below was, in my judgment, right in holding that the evidence of Mr. Somne alone was insufficient and it follows that this appeal must be dismissed.

Lastly, as regards costs, the usual rule is that, when the litigation has been caused in effect by the testator, the costs may properly be paid out of the estate. It appears that there was no argument with regard to costs in the Court below and that the learned Judge simply dismissed the petition with costs. In the other appeal No. 1 of 1945 the learned Judge has said that he is not prepared to go to the length of holding that the petitioner in this case had set up a forged will. The petitioner in fact has failed because she did not prove due execution. The testator by calling in a stranger, if he did so, to witness his will who it may be difficult to trace, has contributed to this litigation, and in my opinion the proper order will be that the petition stands dismissed, but that the order as to the costs of the proceedings in the Court below be varied by a direction that the costs of those proceedings be paid out of the estate as between solicitor and client. This appeal is dismissed with costs.

**Divatia J.**—I agree. The principal point urged by Mr. Khambata on behalf of the appellant is that it was not necessary to examine both the attesting witnesses as the will had been duly proved by examining one of them, Mr. Somne. That argument was rejected by Kania J., on the ground that the Evidence Act lays down only the mode of proving and it does not define what is required to be proved under S. 63 (c), Succession Act. I agree with the learned Judge in holding that it was necessary to prove either by one or more witnesses that both the witnesses had properly attested the will. Section 68, Evidence Act, lays down that if a document was required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. Section 69 provides that if no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least was in his handwriting, and that the signature of the person executing the document was in the handwriting of that person. In the present case S. 69 does not apply because one of the attesting witnesses, Mr. Somne, who is alive has been examined and it is not proved by the appellant that



the other attesting witness was dead. Section 68 speaks of proof of execution of the will. That must, in my opinion, mean execution according to the provisions of S. 63, Succession Act. Under that section it is necessary for due execution of a will that it must be attested by two or more witnesses, and one of the modes of attestation is that each of the witnesses should receive from the testator a personal acknowledgment of his signature and that each should sign the will in the presence of the testator. It is true that under that section it is not necessary that more than one witness should be present at the same time, and in that respect the provisions of this section differ from the English law. Reading S. 63, Succession Act, with S. 68, Evidence Act, it seems to me to be clear that what the person propounding the will has got to prove is that the will was duly and validly executed and that must be done by not simply proving that the signature on the will was that of the testator but that the attestations were also properly made as required by cl. (c) of S. 63. No doubt S. 68, Evidence Act, says that it is not necessary to examine both or all the attesting witnesses, but it does not follow therefrom that if one attesting witness only proves that the testator had acknowledged his signature to him, it is not necessary that the acknowledgment by the testator before the other attesting witness need be proved. All that it means is that if two attesting witnesses had signed in each other's presence, it is not necessary to examine both of them to prove that they had received the acknowledgment from the testator. But if, as allowed under S. 63, as well as under S. 3, T. P. Act, the attestations to the testator's signature were not made at the same time, it is necessary, in my opinion, to prove that both the persons, who put down their attesting signatures on different occasions, had done so on the acknowledgment of the testator.

Mr. Khambata has relied upon several decisions relating to the execution of a mortgage deed under S. 59, T. P. Act. In my opinion, however, the principal case relied upon by him, namely, the Full Bench decision in 54 ALL. 1051,<sup>5</sup> does not support his argument. There were previous decisions of the same Court in 39 ALL. 109,<sup>3</sup> 39 ALL. 112<sup>8</sup> and 39 ALL. 241,<sup>4</sup> which support his contentions to a certain extent, but all these three cases were distinguished in the Full Bench decision, and it was laid down there that there was a distinction between proof of execution

of the mortgage and proof of its validity. It was held that although it was not necessary to examine both the attesting witnesses for proving execution of the mortgage, it was necessary that both the attestations must be proved to establish its validity. Even accepting the distinction made by the learned Judges of the Allahabad High Court between execution and validity of a mortgage in so far as that principle can be applied to the execution of a will in probate proceedings, it must follow that to prove the valid execution of a will under S. 63, it is necessary that both the attestations must be proved. When a person comes to the Court to establish the authenticity and the valid execution of a will, the mere formal execution and its valid execution cannot be separated. He has got to establish that the will had been validly executed. There cannot be a valid execution without proper attestation under S. 63, Succession Act, and if such proper attestation is not proved, there is no proof of execution under S. 68, Evidence Act. Even with regard to the case of mortgages the Rangoon High Court has taken a different view from the Allahabad High Court. It was held in 11 Rang. 26<sup>9</sup> that due execution cannot mean anything less than the signing by the mortgagor and attestation by at least two witnesses. Therefore, although the proviso to S. 68 relieves a party relying upon an instrument of mortgage of the burden of adducing the evidence of one of the attesting witnesses, yet it does not relieve him of the necessity of proving not only that the mortgagor signed the instrument of mortgage but also that he signed it either in the presence of two attesting witnesses or that he acknowledged his signature to each of the two witnesses within the meaning of the term 'attested' in S. 3, T. P. Act. That decision was followed in A.I.R. 1941 Rang. 122,<sup>7</sup> where it was held:

"No doubt only one attesting witness need be called if that attesting witness speaks to attestation by the attesting witnesses. But if he does not do so, it is necessary to prove that the deed was properly attested by those other attesting witnesses."

In my opinion, this principle would apply with greater force to the case of a will of which probate is sought and that in this case the valid execution of the will was not properly proved even though witness Somne is to be believed. I agree, therefore, with the order made by the learned Chief Justice.

G.N./V.S. *Appeal dismissed.*

9. ('33) 20 A.I.R. 1933 Rang. 6 : 11 Rang. 26 : 141 I. C. 700, R. M. A. R. M. Chettyar Firm v. U Htaw.

8. ('17) 4 A.I.R. 1917 All. 89 : 39 All. 112 : 38 I. C. 651, Uttam Singh v. Hukam Singh.



[Case No. 4]

**A. I. R. (33) 1946 Bombay 18**

LOKUR AND WESTON JJ.

*Laxman Bharmaji — Accused*

v.

*Emperor.*

Criminal Revn. Appln. No. 384 of 1944, Decided on 23rd November 1944, from conviction and sentence passed by Chief Presidency Magistrate, Bombay.

(a) Companies Act (1913), S. 2 (1), cl. (4) and cl. 13 (c) — *Indicia to determine instrument a debenture indicated.*

In determining what is or is not a debenture within S. 2 (1) the Court is not bound to hold that an instrument is a debenture because it is called a debenture by the company issuing it, nor to hold that it is not a debenture because it is not so called by the company. The Court must look at the substance of the instrument itself, and, without the assistance of any precise legal definition, form the best opinion it can whether the instrument is or is not a debenture: (1887) 36 Ch. D. 215, *Rel. on.* [P 19 C 2]

A document which either creates a debt or acknowledges it and is one of a series may be dealt with as a debenture. A creation of a charge over the assets of the company issuing the debenture, though usual, is not an essential requisite of a debenture. There may be a mortgage debenture or a simple debenture which does not create any charge on any of the assets of the company: (1837) 37 Ch. D. 260 and (1881) 7 Q. B. D. 165, *Rel. on.* [P 19 C 1, 2; P 20 C 1]

(b) Companies Act (1913), S. 134 — *Private limited company issuing patron bonds to public—Bonds held to be debentures — Company held liable to penalty under S. 134.*

The India Patron Bank Ltd., was a private limited company incorporated under the Companies Act, its main business being to sell what were called "Patron Bonds," to invest moneys realised by the sale of those bonds and to take steps to carry out the terms of the scheme of those bonds. The form of the Patron Bond bore a serial number and its title at the top was "The India Patron Bank Limited" and below it "Patron Bond, Rupees Ten only." The bond acknowledged a debt; it was one of a series; it bore the company's seal; it provided for the payment of interest by determining the lucky numbers and it indirectly created a charge of the amount payable on the reserve fund of the company:

*Held* that the prize bonds were debentures and by issuing them to the public the company had ceased to be a private company and was bound to file its balance-sheet and the profit and loss account with the Registrar of Companies and that the default of the company in complying with that requirement rendered the company and its directors liable to the penalty under S. 134 (4), Companies Act. [P 20 C 2]

*S. S. Kavalekar — for Accused.*

*S. G. Patwardhan (Asst. Govt. Pleader) — for the Crown.*

**Lokur J.** — This is an application in revision against the petitioner's conviction under S. 134, Companies Act, 1913, and the sentence of a fine of Rs. 100 by the Chief Presidency Magistrate, Bombay. The peti-

tioner is one of the directors of the India Patron Bank Ltd., which is a private limited company incorporated under the Companies Act, its main business being to sell what are called "Patron Bonds", to invest moneys realised by the sale of those bonds and to take steps to carry out the terms of the scheme of those bonds. Being a private limited company, it cannot issue an invitation to the public to subscribe for any shares or debentures, and according to S. 2 (1), cl. (13) (c), Companies Act, if it issues such invitation to the public, it ceases to be a private company and becomes a public company liable to fulfil the obligations imposed upon a public company by the Act and the rules. One of such obligations, from which a private limited company is exempt, is to file three copies of the annual balance-sheet and profit and loss account with the Registrar of Companies after they have been laid before the company at the general meeting, and any default in complying with this requirement is made punishable under S. 134 (4) of the Act. Section 134 (3) provides that where a private company has included all the necessary provisions in its articles of association, but is not complying with those or any of those provisions, it shall cease to be entitled to the privileges and exemptions conferred on private companies under the provisions of the Act, and shall be treated as if it were not a private company.

Being of opinion that the so-called Patron Bonds issued by the company to the public are in fact debentures and finding that the company had not filed with him three copies of its balance-sheet and profit and loss account for the year ending 31st March 1939, the Registrar of Companies filed a complaint against the company and its three directors in the Court of the Chief Presidency Magistrate, Bombay. One of the directors died thereafter, and the learned Magistrate, agreeing with the view of the Registrar of Companies, convicted the remaining accused under S. 134 (4), Companies Act, and sentenced each of them to a fine of Rs. 100. One of the directors thus convicted, who was accused 2, has now presented this application for revision. It is admitted that the company has not filed with the Registrar of Companies its balance-sheet and profit and loss account for the year ending 31st March 1939, and, therefore, the only point in dispute is whether the Patron Bonds issued by it are debentures such as are prohibited from being offered to the public by a private limited company. A form of the Patron Bond, is



produced at Ex. A. It bears a serial number and its title at the top is "The India Patron Bank Limited" and below it "Patron Bond, Rs. 10 only." It then goes on to say:

"In consideration of Mr. (name of the holder) having paid Rs. 10 as the purchase price of Patron Bond in the India Patron Bank Limited, Sholapur, it is hereby agreed and declared by the said Bank that the said Bank will pay all money to Mr. (holder) that may hereafter become due in respect of this Bond, on terms and conditions and rules and regulations printed on the reverse. In witness whereof the common seal of the Bank has been affixed and the Manager of the Bank has hereunto set his hand this . . . day etc."

The bond purports to be signed by the manager of the company and sealed with the company's seal. On the reverse of the bond are set out the rules and privileges. According to those rules, every purchaser is to pay 8 annas as admission fee in addition to Rs. 10. Then, after deducting Re. 1-8-0 for initial expenses and reserving 8 annas for the reserve fund, the balance is to be invested and the interest earned is distributed among the bond-holders according to the scheme set out in cl. (2) of the rules. If any of the bond-holders gets any of those prizes, his bond is cancelled, and if the bond-holder is not lucky enough to secure a prize in the distribution for 20 years, the original price of the bond, viz., Rs. 10, would be returned to him without deduction at the end of twenty distributions. In exceptional cases, if the amount is required earlier, then only Rs. 8 are repaid, if the directors are satisfied that the holder cannot do without the amount. Clause (7) provides that the reserve fund would be utilised for payment of the amounts of the bonds. Then there are other conditions which are not material for our purpose.

On a consideration of the nature and conditions of these Patron Bonds, we are clearly of opinion that they are really debentures within the meaning of S. 2 (1), cl. 13 (c), Companies Act. In S. 2 (1), cl. (4) of the Act, a debenture is said to include debenture stock, but nowhere is to be found a legal definition of the word "debenture." In (1837) 37 Ch. D. 260<sup>1</sup> at p. 264, Chitty J., defined a debenture as "any document which either creates a debt or acknowledges it," and he says that any document which fulfils either of those conditions is a debenture. In (1881) 7 Q. B. D. 165<sup>2</sup> at p. 172 Lindley J.,

held that a document which on the face of it was called a debenture and recorded indebtedness and was one of a series was to be dealt with as a debenture under the Stamp Act. He observed (p. 172):

"Now, what the correct meaning of 'debentures' is I do not know. I do not find anywhere any precise definition of it. We know that there are various kinds of instruments commonly called debentures. You may have mortgage debentures, which are charges of some kind on property. You may have debentures which are bonds, and, if this instrument were under seal, it would be a debenture of that kind. You may have a debenture which is nothing more than an acknowledgment of indebtedness."

It is true that the bonds issued by the accused are not styled "debentures." But as pointed out by Chitty J., in (1887) 36 Ch. D. 215<sup>3</sup> at p. 220, in determining what is or is not a debenture within the section we are not bound to hold that an instrument is a debenture because it is called a debenture by the company issuing it, nor to hold it is not a debenture because it is not so called by the company. We must look at the substance of the instrument itself, and, without the assistance of any precise legal definition, form the best opinion we can whether the instrument is or is not a debenture. The main features which in our opinion tend conclusively to show that these Patron Bonds are debentures are the acknowledgment of debt, the promise to return it, the fact that they form a series bearing consecutive numbers and the fact that all the holders get an equal chance to partake in the annual distribution of prizes out of the net interest realized by the company.

Mr. Kavalekar has advanced various reasons on behalf of the petitioner why they are not to be regarded as debentures. The first is that the company does not issue them as debentures but sells them for a price. It is wholly immaterial what the company calls them and the name given to them by the company does not prevent them from being debentures if in fact they are debentures. The next argument advanced is that they do not purport to be a charge on the company's assets. We find that in cl. (7) of the rules and privileges it is provided that the reserve fund is to be utilised for payment of guaranteed amounts payable to the holders under cls. (5) and (6). Thus the reserve fund being ear-marked and set apart for the repayment of the amount of the bonds to the bond-holders, a charge is tacitly

1. (1837) 37 Ch. D. 260 : 57 L. J. Ch. 202 : 58 L. T. 218 : 36 W. R. 411, *Levy v. Abercorris Slate and Slab Co.*

2. (1881) 7 Q. B. D. 165 : 50 L. J. Q. B. 517 : 44 L. T. 378 : 29 W. R. 610, *British India Steam Navigation Co. v. Commrs. of Inland Revenue.*

3. (1887) 36 Ch. D. 215 : 56 L. J. Ch. 815 : 57 L. T. 139 : 35 W. R. 798, *Edmonds v. Blaina Furnaces Co.*



created on that reserve fund. There is no doubt that if the company has other assets, it may pay the bond-holders their debts out of them. But in addition to this, the reserve fund is specially set apart for that purpose, and thus it may be said that the rules of the company do provide for a charge on at least a part of its assets. Moreover a charge, though usual, is not an essential requisite of a debenture. As already pointed out, there may be a mortgage debenture or a simple debenture which does not create any charge on any of the assets of the company. It is next contended that the bonds do not contain in terms an acknowledgment of a debt simpliciter, but it is accompanied by various conditions and the debt is in fact never wholly repaid. Thus although every purchaser has to pay Rs. 10-8-0, if he is not lucky enough to draw a prize within twenty years, he may get back only Rs. 8 if the directors choose to return the amount to him within the period of 20 years or to Rs. 10 at the end of twenty years. This only means that the company undertakes the liability of repaying only Rs. 10 at the end of twenty years. This is nonetheless an acknowledgment of indebtedness and the holder has a right to recover the amount from the company at the end of the stipulated period. The various more common or salient characteristics of a debenture are enumerated in Palmer's Company Precedents (14th Edition), Part III, p. 3. But as pointed out by Pollock M. R. in (1926) 1 Ch. 1<sup>4</sup> at p. 12, it is not essential that all those characteristics should be present and some of them are almost the antithesis the one of the other. After considering these characteristics and in holding certain income stock certificates to be debentures, he observed (p. 15) :

"Now, Sir Francis Palmer in his catalogue of the characteristics of a debenture says : 'A debenture is, as a general rule, one of a series.' This document is certainly one of a series. The term 'debenture' is applied, as a general rule, to instruments issued by a company. This instrument is issued by a company. It is not issued, it is true, under seal. A debenture usually provides for the payment of a specific principal sum at a specific date, but that, as he points out in the paragraph, is not essential, for there are millions of debentures which have not an actual provision for repayment because they are perpetual or permanent debentures. A debenture usually provides for payment of interest. This document does not; and a debenture generally contains a charge on the undertaking of the company; but from the cases that are referred to it is quite plain that there are a number of debentures in which there is no such charge; and indeed

4. (1926) 1 Ch. 1: 95 L.J. Ch. 97: 133 L. T. 790, Lemon v. Austin Friars Investment Trust.

one must be careful not to confuse a debenture with a mortgage debenture."

This reasoning applies all the more strongly to the prize bonds of the accused. Many of the characteristics which did not appear in the income stock certificates, which were held by Pollok M. R. to be debentures, do appear in these prize bonds. The bond acknowledges a debt; it is one of a series; it is issued by a company; it bears the company's seal, it provides for the payment of interest by determining the lucky numbers and it indirectly creates a charge of the amount repayable on the reserve fund of the company. It is true that, as pointed out by Mr. Kavalekar, some other indicia usually found in ordinary debentures are absent in these bonds. But it is not necessary that every one of them must be present in every kind of debentures. The presence of the features referred to above far outweigh the absence of other indicia, and we are clearly of opinion that these prize bonds are debentures, and by issuing them to the public the company has ceased to be a private company and was bound to file its balance-sheet and the profit and loss account with the Registrar of Companies after they were laid before the company at the general meeting of the company. The admitted default of the company in complying with that requirement renders the company and its directors liable to the penalty under s. 134 (4), Companies Act. The petitioner's conviction must, therefore, be upheld. The rule is discharged.

G.N./V.S.

*Rule discharged.*

[Case No. 5]

**A. I. R. (33) 1946 Bombay 20**

**RAJADHYAKSHA J.**

*Keshav Appa Bhagat — Applicant*

*v.*

*Sitaram Hanumandas — Opponent.*

Civil Revn. Appln. No. 87 of 1944, Decided on 17th November 1944, against order of Assistant Judge, Poona, in Misc. Appeal No. 39 of 1942.

Provincial Insolvency Act (1920), Ss. 16 and 9 (1) (c) — Petition under S. 9 (1) (c) dismissed for default—Application by another creditor to substitute — Court has inherent power to restore under S. 151, Civil P. C.

It is desirable that the Court before making an order of dismissal should wait for some time especially as S. 16 provides a special procedure which enables any creditor to have his name brought on record as a petitioner if the original petitioner does not proceed with due diligence on his petition. It is not necessary that the Court should wait indefinitely before passing an order dismissing the application for default. But some intimation by way of a notice on the Court's notice board that in

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the absence of any further steps being taken to continue the proceedings the application would be dismissed on a particular date should be given to the parties interested. S. 16 makes a special provision which enables another creditor to be substituted when the original petitioner does not proceed with due diligence on his petition. The object is to serve as a check on the fraud of either the debtor or the creditor who has presented the application for insolvency. Hence under S. 151, Civil P. C., Court has inherent powers to restore an application under S. 9 (1) (c), Insolvency Act, filed by a creditor dismissed for default at the instance of another creditor who applies under S. 16 for substituting his name in place of the petitioning creditor. [P 23 C 2; P 24 C 1]

*V. H. Gumaste* — for Applicant.

*S. G. Patwardhan* — for Opponent.

**Order.** — This is an application in revision against an order passed by the Assistant Judge of Poona in Miscellaneous Appeal No. 39 of 1942 confirming the order passed by the First Class Subordinate Judge of Poona restoring to file insolvency petition No. 45 of 1938 which had been dismissed for default. The facts of this case are these: Some four creditors filed a petition in insolvency on 25th May 1938, in the Court of the First Class Subordinate Judge at Poona against the present applicant who is one of the owners of the shop going by the name of Bhunjangrao Sadhashiv Bhagat. The petition remained pending for over three years, and on 15th September 1941, the pleaders for the petitioners stated by Exhibits 103 and 104 that they had no directions to continue the proceedings. But on the very next day, i. e. on 16th September 1941, two other creditors shops, viz., Laxminarayan Sitaram Shop and Rambhagat Paichandas Shop applied under S. 16, Provincial Insolvency Act, to be substituted in the place of the petitioning creditors on the ground that the original petitioners were not prosecuting the petition with due diligence. The application was opposed on the ground that it had not been properly verified and presented. The Court dismissed the application for substitution but directed the two creditors to present a new application within a week. This order was passed on 17th September 1941, and on the next day one of the two creditors asking for substitution, i.e. the shop of Rambhagat Paichandas filed a proper application for substitution. The application was granted on 22nd February 1942, and the name of the shop of Rambhagat Paichandas was brought on record as the petitioning creditor. Then the petition continued until 26th June 1942. On that day persons representing the shop of Rambhagat Paichandas remained absent. Their pleaders

also remained absent and accordingly on that very day the learned Judge proceeded to pass an order dismissing for default the petition in insolvency. The receiver who had sold certain properties and collected money was also directed to return the property to the original opponent, i.e., the present applicant. But on the very next day the shop of Laxminarayan Sitaram presented an application purporting to be an application under S. 16, Provincial Insolvency Act, requesting the Court to restore the insolvency petition to file and to substitute its name as the petitioning creditor. It was alleged that the shop of Rambhagat Paichandas had not prosecuted the petition with due diligence and had remained absent on the day of the hearing, and that as a result of this other creditors had suffered irreparable damage. This application was opposed by the opponent on the ground that as the original petition had already been dismissed for default there was no petition pending and that, therefore, the shop of Laxminarayan Sitaram could not ask for its name being substituted as a petitioning creditor under S. 16, Provincial Insolvency Act. It was further contended that the original petitioning creditor whose name had been brought on record by way of substitution, viz., Rambhagat Paichandas, had not made any application for restoring the petition to file and that there was not any sufficient cause alleged for restoring to file the original petition. The learned trial Judge, however, thought that the application that was made was not only for substitution under S. 16, Provincial Insolvency Act, but also for restoring the original petition to file. He considered that the other creditors had not been given any opportunity to proceed with the application before it was dismissed. Under these circumstances, he thought it fit to set aside the order dismissing the insolvency petition and he, therefore, directed that the petition be restored to file.

Against that order an appeal was filed in the District Court of Poona and the learned Assistant Judge who heard the appeal thought that the Court had inherent jurisdiction under S. 151, Civil P. C., to restore the petition to file. He considered that although the application had been made by a person who was not a petitioning creditor when the petition was dismissed, still it was made by one of the creditors whose name had been entered in the list of creditors and that he could be considered to be a party to the proceedings and could, therefore, apply under O. 9, R. 9, Civil P. C. He was of



opinion that in the interests of justice the lower Court had acted rightly in setting aside the order dismissing the petition for default and in restoring the petition to file. He, therefore, confirmed the order of the lower Court and dismissed the appeal with costs. It is against that order that this application has been filed in revision.

The first argument that was advanced by the learned advocate Mr. Gumaste was that under S. 16, Provincial Insolvency Act, there can be no prayer for substitution in a proceeding which has already come to an end by reason of the petition being dismissed for default. In my opinion, this contention has some substance and is supported by the ruling of the Rangoon High Court in 11 Rang. 407.<sup>1</sup> In that case the petitioning creditor came to some kind of an agreement with the debtor which was intimated to the Court, and on this intimation the petition was dismissed. Some months later another creditor asked to be substituted for the original petitioning creditors. The application was opposed on the ground that the original petition having been dismissed, the second petitioning creditors had no locus standi for making an application for substitution. The Rangoon High Court upheld this contention and observed as follows (p. 409):

"A person cannot proceed with due diligence in any proceedings that have come to an end and although, as far as we can see, there is no direct case-law on this point, we are of the opinion that the meaning of the section is quite clear. The only course open to the respondents to this appeal is to launch a fresh petition."

It has to be noticed, however, that in that case it was several months after the original petition was dismissed that an application was made under S. 16, Provincial Insolvency Act. Moreover, that application was made only under that section and did not ask for the original petition being revived. Further, in that case the original order dismissing the petition was passed after an intimation had been given to the Court of a certain agreement which had been arrived at between the petitioning creditor and the debtor. It was not passed for default in the appearance of the petitioning creditor.

However, the position that an application under S. 16, Provincial Insolvency Act, could not be made when the original petition had already been dismissed was apparently realised in the present instance and, therefore, in the application that was made on 27th

June 1942, by the shop of Laxminarayan Sitaram, not only was there a prayer for substitution but it was prayed that the original petition may, in the first instance, be restored to file. But the contention of the learned advocate Mr. Gumaste is that such an application for restoring the dismissed petition to file can only be made under O. 9, R. 9, Civil P. C., and hence it is only the plaintiff—in the present instance the original petitioning creditor—who can apply for the petition being restored to file provided he can show sufficient cause for non-appearance when the petition was called on for hearing. There is, in my opinion, some force in this contention. The learned Assistant Judge considered that the petitioning creditor sues on behalf of the general body of creditors and, therefore, in a sense every creditor is a party to the proceedings and that under O. 9, R. 9, any party to the proceeding can ask for a petition dismissed for default being restored to file. But O. 9, R. 9, refers specifically to the plaintiff who has to satisfy the Court that he has sufficient cause for non-appearance, and it is doubtful whether it was competent to the shop of Laxminarayan Sitaram to apply under O. 9, R. 9, for a revival of the petition.

But the question still remains whether the Court did not have inherent jurisdiction to restore the application to file at the instance of one of the creditors. Under S. 151, Civil P.C., the Court has inherent powers to make such orders as may be necessary for the ends of justice and to prevent abuse of the process of the Court. In my opinion, the ends of justice do require in the peculiar circumstances of this case that the application should be restored to file, and that, therefore, the two lower Courts were right in passing the order that they did.

If the application for restoring the original petition to file was dismissed and the original order dismissing the petition stood good, then a fresh petition in insolvency would have had to be filed. In such fresh petition, a fresh act of insolvency would require to be alleged and proved as under S. 9 (1) (c), Provincial Insolvency Act, "the act of insolvency on which the petition is grounded must occur within three months before the presentation of the petition." The act of insolvency on the basis of which the original petition was filed would not be of any avail for the filing of a fresh petition though that act would be sufficient for the purpose of asking for substitution under S. 16, Provincial Insolvency Act, as held by

1. ('33) 20 A.I.R. 1933 Rang. 251 : 11 Rang. 407: 147 I.C. 299, Maung Gyi v. A. L. K. P. Chettyar Firm.



Ramesam J. in 51 Mad. 594.<sup>2</sup> But there is a more serious difficulty which would arise if the original petition was not restored to file. If the original petition had proceeded as far as adjudication, then under S. 28 (7), Provincial Insolvency Act, the order of adjudication would have related back to the date of the presentation of the petition. In that event under S. 34 of the Act all debts which were not barred on the date of the presentation of the petition could be proved in insolvency. In the present case the original petition was filed in May 1938 and was dismissed for default in July 1942. Many debts owed to the various creditors may have been time-barred during the interval and could not now be proved in insolvency if a fresh petition was to be made. It was this consideration that weighed with the Madras High Court in 51 Mad. 594.<sup>2</sup> In that case a creditor whose debt was barred at the time of asking for substitution was allowed to be treated as a creditor for the purpose of S. 16, and in the course of the judgment Ramesam J. made the following observations (page 596):

"The object of the section is to prevent other creditors from being injured by the action of one creditor, who, by reason of collusion or otherwise, may not diligently prosecute the petition. If it is to be regarded as a new petition, this object is frustrated and there is no purpose in having a section of the kind. If the original petition had proceeded up to adjudication or if another creditor whose debt is not barred by the date of substitution is substituted and obtained an order of adjudication, the appellant's debt which was not barred by the date of the petition could be proved. If so, we see no reason why he cannot be substituted. The words 'as petitioner' in the section show that, on substitution, the petition becomes his petition with the original date and it is enough if the debt was an enforceable debt on the original date."

It might be argued that other creditors should not have allowed their debts to be time-barred merely on the off-chance of there being an order of adjudication which might relate back to the date of filing the petition. But it has to be remembered that in an application in insolvency the Court has got certain responsibilities. Under S. 14 of the Act "no petition whether presented by a debtor or by a creditor, shall be withdrawn without the leave of the Court." As pointed out in the commentary on that section by Rameshwar Dial in his book on the Provincial Insolvency Act,

"the petition once presented, the petitioner is no longer in unfettered control of it. The insolvency proceedings are for the administration of the estate

of the debtor, for the benefit of not any particular creditor but for the general body of creditors. Very often petitions are made not with the bona fide intention of getting the debtor's estate administered under the insolvency laws but for the collateral purpose of bringing pressure to bear upon the debtor. It is to check this abuse of the process of the Court that the section has been enacted."

Similarly, S. 16 makes a special provision which enables another creditor to be substituted when the original petitioner does not proceed with due diligence on his petition. The object is to serve as a check on the fraud of either the debtor or the creditor who has presented the application for insolvency. It is not difficult to imagine the case of a creditor, who has presented the application for insolvency against the debtor, having entered into a private treaty with his debtor, not prosecuting his application with diligence and allowing it to be struck off for default. The creditor presenting the petition is regarded as prosecuting the petition not only for his own benefit but also for the benefit of the creditors generally. It would be an easy way of circumventing the statutory provision contained in S. 14 of the Act, if the petitioning creditor was allowed to let the application be dismissed for default when he could not be allowed to withdraw it without the permission of the Court. In cases such as these, I think, it is desirable that the Court before making an order of dismissal should wait for some time especially as S. 16 provides a special procedure which enables any creditor to have his name brought on record as a petitioner if the original petitioner does not proceed with due diligence on his petition. It is not necessary that the Court should wait indefinitely before passing an order dismissing the application for default. But some intimation by way of a notice on the Court's notice-board that in the absence of any further steps being taken to continue the proceedings, the application would be dismissed on a particular date should be given to the parties interested. Of course, if the application is dismissed on merits and no order of adjudication is eventually made, then the creditors who allowed their debts to be time-barred would have no one else to blame but themselves. But in the present case the application was dismissed for default after it had been pending for four years. There was a very large list of creditors. As soon as it was found that the original four petitioning creditors did not appear, two other creditors immediately came forward and asked for substitution. One of them eventually did,

2. ('28) 15 A. I. R. 1928 Mad. 608 : 51 Mad. 594: 110 I. C. 611, Venkata Hanumantha Rao v. Gangayya.



apply to be substituted; but on the day of hearing he remained absent and on that very day the learned Judge, apparently without considering the effect of it, proceeded to make an order dismissing the petition and even directed that the property in the hands of the receiver be returned to the opponent. But on the very next day the present application was made for restoring the original petition to file. I think, therefore, that it was in the interests of justice that the original order dismissing the petition for default should be set aside and the petition restored to file. I, therefore, think that both the lower Courts rightly held that under the inherent jurisdiction of the Court, the original application should be revived. The rule will, therefore, be discharged and there will be no order as to costs.

R.K.

*Rule discharged.*[ *Case No. 6* ]**A. I. R. (33) 1946 Bombay 24**

LOKUR AND WESTON JJ.

*Emperor*

v.

*Shankar Ganpat Pawar — Accused.*

Criminal Ref. No. 97 of 1944, Decided on 24th November 1944, made by Addl. Sessions Judge, Poona.

Criminal P. C. (1898), S. 307 — Reference under—Powers of High Court to interfere with verdict of jury.

In dealing with a case submitted to the High Court under S. 307, the High Court may exercise any of the powers which it may exercise on an appeal. But this does not mean that in every case the High Court should appreciate the evidence and come to a conclusion independently of the verdict of the jury. Ordinarily, the High Court will not interfere with the verdict, unless it is either perverse, or manifestly wrong, or wholly unreasonable, or definitely contrary to evidence, or not supported by any evidence or induced by a misdirection or non-direction in the Judge's charge to the jury. The High Court will not interfere with the verdict of the jury merely because on a perusal of the evidence the High Court thinks that it would have come to a different conclusion from that at which the jury arrived. Under S. 307 (1), when the Judge disagrees with the verdict of the jury, he can make a reference to High Court only if he is clearly of opinion that it is necessary for the ends of justice to submit the case to the High Court, and the only question which the High Court will consider itself is whether the Judge's view that the verdict of the jury has been perverse or unreasonable or altogether against the weight of the evidence, is justified by the record; and if the High Court comes to the conclusion that it is not, then it will accept the verdict of the jury. It is not the duty of the High Court to try the whole case de novo, as if there had been no trial in the Sessions Court at all; and the jury being primarily the tribunal to find the facts, it is not for the High

Court to interfere with the verdict of the jury unless it is unreasonable : 139 I. C. 272 (Bom.) and ('28) 15 A. I. R. 1928 Mad. 1186 (F. B.), *Rel. on.* [P 25 C 1, 2]

Cr. P. C. —

('41) Chitale, S. 307, N. 11, Pts. 4 to 9.

('41) Mitra, Page 1067, N. 938; Page 1071, N. 939.

*B. G. Rao, Govt. Pleader — for the Crown.**R. A. Jahagirdar — for Accused.*

**Lokur J.** — This is a reference made by the Additional Sessions Judge of Poona under S. 307, Criminal P. C., 1898. The accused Shankar alias Baban Pawar was a friend of a deceased Vishnu, who was living in the house of Babu Kale in Shukrawara Peth, Poona City. Vishnu and Babu Kale went to the toddy shop at about 8.30 P. M. on the night of 21st May 1944, and thence they proceeded to the liquor shop at about 9 or 9.15 P. M. They met the accused there, and Vishnu asked him to give some drink to him and his friend Babu at his cost. The accused said that he had no money, and called them some bad names. This was followed by an exchange of abuses between them, and Vishnu lost his temper and struck the accused with his chappal on his face. The accused retaliated by giving a slap on Vishnu's face. In the meantime witness Gulam Mahomed came out of the liquor shop and separated them. He took the accused away in the direction of the lamp post to the north, and, when they had gone some distance, the accused slipped away and ran towards Vishnu. The accused took out his knife from his pocket, opened its blade, and, going to Vishnu, suddenly stabbed him near his left chest. Vishnu cried aloud and fell down on the ground. He died almost instantaneously, and a large crowd of people collected. The accused left the place, stood for a while near the telephone post at a distance of about 25 feet, and then proceeded to the electric lamp post at a distance of about 30 feet more. He was carrying an open penknife still in his hand, and talked to police constable Dhawale, who was going on a bicycle. Police constable Powale who had seen the accused stabbing Vishnu, followed the accused and caught hold of him by his neck. He wanted to take him to the Police Gate, but the accused said that he would first go to his house and talk to his people. As he promised to go with him thereafter to the Police Station quietly, constable Powale accompanied him to his house. The accused told his women what had happened, and then both he and constable Powale started for the Police Gate.



On the way the accused gave a jerk to the constable and ran away. Powale pursued him and caught hold of him, but in the meantime the accused had thrown away the penknife in his hand, and the constable was not able to trace it. He took the accused to the Police Gate and produced him before constable Shelar who was then in charge there. Police jamadar Shaikh Abdul Kadar, who came to know about the incident, went to the scene of offence and found that Vishnu had already died. He kept a police constable to watch the dead body, and sent a message to the Police Sub-Inspector. The Sub-Inspector recorded the complaint of the jamadar, and started investigation. He held an inquest over the dead body, and sent it to the Sassoon Hospital for post mortem examination. The accused was formally arrested at 11-30 P. M., and an electric torch was found with him. The Sub-Inspector completed the investigation and sent a charge-sheet against the accused on 28th May 1944. The accused was committed to Sessions on a charge under S. 304, Part 1, Penal Code, 1860, and was tried by the Additional Sessions Judge and a jury. The accused pleaded not guilty, and stated that, when he met the deceased Vishnu and Babu Kale near the liquor shop, Vishnu asked him to pay for his drink and, when he refused, Vishnu got so enraged that he took out his chappal and hit him on his face, that he (the accused) told him (Vishnu) that he would lodge a complaint with the police and being enraged Vishnu took out an open knife from his pocket and aimed a blow at him, that he (the accused) moved back and caught hold of Vishnu's right wrist and tried to wrest the knife with his left hand, that in doing so he got a cut on his left middle finger, that Vishnu who was then drunk gave a jerk to his hand towards his own body and when he (the accused) let go the hold, the knife in Vishnu's hand was drawn with force towards his own body, that Vishnu lost his balance, and when he bent, the knife struck him on his left chest, and that Vishnu then fell down. He further stated that, after Vishnu fell, Babu took the knife from his hand and ran away. The accused left the place and was afterwards arrested by the police constable. The jury by a majority of four to one returned a verdict that the accused was not guilty of the offence charged against him. The learned Additional Sessions Judge, disagreeing with the verdict, has made this reference under S. 307, Criminal P. C. In dealing with a case submitted to the High Court under S. 307, Criminal P. C.,

"the High Court may exercise any of the powers which it may exercise on an appeal, and subject thereto it shall, after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and the jury, acquit or convict such accused of any offence of which the jury could have convicted him upon the charge framed and placed before it."

This does not mean that in every case the High Court should appreciate the evidence and come to a conclusion independently of the verdict of the jury. Ordinarily the High Court will not interfere with the verdict, unless it is either perverse, or manifestly wrong, or wholly unreasonable, or definitely contrary to evidence, or not supported by any evidence or induced by a misdirection or non-direction in the Judge's charge to the jury. In the words of Beaumont C. J. in 34 Bom. L. R. 896,<sup>1</sup> the High Court will not interfere with the verdict of a jury merely because on a perusal of the evidence the Judges think that they would have come to a different conclusion from that at which the jury arrived, and before interfering with the verdict the Court must come to the conclusion on a perusal of the evidence that no jury could really have entertained any reasonable doubt as to the guilt of the accused. Under S. 307, sub-s. (1), Criminal P. C., when the Judge disagrees with the verdict of the jury, he can make a reference to this Court only if he is clearly of opinion that it is necessary for the ends of justice to submit the case to the High Court, and the only question which the High Court will consider itself is whether the Judge's view that the verdict of the jury has been perverse or unreasonable or altogether against the weight of the evidence, is justified by the record; and, if the High Court come to the conclusion that it is not, then it will accept the verdict of the jury. As observed by the Full Bench in 51 Mad. 956,<sup>2</sup> it is not the duty of the High Court to try the whole case de novo, as if there had been no trial in the Sessions Court at all; and the jury being primarily the tribunal to find the facts, it is not for the High Court to interfere with the verdict of the jury unless it is unreasonable. Considering the evidence from this point of view, we are not prepared to say that the verdict of the jury in this case is manifestly wrong or unreasonable, much less perverse. The learned Judge's charge to the jury is fair and exhaustive and there is no misdirection or non-direction in it.

1. ('32) 139 I.C. 272 : 34 Bom.L.R. 896, Emperor v. Bai Lali.

2. ('28) 15 A.I.R. 1928 Mad. 1186 : 51 Mad. 956 : 114 I. C. 350 (F. B.), In re Veerappa Goundan.



It is true, there are three eye-witnesses who depose to having actually seen the accused stabbing the deceased Vishnu on the left side of his chest with a knife. Babu Kale, who was Vishnu's companion, was admittedly present when the incident took place. He is certainly an interested witness, and the accused says that it was he who left the place with the penknife with which the deceased was injured. Nivratti, who was a servant in a chivda shop inside the compound of the liquor shop, says that he had just come out of the chivda shop when the deceased was asking the accused to give him a drink of liquor, that he saw the deceased giving a blow on the face of the accused with a chappal, that Gulam Mahomed then took away the accused from the place, and that the accused slipped away and returning to the deceased stabbed him on his chest with a knife. The third eye-witness is Constable Sonu Powale who was passing by the liquor shop at 9 P. M., and he says that on seeing a crowd gathered near the liquor shop he stopped for a while and saw the accused come running from the side of Datta Upahar Griha and opening his knife, that he then saw the accused go to the deceased, stab him, and run away towards the lamp post with the blood-stained knife in his hand, that he then went after him, caught him and took him to his house at his request, and that when he was taking him to the Police Gate from there the accused ran away and threw the knife somewhere. If the evidence of these three witnesses is believed then there is no doubt that the accused stabbed the deceased Vishnu and caused his death. But there are various circumstances which go to throw some doubt on this evidence, and, if the jury refused to place any reliance on it, or preferred to give the benefit of the doubt to the accused, their verdict cannot be said to be perverse or unreasonable.

In the first place, it was a dark night, the next day being Amavasya. It is said that there was a lamp post near the gate of the liquor shop, but it did not shed any light on the road where this scuffle took place. The electric lamp post was at a distance of about 60 feet from that place, and the evidence of Vyankataswami shows that it was dark at the place where Vishnu's corpse lay. In his cross-examination he admits that there was no light on the scene of offence. It is therefore difficult to believe that the eye-witnesses could definitely say how Vishnu came by his injury. The version of the accused is

not wholly impossible, and the jury seem to have accepted his version. The conduct of the accused after Vishnu fell down shows that he may not have committed the murder. Immediately after he left the scene and went towards the lamp post, he met Police Constable Dhawale whom he knew and who was going on a bicycle. Dhawale says that he saw a crowd of people near the liquor shop, and that getting down from his bicycle he had a talk with the accused standing near the electric lamp post. The accused inquired with him as to where he was working, and in the meantime Constable Powale came there and took away the accused. In his cross-examination he definitely says that he did not see anything in the hands of the accused at that time. Powale, on the other hand, says that he saw the bloodstained knife in the hand of the accused, and yet he did not ask Constable Dhawale to help him in arresting the accused and removing the weapon from his hand. The conduct of Powale seems to be quite unnatural since he consented to take the accused to his house and to let him have a talk with his people, knowing full well that he had committed a murder in his presence and was carrying the weapon with which he had stabbed the deceased. His explanation is that he was afraid. But there was a large crowd of people who had gathered at the scene of offence, and Constable Dhawale, whom he knew well, was close by. It was easy to overpower the accused if he resisted and take him to the Police Station immediately with the bloodstained weapon in his hand. Instead of that, he accompanied the accused to his house, as if nothing serious had taken place, he allowed him to chat with the members of his family, and then when returning, he allowed the accused to slip from his hand and dispose of the knife. It is strange that although all this took place in the presence of the Constable, he was not able to trace the knife. Even now the knife has not been traced. This seems unaccountable, and lends support to the version of the accused that Babu Kale himself removed the knife from the hands of the deceased and went away with it. Babu Kale admits that after the deceased fell down he left the place and never returned to it. Babu Kale was a friend of the deceased, and it is rather strange that he did not care to stay near the corpse until it was removed. He says that he went to give information to the mother of the deceased, but he himself did not return with her.



Then there was an injury on the inner side of the left middle finger of the accused. The learned additional Sessions Judge has pointed out to the jurors in his summing-up that the prosecution did not offer any explanation of that injury. The accused says that when he was trying to snatch away the knife from the hand of the deceased by holding his wrist with his right hand and trying to loosen his grip with his left hand, his finger was injured by the knife. This is a quite plausible explanation of the injury on the finger of the accused, whereas on the version of prosecution no explanation has been offered. This circumstance also may have weighed with the jury. The accused has given a vivid description as to how he caught hold of the wrist of the deceased when the deceased raised the penknife to stab him, how he twisted his hand, and when the deceased pulled his hand with a jerk and bent forward, how the knife pierced into the deceased's heart. The medical officer who made the post-mortem examination says that the wound on the chest must have been caused by a straight stroke. This is quite compatible with the version of the accused. It does appear from the description of the injury as given in para. 17 of the memorandum of post-mortem examination that the stab wound was transverse in the left first intercostal space about  $1\frac{1}{4}$ " to the left mid-sternal line and about  $\frac{1}{2}$ " below the left sternoclavicular joint, and the weapon caused injury to the heart also. In the panchanama the wound is described as horizontal. Possibly it may have appeared horizontal on account of the width of the blade of the knife. From this description of the wound it is not safe to come to the conclusion that the version of the accused cannot be true. Thus we find that there are various circumstances which may have led the jury to entertain a reasonable doubt regarding the guilt of the accused, especially in view of the subsequent conduct of the accused, the darkness at the scene of offence, the failure to account for the injury on the left middle finger of the accused, and the disappearance of the weapon. We, therefore, do not think that this is a fit case in which we should interfere with the verdict of the jury. The reference is, therefore, not accepted, and the accused is acquitted and discharged.

G.N.

*Reference not accepted.*

[Case No. 7]

**A. I. R. (33) 1946 Bombay 27**

STONE C. J. AND CHAGLA J.

*Kirtilal Jivabhai — Appellant*

v.

*Chunilal Manilal — Respondent 1.*

O. C. J. Appeal No. 5 of 1944, Decided on 12th April 1945, from judgment of Kania J., in suit No. 1970 of 1923.

(a) Limitation Act (1908), Art. 183 — Decree — Revivor of — What constitutes.

To constitute a revivor of a decree there must be a determination by a Court that the decree is still capable of execution and the decree-holder is entitled to enforce it. Such a revivor can be effected by an order for execution, provided the order made is a valid order. [P 28 C 2; P 29 C 1]

Limitation Act —

('42) Chitaley, Art. 183, N. 10, Pts. 3, 5, 9.

('38) Rustomji, Page 1841, Pts. 3, 4, 5.

(b) Civil P. C. (1908), O. 21, Rr. 15, 16 and 10 — Decree — Execution of, by heir of decree-holder — Proper procedure indicated.

Under the Civil P. C. it is only a decree-holder who can ordinarily apply for execution of the decree. If there are more than one decree-holders, then under O. 21, R. 15 it is competent to one of the joint decree-holders to apply for execution. If the decree is transferred either by assignment in writing or by operation of law, the transferee can also apply for execution under O. 21, R. 16. Whether the decree-holder applies under O. 21, R. 10, or under O. 21, R. 15, the executing Court can only execute the decree provided his name appears as a decree-holder on the face of the decree itself. The executing Court cannot look to anything outside or beyond the decree in order to satisfy itself that the person who is applying for execution is the decree-holder. The very definition of "decree-holder" contained in S. 2, sub-cl. (3) of the Code, makes this clear. [P 29 C 1]

In a joint Hindu family a coparcener of the decree-holder in whose favour it is not passed can never be a decree-holder and cannot apply for execution of the decree as a decree-holder : ('27) 14 A. I. R. 1927 Bom. 123. *Dissent.* [P 29 C 2]

He may become a transferee of the decree by operation of law; and if there are other coparceners in whose favour also the decree becomes transferred, then he may apply as one of the assignees under O. 21, R. 16, read with O. 21, R. 15 : ('45) 32 A. I. R. 1945 Bom. 380 and ('40) 27 A. I. R. 1940 Mad. 89, *Rel. on* ; ('37) 24 A. I. R. 1937 Pat. 607, *Dissent.* [P 29 C 2]

C. P. C. —

('44) Chitaley, O. 21, R. 16, N. 3, Pts. 1, 4, 8 ;

('41) Mulla, Page 766, Note "Scope of the rule"; Page 757, Pt. (g) ; Page 767 pt. (g).

(c) Civil P. C. (1908), O. 21, R. 16 — Scope and essentials of — Application for execution if must be made to Court which passed decree — Notice to transferor and judgment-debtor.

O. 21, R. 16 contemplates two cases of a transfer of a decree—one by assignment in writing and the other by operation of law. If the transfer is by assignment in writing, then it is obligatory upon the Court to give a notice of the application to the transferor and the judgment-debtor and the decree cannot be executed until the Court has heard their objec-



tions (if any) to its execution. The application has got to be made to the Court which passed the decree and the application must be an application for execution. No separate application need be made under O. 21, R. 16. All that the rule requires is that the transferee must apply for execution to the Court which passed the decree. Two applications are not necessary, one under O. 21, R. 16, and the other under O. 21, R. 11, although two applications may be necessary and may be desirable where the Court that passed the decree is not executing the decree and the decree has been transferred to another Court for execution : ('43) 30 A. I. R. 1943 P. C. 66 and ('41) 28 A. I. R. 1941 Bom. 302, *Rel. on.* [P 30 C 1]

Where an application under O. 21, R. 16 is made to executing Court to which the decree was transferred for execution and not to the Court which passed the decree O. 21, R. 16 cannot be said to be complied with but in view of the Privy Council decision in ('28) 15 A. I. R. 1928 P. C. 162 the making of application to the wrong Court namely the executing Court to which the decree was transferred for execution may not be fatal to the order for execution made by that Court on that application : ('30) 17 A. I. R. 1930 Cal. 614, *Ref.* [P 30 C 1,2]

#### **C. P. C. —**

('44) Chitale, O. 21, R. 16, N. 12, Pts. 1, 2, 3 ; N. 14, Pt. 1.

('41) Mulla, Page 767, Note "Application . . . . . decree", Page 770, Note "Application . . . . . decree", Page 770, Pts. (j), (k), (l).

(d) **Civil P. C. (1908), O. 21, R. 16 — Application under — Making of order declaring applicant to be transferee of decree is desirable.**

No doubt O. 21, R. 16, does not require that on an application for execution under that rule the Court should pass an order declaring that the applicant is the transferee of the decree. But it is desirable that ordinarily such an order should be made on an application under O. 21, R. 16 : ('31) 18 A. I. R. 1931 Bom. 423 and ('40) 27 A. I. R. 1940 Bom. 5, *Approved* ; ('28) 15 A. I. R. 1928 P. C. 162, *Rel. on.* [P 30 C 2]

But even without the passing of a formal order there must be a recognition by the Court that the person who has applied for the execution of the decree is a transferee within the meaning of O. 21, R. 16. But for such recognition the person who applies for execution would be a stranger to the decree and would not be entitled to maintain the application. [P 31 C 1]

#### **C. P. C. —**

('44) Chitale, O. 21, R. 16, N. 3, 11.

('41) Mulla, Page 766, Note "Scope of the rule."

*H. D. Banaji and J. C. Shah — for Appellant.*

*Sir Jamshedji Kanga and R. J. Kolah — for Respondent 1.*

**Chagla J.** — This is an appeal from a judgment of Kania J., and the question that arises for determination is whether a decree is capable of execution or is barred by limitation. It was an ex parte decree that was passed on 13th November 1923, in favour of Jivabhai Maganlal, the father of the appellant, against the firm of Vadilal Manilal. On 4th January 1926, Jivabhai applied for execution of the decree to this Court and a

warrant was issued for the arrest of Vadilal Manilal and Chunilal Manilal, respondent 1 herein, partners of the defendant firm, the notices under O. 21, R. 22, and under O. 21, R. 37, Civil P. C., 1908, being dispensed with. In June 1928, Jivabhai died leaving behind him two sons, Kantilal (respondent 2), Kirtilal (the appellant), a widow and a brother's widow. In August 1930, the decree was transferred to Ahmedabad for execution. On 4th September 1930, a certificate was issued by the Prothonotary and Senior Master that further execution had been stayed in this Court. On 10th February 1931, Kantilal applied for execution in the Ahmedabad Court. On 2nd March 1931, notice was issued by that Court under O. 21, R. 22. The service of this notice was effected by substituted service, and on 31st August 1931, the Court made an order for attachment of properties belonging to the judgment-debtors. On 30th September 1931, notice was issued under O. 21, R. 66, for settling draft proclamation of sale. On 15th October 1931, respondent 1 appeared and raised various objections. On 12th March 1932, Kantilal applied to withdraw his application for execution with liberty to file a fresh one. This application of Kantilal was granted and he was made to pay the costs of the application for execution. Kantilal filed a suit for partition in this Court being Suit No. 1177 of 1940, and in that suit a consent decree was passed on 23rd September 1940. By that decree the joint family properties were partitioned, and it is the appellant's case that the judgment-debt against the firm of Vadilal Manilal came to his share. The appellant applied for execution to the Ahmedabad Court on 25th July 1941, and that Court issued notice under O. 21, R. 22. On 30th August 1943, the appellant got the stay order for the execution of the decree in this Court removed ; and on 31st August 1943, he presented an application under O. 21, R. 16, which Kania J. dismissed holding that the decree was time-barred and not capable of execution.

The decree having been passed on 13th November 1923, was revived by the order made on 4th January 1926, for the issue of a warrant, and prima facie the decree would be barred on 31st August 1943, when an application for execution was made under O. 21, R. 16, unless in the intervening period the decree had again been revived. The appellant relies on the order made by the Ahmedabad Court on 31st August 1931, as a revivor of the decree. To constitute a revivor of a decree there must be a determina-



tion by a Court that the decree is still capable of execution and the decree-holder is entitled to enforce it. Such a revivor can be effected by an order for execution, provided the order made is a valid order. As we have pointed out, the application for execution on which the order of attachment was made by the Ahmedabad Court on 31st August 1931, was made by Kantilal on 10th February 1931. The most important question we have to consider is : in what capacity did Kantilal make this application? The scheme of the Civil Procedure Code is that it is only a decree-holder who can ordinarily apply for execution of the decree. If there are more than one decree-holders, then under O. 21, R. 15, it is competent to one of the joint decree-holders to apply for execution. If the decree is transferred either by assignment in writing or by operation of law, the transferee can also apply for execution under O. 21, R. 16, Civil P. C.

It is contended, in the first place, by Mr. Banaji on behalf of the appellant that the decree dated 13th November 1923, was passed in favour of Jivabhai as the karta of a joint Hindu family and that Kantilal being a coparcener in that family was a joint decree-holder and as such he was entitled to apply for execution under O. 21, R. 15. Now, in the first place, there is nothing on the face of the record to show that Jivabhai was suing the firm of Vadilal Manilal in his capacity as the karta in respect of a joint family debt. Jivabhai is described in the title of the plaint as Jain Hindu inhabitant, a commission agent and shroff carrying on business as such at Pydhonie outside the fort. But there is nothing to suggest in the plaint that the business he was carrying on was an ancestral business. In the second place, in our opinion, a decree-holder entitled to execute the decree as such must appear to be a decree-holder on the face of the decree. Whether the decree-holder applies under O. 21, R. 10, or under O. 21, R. 15, the executing Court can only execute the decree provided his name appears as a decree-holder on the face of the decree itself. The executing Court cannot look to anything outside or beyond the decree in order to satisfy itself that the person who is applying for execution is the decree-holder. The very definition of "decree-holder" contained in S. 2, sub-cl. (3) of the Code, makes this clear beyond any doubt.

Reliance was placed on 51 Bom. 143.<sup>1</sup> In

1. ('27) 14 A.I.R. 1927 Bom. 123 : 51 Bom. 143 : 100 I. C. 619, Madhav Prabhakar v. Balaji.

that case a decree on a mortgage was passed in favour of one Vishnu Vishwanath Oke. He died on 8th April 1919, and in 1920 Vishnu's brother Balvant applied for execution. The darkhast was sent to the Collector for execution on 20th August 1920. On 27th April 1922, the Subordinate Judge held that it was not competent to the applicant Balvant to proceed with the execution as other persons interested with him in the decree as coparceners after the death of Vishnu were not joined. The proceedings were, therefore, called back from the Collector on 5th May 1922. On 23rd October 1923, another application for execution was filed to which all the coparceners were parties; and the question arose whether the time occupied before the Collector from 20th August 1920 to 5th May 1922, in execution of the previous darkhast could be excluded under Para. 11, sub-para. (3) of Sch. 3, Civil P. C. The learned Subordinate Judge held that it could not be excluded. From this decision there was an appeal to the High Court before Shah and Fawcett JJ. Shah J. in delivering the judgment of the Court, held that the time could be excluded; he then went on to hold that the first darkhast was properly presented by one of the coparceners under O. 21, R. 15. To the extent that Shah J. held that Balvant could present the application as one of the assignees by operation of law on the death of Vishnu under O. 21, R. 15, read with O. 21, R. 16, that decision, with respect, is perfectly correct and is consistent with the recent decision of our Court that when a decree is assigned to two persons jointly, any one of the co-assignees can validly present an application for execution of the decree under O. 21, R. 15 of the Code : see 47 Bom. L. R. 104.<sup>2</sup> But if the decision of Shah J. is sought to be read as meaning that a coparcener of the decree-holder can apply for an execution of the decree under O. 21, R. 15, as a decree-holder, with great respect to the learned Judge we are unable to agree with that view. A coparcener in whose favour a decree is not passed can never be a decree-holder. He may become a transferee of the decree by operation of law; and if there are other coparceners in whose favour also the decree becomes transferred, then he may apply as one of the assignees under O. 21, R. 16, read with O. 21, R. 15 of the Code. The same view of the law has been taken by Burn and

2. ('45) 32 A. I. R. 1945 Bom. 380 : 47 Bom. L. R. 104, Shankar Hari v. Damodar Vyankaji.



Stodart JJ. in *I. L. R.* (1940) *Mad.* 79<sup>3</sup> and they have expressly dissented from the contrary view taken in *A. I. R.* 1937 *Pat.* 607.<sup>4</sup>

Alternatively it has been contended that the application by Kantilal for execution to the Ahmedabad Court was under O. 21, R. 16. It is urged that he was applying as one of the surviving coparceners of Jivabhai and the order made for attachment was in favour of one of the transferees of the decree. Order 21, R. 16, contemplates two cases of a transfer of a decree : one by assignment in writing and the other by operation of law. If the transfer is by assignment in writing, then it is obligatory upon the Court to give a notice of the application to the transferor and the judgment-debtor and the decree cannot be executed until the Court has heard their objections (if any) to its execution. The application has got to be made to the Court which passed the decree and the application must be an application for execution. No separate application need be made under O. 21, R. 16. All that the rule requires is that the transferee must apply for execution to the Court which passed the decree. Any doubt on this point has been set at rest by the recent decision of the Privy Council in 70 *I. A.* 50.<sup>5</sup> As also pointed out by Sir John Beaumont C. J., in 43 *Bom. L. R.* 751,<sup>6</sup> two applications are not necessary, one under O. 21, R. 16, and the other under O. 21, R. 11, although two applications may be necessary and may be desirable where the Court that passed the decree is not executing the decree and the decree has been transferred to another Court for execution. In this case the application for execution was made to the Ahmedabad Court which was not the Court that passed the decree, and to that extent the provisions of O. 21, R. 16, were not complied with. But the Privy Council in 55 *I. A.* 227,<sup>7</sup> has held in construing the analogous provisions of S. 50, Civil P. C., that the application to the executing Court and not the Court which passed the

decree is a matter of procedure and not of jurisdiction and that exclusive jurisdiction was not conferred on the Court which passed the decree but merely a rule of procedure was laid down as to which of the two Courts should hear the application for execution ; and the Calcutta High Court in 57 *Cal.* 1137<sup>8</sup> has applied the principle underlying the decision of the Privy Council to the provisions of O. 21, R. 16. Therefore, it may be that the application by Kantilal to the wrong Court for execution under O. 21, R. 16, might not have been fatal to the validity of the order made by the Ahmedabad Court.

But the more serious difficulty in the way of the appellant which has got to be considered is whether any application under O. 21, R. 16 was made at all by Kantilal to the Ahmedabad Court. In the application for execution Kantilal has described himself as the proprietor of the firm of Jivabhai Maganlal, and he has affirmed the application as the plaintiff. In the notice issued under O. 21, R. 22, also Kantilal is described as the plaintiff, and the notice calls upon the defendant to show cause why an order for execution should not be made in favour of Kantilal in whose favour the decree was passed. Throughout the record of these execution proceedings in the Ahmedabad Court, there is no suggestion by Kantilal that he was applying for execution as a transferee and no order has been passed by the Ahmedabad Court recognizing the status of Kantilal as a transferee. It is true that O. 21, R. 16, does not require that on an application for execution under that rule the Court should pass an order declaring that the applicant is the transferee of the decree. But in our opinion it is desirable that ordinarily such an order should be made on an application under O. 21, R. 16. We have ascertained that the practice on the Original Side has always been for the Judge in Chambers to pass such an order.

In 33 *Bom. L. R.* 818<sup>9</sup> Madgavkar and Murphy JJ. held that an application to execute a decree filed by the decree-holder can, on his death, be continued by his son and heir, provided the heir first obtains an order of the Court under O. 21, R. 16; and in 41 *Bom. L. R.* 1190<sup>10</sup> Lokur J. also held that

3. ('40) 27 *A. I. R.* 1940 *Mad.* 89 : *I. L. R.* (1940) *Mad.* 79 : 187 *I. C.* 352, *Narayanan v. Panchanathan.*

4. ('37) 24 *A. I. R.* 1937 *Pat.* 607 : 172 *I. C.* 100, *Akhorji Ramsewakprasad v. Saran Singh.*

5. ('43) 30 *A. I. R.* 1943 *P. C.* 66 : *I. L. R.* (1944) *Mad.* 1 : *I. L. R.* (1943) *Kar. P. C.* 77 : 70 *I. A.* 50 : 207 *I. C.* 131 (P.C.), *Bhavani Shankar Joshi v. Gordhandas Jamnadas.*

6. ('41) 28 *A. I. R.* 1941 *Bom.* 302 : *I. L. R.* (1941) *Bom.* 596 : 196 *I. C.* 1 : 43 *Bom. L. R.* 751 (F. B.), *Krishna Govind v. Moolchand Keshavechand.*

7. ('28) 15 *A. I. R.* 1928 *P. C.* 162 : 8 *Luck.* 314 : 55 *I. A.* 227 : 109 *I. C.* 417 (P. C.), *Jang Bahadur v. Bank of Upper India, Ltd.*

8. ('30) 17 *A. I. R.* 1930 *Cal.* 614 : 57 *Cal.* 1137 : 129 *I. C.* 572, *Shailendra Nath v. Surendranath.*

9. ('31) 18 *A. I. R.* 1931 *Bom.* 423 : 134 *I. C.* 720 : 33 *Bom. L. R.* 818, *Kacharabhai Mehrabhai v. Kacharabhai Wadilal.*

10. ('40) 27 *A. I. R.* 1940 *Bom.* 5 : 187 *I. C.* 85 : 41 *Bom. L. R.* 1190, *Brijmohandas Damodardas v. Sadashiv Laxman.*



when a decree is transferred to another Court and the decree-holder dies before starting execution proceedings in that Court, his legal representatives cannot institute execution proceedings in that Court until they obtain an order under O. 21, R. 16, from the Court which passed the decree recognizing them as the legal representatives of the deceased decree-holder and have that order remitted to the Court to which the decree is transferred for execution under O. 21, R. 6; and the Privy Council also in the case to which we have referred, 55 I. A. 227,<sup>7</sup> seems also to have taken the view that an order was necessary under the analogous provisions of S. 50, because it appears from the judgment of their Lordships at p. 233 that they took the view that before execution could proceed against the legal representative of the deceased judgment-debtor the decree-holder must get an order for substitution from the Court which passed the decree. But even without the passing of a formal order, there must be a recognition by the Court that the person who has applied for the execution of the decree is a transferee within the meaning of O. 21, R. 16. But for such recognition, the person who applies for execution would be a stranger to the decree and would not be entitled to maintain the application. In the case before us on the face of the decree Kantilal was a stranger to it. He never made a claim to be a transferee of the decree and we find no recognition by the Ahmedabad Court that he was a transferee either by a formal order or by anything appearing on the record which would go to show that the Ahmedabad Court had judicially determined the status of Kantilal. Under the circumstances we must hold that the application for execution made by Kantilal to the Ahmedabad Court was by a stranger to the decree who had no right to make the application and that the order made on that application was not a valid order which could revive the decree dated 13th November 1923.

A further point was urged by Sir Jamshedji Kanga that inasmuch as Kantilal applied for withdrawal of the execution proceedings and the application was granted, the order made on that application must also go along with the application. This point was not urged in the Court below. Mr. Banaji points out that there can be no withdrawal of execution proceedings because O. 23, R. 1, does not apply to proceedings in execution and the effect of granting the application of Kantilal for withdrawal of his

application was tantamount to the dismissal of the application; and although the application might ultimately be dismissed, if the interim order made on 31st August 1931 was a good and valid order, notwithstanding the ultimate dismissal of the application that order could act as a revivor of the decree. We have merely noted the rival contentions; but we do not think it necessary to express any opinion in view of our decision that Kantilal was not entitled to maintain this application for execution.

We might also point out that even now there is not on the record any clear and convincing evidence that the judgment-debt was a joint family asset because even in the consent decree which was passed on 23rd September 1940 and to which we have already referred, the appellant got as his share all the moveable and immovable properties and all the outstandings, assets, goodwill and account books of all the businesses of the joint family or of the estate of Jivabhai Maganlal which seems to imply that Jivabhai also left behind him some self-acquired properties, and there is no specific declaration in the decree that this judgment-debt was a joint family asset; and when the appellant applied to this Court under O. 21, R. 16, on 18th September 1943 he claimed to be the assignee from Kantilal whom he described as the heir and legal representative of the plaintiff. If the judgment-debt was the self-acquired property of Jivabhai, then Kantilal could not have applied to execute the decree as the heir and legal representative of his father without obtaining representation to his estate in view of the provisions of S. 214, Succession Act, 1925. He could only have maintained the application if the judgment-debt was a joint family asset and he became entitled to it along with the other coparceners by survivorship. All these questions would have been considered if Kantilal had applied for execution as a transferee and if the Ahmedabad Court had applied its mind to that question. But neither Kantilal applied for execution under O. 21, R. 16, nor did the Ahmedabad Court at any time recognize him as the transferee; and therefore the question whether Kantilal was the heir and legal representative of his father or whether he was the surviving coparcener was neither considered nor determined. This case amply illustrates the necessity and desirability of the executing Court deciding in the first instance the capacity in which the applicant is applying for execution before making an order executing



the decree. The appeal therefore fails and must be dismissed with costs.

G.N.

*Appeal dismissed.*

[Case No. 8]

**A. I. R. (33) 1946 Bombay 32**

CHAGLA AND GAJENDRAGADKAR JJ.

*Bajirao Yamanappa Hatgar and others*  
*Applicants*

v.

*Emperor.*

Criminal Applications Nos. 426, 427 and 428 of 1944, Decided on 10th April 1945.

(a) Restriction and Detention Ordinance (3 of 1944), S. 10—Object of detention is preventive not punitive—Court cannot enquire into sufficiency or reasonableness of grounds of detention.

The jurisdiction of the Court is only taken away provided the order on which the Government is relying is an order "made under the Ordinance." It must be made by the detaining authority in the proper exercise of its powers. It would not be an order "made under the Ordinance" if it was made merely in the colourable exercise of its powers or if the detaining authority exceeded the powers given to it under the Ordinance. The detaining authority must satisfy the Court that it has complied with all the rules of procedure laid down in the Ordinance and has observed all the safeguards. The order must not be made for an ulterior purpose—a purpose which has no connexion with the security of the State or the efficient prosecution of the war. The order must not be intended to override the ordinary powers of the police for the investigation of a crime or to suspend the ordinary criminal tribunals of the land or prevent them from exercising their ordinary jurisdiction. The powers conferred on the executive under the Ordinance are for the purpose of preventive detention and they are not punitive in their nature. The executive must not detain a subject in order to punish him for what he has already done but in order to prevent him from doing something which in the opinion of the executive is likely to affect the safety of the State or the efficient prosecution of the war. It is not competent to the Court to inquire into the sufficiency of the materials and the reasonableness of the grounds on which the detaining authority was satisfied that it was necessary to make the order. But if any reasons which influenced the detaining authority in making the order appear on the record, then the Court can scrutinize them in order to see what was the condition of the mind of the detaining authority when it made the order. It is not open to the Court to go behind the statement as to sufficiency of materials. Whether the authority has sufficient materials or whether the grounds on which it has acted were reasonable is not for the Court to inquire into and, therefore, it is not open to the detinue to challenge the order. [P 34 C 1; P 35 C 2]

(b) Restriction and Detention Ordinance (3 of 1944), S. 3—Governor acts as part of Provincial executive and not as contrast to it.

In every case the Governor either with or without his Ministers is the authority which has got to be satisfied before the powers are exercised under S. 3 of the Ordinance. But the Governor who has to be satisfied is a part of the Provincial

executive and not in any way in contrast with or in contradistinction to the Provincial executive. [P 35 C 1]

(c) Restriction and Detention Ordinance (3 of 1944), S. 10 — Detention not with view to prevent acting prejudicially to public safety but to consider whether Criminal Tribes Act should be applied — Detention is bad.

When wide powers are given to the executive to deprive His Majesty's subjects of their liberty without the intervention of the Courts of law, the detaining authority must consider each case with that care and caution which the exercise of so tremendous a power should call for. The liberty of the subject is not to be lightly taken away. The satisfaction which the law requires on the part of the detaining authority before a subject can be detained is a reasonable satisfaction—a satisfaction not vitiated by any consideration which is foreign to the scope and object of Ordinance, 3 of 1944. When mind is directed not on the question of security of the State but as to whether Criminal Tribes Act should be used or not, the detention can be questioned. [P 36 C 1]

(d) Restriction and Detention Ordinance (3 of 1944), S. 3—Order of detention bad—Subsequent order continuing it is equally invalid.

When the first order of detention is invalid the subsequent order must also as a necessary consequence be equally invalid, because all that the latter order does is to direct that the original order shall continue in force. Because if the original order is bad, the subsequent order directing it to continue cannot validate it. [P 36 C 2]

*R. A. Jahagirdar and D. M. Athavale*

— for Applicants.

*C. K. Daphtary (Advocate-General) and S. G. Patvardhan (Asst. Govt. Pleader)*

— for the Crown.

**Chagla J.** — This is an application under S. 491, Criminal P. C. It seems that on 22nd May 1942, one S. V. Ghatnatti, Sub-Inspector of Police, was murdered at Kerur. In connexion with that offence the applicant was arrested on 27th August 1942, and he along with others was tried by the Sub-Divisional Magistrate, First Class, Southern Division, Bijapur, under ss. 147 and 186 read with S. 149, Penal Code. The applicant was released on bail by the Court on 7th October 1942. The trial of the case went on on 9th, 10th, 14th, 15th and 16th October 1942, and on 11th May 1943. On all these days the applicant appeared at the trial. Thereafter he absconded. On 24th May 1943, the District Magistrate, Bijapur, issued an order under R. 26, Defence of India Rules, for the detention of the applicant in the Belgaum Central Prison for one year from the date of arrest. On 4th January 1944, a proclamation under S. 87, Criminal P. C., was issued for the arrest of the applicant, and he ultimately surrendered to the District Superintendent of Police, Bijapur, on 8th April 1944. In the meanwhile, the case against the other accused was disposed of on 14th September 1943, and



all of them were acquitted. On 6th June 1944, the District Magistrate, Bijapur, sanctioned the withdrawal of the case against the applicant and an order for his acquittal was made by the Resident Magistrate, First Class, Bijapur, on 24th June 1944. On 23rd May 1944, the Government of Bombay issued an order under cl. (b) of sub-s. (1) of S. 3 of Ordinance 3 of 1944, for the detention of the applicant, and on 6th November 1944, the Government under S. 9 of the Ordinance directed that the order of 23rd May 1944 should continue in force.

The applicant has been in detention since 8th April 1944, and his contention is that his detention is illegal and he should be set at liberty. The applicant is at present detained under an order of the Government of Bombay dated 6th November 1944, and we have to consider whether that order is valid and whether the detention of the applicant under that order is legal. Section 10 of Ordinance 3 of 1944 provides that no order made under the Ordinance shall be called in question in any Court, and no Court shall have power to make any order under S. 491, Criminal P. C., in respect of any order made under or having effect under the Ordinance, or in respect of any person the subject of such an order. But it is clear that the jurisdiction of the Court is only taken away provided the order on which the Government is relying is an order "made under the Ordinance." It must be made by the detaining authority in the proper exercise of its powers. It would not be an order "made under the Ordinance" if it was made merely in the colourable exercise of its powers or if the detaining authority exceeded the powers given to it under the Ordinance. The detaining authority must satisfy the Court that it has complied with all the rules of procedure laid down in the Ordinance and has observed all the safeguards. The order must not be made for an ulterior purpose—a purpose which has no connexion with the security of the State or the efficient prosecution of the war. The order must not be intended to override the ordinary powers of the police for the investigation of a crime or to suspend the ordinary criminal tribunals of the land or prevent them from exercising their ordinary jurisdiction. The powers conferred on the executive under the Ordinance are for the purpose of preventive detention and they are not punitive in their nature. The executive must not detain a subject in order to punish him for what he has already done but in order to prevent him from doing

something which in the opinion of the executive is likely to affect the safety of the State or the efficient prosecution of the war. It is not competent to the Court to inquire into the sufficiency of the materials and the reasonableness of the grounds on which the detaining authority was satisfied that it was necessary to make the order. But if any reasons which influenced the detaining authority in making the order appear on the record, then the Court can scrutinize them in order to see what was the condition of the mind of the detaining authority when it made the order. These principles which I have stated clearly emerge from the various decisions of the Federal Court and the High Courts in India which have been cited at the Bar. In A.I.R. 1944 F. C. 86<sup>1</sup> Sir Patrick Spens, C. J., delivering the judgment of the Federal Court, observed (p. 93) :

"In our judgment, no further curtailment of the power of the Court to investigate and interfere with orders for detention has been imposed by Ordinance, 3 of 1944. The Court is and will be still at liberty to investigate whether an order purporting to have been made under R. 26 and now deemed to be made under Ordinance 3 or a new order purporting to be made under Ordinance 3 was in fact validly made, in exactly the same way as immediately before the promulgation of the Ordinance. If on consideration the Court comes to the conclusion that it was not validly made on any of the grounds indicated in any of the long line of decisions in England and this country on the subject, other than the ground that R. 26 was ultra vires, S. 10 of Ordinance 3 will no more prevent it from so finding than S. 16, Defence of India Act, did. Such an invalid order, though purporting to be an order, will not in fact be an 'order made under this Ordinance' or having effect by virtue of S. 6 as if made under this Ordinance at all for the purposes of section 10."

And Harries C. J., in A.I.R. 1944 Lah. 373,<sup>2</sup> in the course of his judgment, said (p. 375) :

"In my judgment R. 129 cannot be used legally for any purpose, other than that for what it was intended, namely, to ensure inter alia the security of the State and the efficient prosecution of the war.

To use it for some entirely different purpose, wholly unconnected with the security of the State or the efficient prosecution of the war, is in my view a misuse of the powers given by that rule and an order passed for such purposes cannot be said to be an order under R. 129, Defence of India Rules."

Further on the learned Chief Justice observed (page 376) :

"It would in my view be extremely dangerous to hold that the police or the Provincial Government had any right to detain persons under R. 129 unless the order was made with the object of making it impossible for the person detained to in-

1. ('44) 31 A.I.R. 1944 F. C. 86 : 23 Pat. 678 : I.L.R. (1944) Kar. F. C. 172 : 1944 F. C. R. 295 (F.C.), Basanta Chandra v. Emperor.  
2. ('44) 31 A.I.R. 1944 Lah. 373 : 217 I. C. 162, Dilbagh Singh v. Emperor.



terfere with matters connected with the defence of India or the efficient prosecution of the war."

With respect, I entirely agree with these observations of the learned Chief Justice, and, in our opinion, these observations apply as much to an order made under Ordinance 3 of 1944 as to an order made under R. 129, Defence of India Rules. In this case the order made by the Government of Bombay is valid on the face of it. The original order was made on 23rd May 1944, and it purports to order the detention of the applicant because the Government of Bombay was satisfied that it was necessary to do so with a view to preventing the applicant from acting in a manner prejudicial to the public safety and the maintenance of public order; and the order of 6th November 1944, directs that the original order shall continue in force which direction was given by the Government of Bombay after a further consideration of all the circumstances of the case. It is, therefore, for the applicant to satisfy us that it was not validly made on any of the grounds which I have indicated above.

The first ground on which the order is attacked is that before the applicant could be validly detained the authority that has got to be satisfied is the Governor of Bombay, and in this case it is not the Governor of Bombay that is satisfied but the Government of Bombay. This contention is clearly untenable because it is opposed to the clear and specific language of S. 3 of the Ordinance which requires that it is the Provincial Government which has got to be satisfied. But reliance is placed on a decision of the Federal Court in A.I.R. 1943 F. C. 75.<sup>3</sup> In that case Zafrulla Khan J. took the view that for the definition of "Provincial Government" for the purpose of the Defence of India Rules, recourse must be had to the General Clauses Act; and the General Clauses Act defines in S. 3 (43a) (a) "Provincial Government" in a Governor's Province as: "the Governor acting or not acting in his discretion, and exercising or not exercising his individual judgment, according to the provision in that behalf made by and under the said Act (Government of India Act)."

And in the course of his judgment the learned Judge observed (p. 85):

"In each case, it must be the Governor who acts, whether without the advice of his Ministers or after such advice has been tendered, and in the latter case, whether in accordance with such advice or differing from such advice."

3. (43) 30 A.I.R. 1943 F. C. 75 : I.L.R. (1943) Kar. F. C. 103 : 1944 F. C. R. 1 : 211 I. C. 241 (F.C.), *Emperor v. Sibnath Banerjee*.

Therefore the effect of this decision is that in every case the Governor either with or without his Ministers is the authority which has got to be satisfied before the powers are exercised under S. 3 of the Ordinance. But the Governor who has to be satisfied is as a part of the Provincial executive and not in any way in contrast with or in contradistinction to the Provincial executive. It is true that in no case can the Provincial Government exercise its powers unless the Governor has applied his mind and is satisfied as required by S. 3 of the Ordinance. But all the same the authority contemplated by S. 3 is the Provincial Government and not the Governor. In this case there is nothing on the face of the order to show that the Governor as a part of the Provincial Government was not satisfied with respect to the applicant that he should be detained. The order itself is issued by order of the Governor of Bombay, and in his affidavit made on this application Mr. Drewe, Secretary to the Government of Bombay, Home Department, specifically states that His Excellency the Governor agreed to the detention of the applicant when the order of 23rd May 1944, was made and His Excellency considered the case of the applicant when the order of 6th November 1944, was made directing that the order of 23rd May 1944, shall continue in force.

It is further contended by the applicant that he is detained not for any purpose connected with the security of the State or the efficient prosecution of the war, but in order to punish him for the alleged offence in connection with the murder of S. V. Ghatnatti. It is urged that because the prosecution in that case did not have sufficient evidence to warrant his conviction the Government availed themselves of the powers under the Defence of India Rules and under Ordinance 3 of 1944, and detained the applicant in custody having failed to secure his conviction by due process of law. It is pointed out that the District Magistrate made the order on 24th May 1943, only after the accused had absconded on 12th May 1943; that if Government had any materials to suspect the applicant of any activities prejudicial to the safety of the State or the efficient prosecution of the war, an order under R. 26, Defence of India Rules, would have been made long prior to 24th May 1943; and that the order of 24th May 1943 was made in order to detain the applicant in connection with his alleged connection with the murder of S. V. Ghat-



natti. It has to be remembered that the order of 24th May 1943, was made 12 days after the accused had absconded, and the District Magistrate in his affidavit swears that he was satisfied from reports and information received by him from responsible sources that with a view to preventing the applicant from acting in a manner prejudicial to the defence of British India, the public safety, the maintenance of public order and the efficient prosecution of the war, it was necessary to make the order. It is not open to the Court to go behind this statement of the learned District Magistrate. Whether he had sufficient materials or whether the grounds on which he acted were reasonable is not for the Court to inquire into and, therefore, in our opinion it is not open to the applicant to challenge the order made on 24th May 1943. With regard to the order of 23rd May 1944, Mr. Drewe in his affidavit says that "there is a note written on 21st May 1944, by His Excellency the Governor's Secretary Mr. Symington that His Excellency agreed to the detention of the applicant." We have seen this minute, and what the minute says is this:

"His Excellency agrees to the detention as proposed pending consideration of use of the Criminal Tribes Act."

This minute clearly shows that the Governor was considering the use of the Criminal Tribes Act against the applicant and pending his decision on that question, he agreed to the detention of the applicant under Ordinance 3 of 1944. Now the considerations which must weigh with the Governor in deciding whether he should use the Criminal Tribes Act against the applicant or not are quite foreign to those which must weigh with him in deciding whether he should detain the applicant under S. 3 of Ordinance 3 of 1944. The scope and ambit of the Criminal Tribes Act have no bearing upon the purpose for which the extraordinary powers vested in the executive have to be exercised under S. 3 of the Ordinance. In our opinion this minute of Mr. Symington throws a flood of light on the condition of mind of the detaining authority when it made the order. Its mind was directed not on what it should have been directed to, namely, the question of the security of the State or the efficient prosecution of the war, but it was directed to the more parochial and limited question as to whether the Criminal Tribes Act should be used or not against the applicant.

It is unnecessary to emphasize that when wide powers are given to the executive to deprive His Majesty's subjects of their liberty without the intervention of the Courts of law, the detaining authority must consider each case with that care and caution which the exercise of so tremendous a power should call for. The liberty of the subject is not to be lightly taken away. The satisfaction which the law requires on the part of the detaining authority before a subject can be detained is a reasonable satisfaction—a satisfaction not vitiated by any consideration which is foreign to the scope and object of Ordinance 3 of 1944. In this case, in our opinion, it is impossible to hold that the Government of Bombay was reasonably satisfied that it was necessary to detain the applicant with a view to prevent him from acting in a manner prejudicial to the public safety and the maintenance of public order.

It is contended by the learned Advocate-General that even though the order of 23rd May 1944, be bad the applicant is detained not under that order but under the order of 6th November 1944, and that order on the face of it states that it was made after a further consideration of all the circumstances of the case, and the affidavit of Mr. Drewe further bears out the fact that His Excellency the Governor considered the case of the applicant before his detention was continued under that order. I take it that all the materials were before His Excellency the Governor when he made the order on 23rd May 1944. After that date, the applicant continued to be in detention and was never free even for a single hour. Therefore he could not have done anything between 23rd May 1944, and 6th November 1944, to cause the Government of Bombay to be satisfied that his detention was necessary. The learned Advocate-General says that further materials about his activities prior to his detention might have been placed before the Government of Bombay. We refuse to speculate and certainly not to the prejudice of the subject. It was open to the Government once the original order of 23rd May 1944 was successfully challenged to place further materials before the Court, but it has not chosen to do so.

But it is unnecessary to consider this argument further because in our view when the order of 23rd May 1944, is invalid the order of 6th November 1944, must also as a necessary consequence be equally invalid, because all that the order of 6th November 1944 does is to direct that the original order



of 23rd May 1944, shall continue in force, and if the original order is bad, the subsequent order directing it to continue cannot validate it. The position might perhaps have been different if the Government of Bombay had made a fresh order under S. 3 of the Ordinance but that they have not done. In our opinion, therefore, the order of 23rd May 1944, and the order of 6th November 1944, extending the former order are invalid, and the detention of the applicant under these orders is illegal.

We, therefore, direct that the applicant should be immediately set at liberty. In Applications Nos. 427 and 428 of 1944 which are also applications under S. 491, Criminal P. C., our decision is the same on the same grounds, and we direct that the applicants in both those applications be also set at liberty immediately.

R.K.

*Order accordingly.**[Case No. 9.]***A. I. R. (33) 1946 Bombay 36**

LOKUR AND WESTON JJ.

*Emperor v. Nanabhai Nagindas*

Cri. A. No. 308 of 1944, Decided on 2-11-1944.

(a) Defence of India Act (1939), S. 2 (2) (xxii) — Expression "controlling the use" includes controlling use of extra coins in swelling cash balance in hand—R. 90 (2) (e), Defence of India Rules, is not ultra vires.

Rule 90 (2) (e) does not impose an absolute prohibition against the possession of small coins, but merely prohibits their hoarding, that is to say, keeping them in excess of the normal requirements. The rule requires every one to "use" the excess for the purpose of circulation and not hoarding. The obvious object of the rule is that small coins in excess of the normal requirements must not be kept out of circulation. Power to control the "use" includes the power to compel the use. Rule 90 (2) (e) does in effect require every one to "use" the small coins in excess of his normal requirements and not to retain it or keep it out of circulation. The word "possession" was not expressly used in the Rule as the expression "controlling the use" has a very wide significance and includes the controlling of the use of extra coins in swelling the cash balance in hand. In the case of coins, the power to control the use would include the power to prohibit hoarding. Hence R. 90 (2) (e), Defence of India Rules, is valid and not beyond the rule-making power conferred upon the Central Government by S. 2 (2), cl. (xxii), Defence of India Act, 1939. [P 37 C 1, 2]

(b) Defence of India Rules (1939), R. 90 (3)—Small coin found in excess can be confiscated under Criminal P. C. (1898), S. 517.

On conviction of the accused for contravening R. 90 (2) (e), Defence of India Rules, the Court can, under S. 517, Criminal P. C., confiscate small coins regarding which the offence has been committed : ('44)31 A.I.R. 1944 Bom. 292, *Disting.* [P 38 C 1]

*N. P. Engineer (Advocate-General) and B. G. Rao (Govt. Pleader) — for the Crown.*

*B. G. Thakor — for Accused.*

**Lokur J.**—This is an appeal against an

acquittal by the Government of the Province of Bombay. The accused is a petty dealer in ghee at Surat and when his house was searched by the Police Sub-Inspector on 21st August 1943, he was found to have in his possession Rs. 47-9-3 in small coins in excess of his personal and business requirements for the time being. This being in contravention of R. 90 (2) (e), Defence of India Rules, he was tried by the City Magistrate of Surat, convicted under R. 90 (3), and sentenced to pay a fine of Rs. 75, or in default to suffer rigorous imprisonment for one month. In appeal the conviction and fine were set aside by the Sessions Judge of Surat on the ground that R. 90 (2) (e) was ultra vires of the Central Government, being in excess of the rule-making power conferred upon it by S. 2, Defence of India Act, 1939. Rule 90 (2) (e), Defence of India Rules, provides that no person shall possess coin to an amount in excess of his personal or business requirements for the time being. This rule is evidently made in exercise of the rule-making power conferred upon the Central Government by S. 2 (2), cl. (xxii), Defence of India Act, 1939. That clause is now amended by Ordinance No. 26 of 1944 after the Sessions Judge acquitted the accused in this case. Before its amendment the clause empowered the Central Government to make rules "controlling the use or disposal of, or dealings in, coin, bullion, securities or foreign exchange." Now by the amending Ordinance the word "possession" is added before the word "use." It is argued that in the absence of that word the Central Government had no power to make any rule prohibiting the possession of small coin. This contention was accepted by the learned Sessions Judge who held that the expression "use or disposal" did not include "possession." He seems to have thought that as there is no comma between "use" and "or disposal," the words "use" and "disposal" are intended to be synonymous. This inference is not sound. No comma is used between the words "use" and "disposal," since both of them are followed by the preposition "of", whereas the following word "dealings" is followed by the preposition "in." The words "use" and disposal" are not synonymous. Using a thing cannot mean disposing of it. The clause in question empowers the Central Government not merely to prohibit the use or disposal of coin but also to control it. The dictionary meaning of the word "use" is "employment for any purpose." Any one may hoard any quantity of money in



his safe, but R. 90 (2) (e) says that no one shall "use" small coins for that purpose. It does not impose an absolute prohibition against the possession of small coins, but merely prohibits their hoarding, that is to say, keeping them in excess of the normal requirements. In other words, the rule requires every one to "use" the excess for the purpose of circulation and not hoarding.

This clearly falls within the power to control the use of coins. The obvious object of the rule is that small coins in excess of the normal requirements must not be kept out of circulation. Even according to the restricted meaning given to the word "use" by the learned Sessions Judge, power to control the "use" includes the power to compel the use, and the rule in question does in effect require every one to "use" the small coin in excess of his normal requirements and not to retain it or keep it out of circulation. The word "possession" was not expressly used in the rule as the expression "controlling the use" has a very wide significance and includes the controlling of the use of extra coins in swelling the cash balance in hand. It is pointed out that in cl. (xxv) of the same sub-section the expression used is "prohibiting or regulating the possession, use or disposal." But that clause deals with articles of a different kind, explosives, arms, ammunitions, vessels, wireless telegraphic apparatus, aircraft, photographic and signalling apparatus and any means of recording information. In the case of these articles, one may use them and still be in possession of them, but in the case of coins, if they are used for any purpose other than hoarding, they go out of possession. Hence in their case the Legislature seems to have thought that the power to control the use would include the power to prohibit hoarding, whereas in the case of other articles, as they can be possessed and used simultaneously, both the terms had to be specifically used. The same reasoning applies to cls. (iv), (xviii) and (xxvii) which are referred to in the judgment of the learned Sessions Judge. A critical examination of the different clauses of sub-s. (2) shows that in conferring rule-making powers upon the Central Government in respect of various objects, words appropriate to those objects are used in the different clauses dealing with them. It would not, therefore, be proper to compare the use of one expression in connexion with a particular object in one clause with the use or absence of that expression with regard to a different object in another clause. Current

coins which are intended for circulation stand on an altogether different footing and the power to control their use includes power to compel their being put into circulation, which obviously means the power to prohibit their hoarding. We, therefore, hold that R. 90 (2) (e), Defence of India Rules, is valid and not beyond the rule-making power conferred upon the Central Government by S. 2 (2), cl. (xxii), Defence of India Act, 1939.

On the merits it is argued that the coins found in the possession of the accused were not in excess of his normal requirements. On this point both the learned Magistrate and the learned Sessions Judge have held against the accused. When the Police Sub-Inspector first questioned the accused he first produced before him coins of Rs. 12-2-0 and told him that those coins were required for his use. He was, therefore, allowed to keep them, but as the Police Sub-Inspector suspected that he must have concealed some more coins, he took him upstairs and asked him to unlock the cupboard. When the cupboard was opened, he found there forty-five rupee coins and Rs. 47-9-3 in small coins. The accused explained that they belonged to different members of his family, but led no evidence to prove it. This explanation itself shows that he had not kept them in the cupboard for the purpose of his normal use. It is true that he had then employed some labourers for repairing his house. This is frankly admitted by the Police Sub-Inspector himself and the Mistry Nagindas, who was examined for the defence, says that the labourers were paid daily wages at the rate of ten or twelve annas every day, but Nagindas admits that he himself never received his wages in small coins but was paid at the end of the month. No labourer has been examined and it is unusual to pay the labourers every evening in small coins. The evidence shows that the accused keeps accounts but he has not produced his account books. The Police Sub-Inspector believed him when he told him that the coins of Rs. 12-2-0, which were found on the ground floor, were intended for his normal use. It is obvious that the small coins in the cupboard kept upstairs which he disowned were in excess of his personal or business requirements for the time being, and as they are proved to have been in his possession, he is liable to be convicted under R. 90 (3), Defence of India Rules. The fine imposed on him by the learned Magistrate is not excessive.

The learned Magistrate has further ordered the confiscation of the small coins under



s. 517, Criminal P. C., and it is contended that according to the ruling in 46 Bom. L. R. 529<sup>1</sup> the order of confiscation under s. 517, Criminal P. C., is illegal. But in that case the conviction was under Rule 81 (4), Defence of India Rules, for contravention of an order made under R. 81 (2) and sub-r. (4) expressly permits confiscation only if the order contravened so provides. There was no such provision in the order said to have been contravened in that case. There is no similar provision in R. 90 (3) and hence the power of confiscation given by s. 517, Criminal P. C., on a conviction under that sub-rule is unaffected. We, therefore, allow the appeal, set aside the order of acquittal of the accused by the learned Sessions Judge and restore the order passed by the City Magistrate, First Class, Surat.

**Weston J.**—I agree and I have only a few words to add. It is, I think, permissible that Judges should retain some sense of realities when considering legislation and rules made thereunder, intended to meet the abnormal conditions created by war. One such abnormal condition bearing hardly on the poorer classes is the inadequacy of existing currency, particularly small coin, to meet the requirements of the public, by reason of increased prices, greater volume of purchases and a tendency to hoard. Rule 90 (2) (e), Defence of India Rules, obviously was made to minimise this difficulty, and it seems to me plain that such a rule can be brought within the general powers conferred by s. 2 (1), Defence of India Act. It is said, however, that by cl. (xxii) of sub-s. (2) of s. 2 of the Act the Legislature expressly defined the power to make rules dealing with coin, and directed that such rules may provide for controlling the use or disposal of, or dealings in, coin, and must be taken, therefore, not to have granted permission to interfere by rule with possession of coin. It is argued on the authority of the decision of the Federal Court in 46 Bom. L. R. 22<sup>2</sup> that it is not permissible to look to the general provisions of sub-s. (1) of s. 2 of the Act to justify R. 90 (2) (e), which in terms interferes with the possession of coin, and that this rule, therefore, is ultra vires of the Act as it stood at the material time.

1. ('44) 31 A. I. R. 1944 Bom. 292 : I. L. R. (1944) Bom. 576 : 46 Bom. L. R. 529 : 218 I. C. 359 (F. B.), Emperor v. Hansraj Astaji.
2. ('43) 30 A. I. R. 1943 F. C. 1 : I. L. R. (1943) Kar. F. C. 26 : I. L. R. (1944) Bom. 183 : 1943 F. C. R. 49 : 207 I. C. 1 : 46 Bom. L. R. 22 (F. C.), Keshav Talpade v. Emperor.

The decision in 46 Bom. L. R. 22,<sup>2</sup> however, does not lay down that, when a particular subject is mentioned in one of the 35 clauses of sub-s. (2) of s. 2, then the powers stated in that clause must be regarded as exhaustive of the particular subject. What the decision does lay down is that where in any of the clauses of sub-s. (2) certain express limitations are imposed in relation to any particular subject, it is not permissible to avoid those limitations by recourse to the general provisions of sub-s. (1) of s. 2. In my opinion, if R. 90 (2) (e) is not covered by cl. (xxii) of s. 2 (2), as it stood, it is intra vires under s. 2 (1), Defence of India Act. I agree, however, with my learned brother that the rule can be brought within cl. (xxii) of s. 2 (2) without doing violence to the language of that clause. It is true that as cl. (xxii) stood before its later amendment it did not mention expressly "possession" of coin. The rule, however, does not prohibit possession of coin, except above the reasonable requirements of individuals. It requires that persons shall deal with coins in the same manner as they would deal with them if the times were normal; persons are compelled by the rule to put into circulation all coins they do not require for their legitimate purposes. To say that such a rule is not a rule controlling the use or disposal of coin seems to me to ignore its plain meaning and purpose; and in my opinion R. 90 (2) (e) does fall within the powers conferred by cl. (xxii) of s. 2 (2) as it then stood. On the facts of the present appeal, I agree with my learned brother and I agree with the order he has proposed.

R.K./V.S.

*Appeal allowed.*

[Case No. 10.]

**\* A. I. R. (33) 1946 Bombay 38**  
**FULL BENCH**

CHAGLA, LOKUR AND RAJADHYAKSHA JJ.

*Govt. of Bombay v. Abdul Wahab.*

Criminal Appeal No. 12 of 1944, Decided on 17th September 1945, from order of acquittal passed by Divatia J. reported in ('45) 32 A. I. R. 1945 Bom. 110.

\* (a) Criminal P. C. (1898), Ss. 403, 308, 305, 237, 238 and 299 — Accused charged in High Court with murder only—Judge directing jury to return verdict on lesser offence—Jury holding accused not guilty of murder unanimously and not guilty of grievous hurt by divided verdict—Judge disagreeing with latter verdict but acquitting accused instead of discharging jury—S. 403 is no bar to retrial of accused under S. 308 for grievous hurt : 55 Bom. 520 = ('31) 18 A. I. R. 1931 Bom. 309 = 134 I. C. 1219, **OVER- RULED** ; 46 Bom. L. R. 818 = ('45) 32 A. I. R. 1945 Bom. 110, **REVERSED**.



Although the accused in the High Court was only charged with murder, the Judge in his charge to the jury directed them that if they found on the facts that the lesser offence of culpable homicide not amounting to murder or of grievous hurt was committed they could bring in a verdict on the lesser offence. The jury brought in a unanimous verdict of not guilty on the charge of murder and also on the charge of culpable homicide not amounting to murder, and they brought in a divided verdict of not guilty by six to three on the charge of grievous hurt. On this verdict the accused was acquitted of the charge of murder and culpable homicide not amounting to murder. With regard to the verdict on the charge of grievous hurt, the Judge disagreed with the jury. The Judge, instead of discharging the jury under S. 305 (3) acquitted the accused, under the impression that retrial of the accused under S. 308, would be barred by S. 403. The question was whether S. 403 operated as a bar to the retrial of the accused by another jury under Ss. 305 and 308, on the charge of grievous hurt. It was contended that as the accused was charged only with murder and no specific charge was framed for grievous hurt the jury were not bound to return the verdict with regard to the offence of grievous hurt and, therefore, the acquittal on the charge of murder operated as a bar under S. 403, against a retrial for the minor offence of grievous hurt which was included in the major offence of murder:

*Held* that, (1) S. 238 enabled the Court to convict an accused of the minor offence if he was charged with the major offence although no specific charge in regard to the former was framed against him and under S. 299, it was the function of the jury to find the facts but as to the law applicable to those facts they must take the direction of the Judge and return the verdict accordingly. Therefore, when the Judge in his charge to the jury directed them that on a certain finding of facts they should return a verdict on the minor offence the jury was bound to return the verdict on the minor offence namely of grievous hurt although the accused was not charged with the minor offence; [P 42 C 1]

(2) that a retrial resulting from the disagreement by the Judge with the jury under S. 305 and as provided by S. 308 was not a new trial as contemplated by S. 403 and, therefore, the order of acquittal on the charge of murder did not give the accused protection under S. 403 of not being liable to be retried for the offence of grievous hurt; [P 42 C 2]

(3) that the Judge having disagreed with the jury under S. 308, there must be a retrial of the accused for the offence of grievous hurt: 55 Bom. 520=(31) 18 A. I. R. 1931 Bom. 309=134 I. C. 1219, *OVERRULED*; 46 Bom. L. R. 818=(45) 32 A. I. R. 1945 Bom. 110, *REVERSED*; (43) 30 A. I. R. 1943 Mad. 737, *Dissent.*; (41) 28 A. I. R. 1941 Cal. 901, *Expl.* [P 44 C 2]

#### Cr. P. C. —

(41) Chitale, S. 403, N. 7, Pt. 9; S. 299, N. 5; S. 238, N. 1, Pt. 11.

(41) Mitra, Page 1274, N. 1091; Page 1074, N. 940; Page 842, Note "Minor offence."

(b) Criminal P. C. (1898), S. 423 — Verdict of jury—Unanimous verdict of not guilty—Appeal against — Grounds on which appellate Court will interfere stated.

The appellate Court must always be reluctant to interfere with the verdict of not guilty by the jury

especially when it is a unanimous verdict. The Court must be satisfied that it is a perverse verdict, and the line of demarkation between a perverse verdict and an erroneous appreciation of evidence must be clearly and sharply drawn. The Court must be satisfied that no reasonable body of men could have arrived at the verdict at which the jury arrived. It is not sufficient that the appellate Court reading the evidence might have come to a conclusion different from the one that the jury arrived at. The Court must be satisfied that the only possible view on the evidence was the view that the accused was guilty and that the jury were manifestly perverse in the decision at which they arrived.

[P 41 C 1]

#### Cr. P. C. —

(41) Chitale, S. 307, N. 11, Pts. 3 to 6; S. 423, N. 40.

(41) Mitra, Page 1359, N. 1151.

(c) Penal Code (1860), Ss. 299 and 320—Culpable homicide and grievous hurt — Distinction.

The line between culpable homicide not amounting to murder and grievous hurt is a very thin and subtle one. In the one case the injuries must be such as are likely to cause death; in the other, the injuries must be such as endanger life.

[P 41 C 2]

#### Penal Code —

(45) Ratanlal, Page 681, N. 4; Page 795, N. 4.

(36) Gour, Page 964, N. 3224; Page 1098, N. 3699; Page 1099, N. 3704.

(d) Criminal P. C. (1898), Ss. 305 and 308 — Judge disagreeing with jury and of opinion that accused should not be retried — Proper order to be passed indicated.

Where the Judge disagrees with the verdict of the jury he ought to discharge the jury and if he is of the opinion that the accused should not be retried the passing of an order of acquittal is not technically correct. The proper course for the Judge is to make an entry against the charge as provided by S. 308, that in his opinion the accused should not be retried though in either case in substance the effect is the same. [P 42 C 1, 2]

#### Cr. P. C. —

(41) Chitale, S. 308, N. 4.

(e) Criminal P. C. (1898), Ss. 403, 237 and 238—Protection under S. 403 applies not only to cases under S. 237 but also to cases under Section 238.

Section 403 affords protection not only against the accused being tried for the same offence or for offences with which he might have been charged under S. 237, but also against a new trial in respect of a minor offence under S. 238. When the accused is acquitted on a major offence and is sought to be tried at a new trial on a minor offence which is included in the major offence he would be tried for the same offence as provided by S. 403 and the new trial would be barred under S. 403: (43) 30 A. I. R. 1943 Mad. 737, *Dissent.*

[P 42 C 2; P 44 C 2]

#### Cr. P. C. —

(41) Chitale, S. 403, N. 2.

(41) Mitra, Page 1278, N. 1093.

(f) Criminal P. C. (1898), Ss. 237 and 238 — Sections are exception to rule that person cannot be convicted of offence not charged.

Undoubtedly the ordinary rule is that the accused cannot be convicted of any offence with which he is not charged. But to this ordinary rule



there are two exceptions contained in Ss. 237 and 238. [P 41 C 2]

Cr. P. C. —

(41) Chitale, S. 237, N. 1; S. 238, N. 1, Pt. 5.

K. M. Munshi and V. G. Mohile —

for the Crown.

S. Baptista — for Respondent.

**Chagla J.** — This is an appeal by the Government of the Province of Bombay under S. 411A from an order of acquittal passed by Divatia J. The accused was tried on 7th August 1944 at the Criminal Sessions presided over by that learned Judge and he was charged as follows :

"That you, on or about 30th January 1944, at Bombay, did commit murder by intentionally causing the death of one Balwantsing Mansing, and thereby committed an offence punishable under S. 302, Penal Code, and within the cognizance of the High Court."

The prosecution case was that on 29th January 1944, the accused in the company of one Chandraseker, a motor driver, went at night to Chembur. At Chembur in a hotel they found Balwantsing the deceased. It seems that Balwantsing, the accused and Chandraseker had a few drinks together and there was a quarrel between Balwantsing and the accused. The accused was assaulted and the result of his injuries was that his face became swollen. Next morning Chandraseker brought the accused back to Bombay. He was taken to the J. J. Hospital and his injuries were attended to. On the same day, that is, 30th January 1944, Chandraseker happened to be at Kalbadevi Road and he saw the accused coming from the direction of Pydhonie and going towards a urinal. He also saw Balwantsing standing on the opposite side of the road with four or five persons. Then it seems that Balwantsing and these four or five persons crossed over and came to the place where the accused was, and a fight ensued. The result was that Balwantsing was stabbed and also the accused was stabbed on his leg. As a result of the injuries received Balwantsing died and the prosecution case was that the accused had stabbed Balwantsing and he was guilty of the offence of murder. At the trial the prosecution led the evidence of Chandraseker who deposed to the facts which I have just narrated. They also called Gulab, another motor driver, who saw the deceased and the accused lying on the road, both of them in a pool of blood. They further called one Mukundlal Pitambardas Shah who also deposed to seeing the deceased and the accused lying on the ground. Apart from the evidence of these three wit-

nesses Chandraseker, Gulab and Mukundlal, the prosecution also led the evidence of Keshav Laxman Mane, police constable No. 1336/B, who deposed to the deceased having made a statement to him when he took the accused and the deceased to the hospital, and according to him the deceased told him that the accused had stabbed him. There was further the evidence of Sub-Inspector Mahomed Umarkhan who recorded the statement of the deceased at the hospital. In this statement the deceased also gave the name of the accused as his assailant though he stated that he did not know the reason why the accused had stabbed him. And finally there was the evidence of Rao Bahadur Ramchandra Santuram Asavle who recorded the dying declaration of the deceased in the presence of the accused, and the deceased identified the accused from among a few persons who were present there as his assailant. The medical evidence as to the injuries inflicted on the deceased was very clear. There were four stab wounds, and a superficial injury in the nature of an abrasion on the person of the deceased, and the most serious injury was an incised wound  $\frac{3}{4}'' \times \frac{3}{4}''$  on the left side at the level of seventh rib midaxillary omentum protruding out. It was found when the deceased was operated upon that spleen had been ruptured. The deceased expired on 11th February 1944, at 10-45, and according to the doctor the cause of his death was pericarditis and pneumonia following stab wounds. According to him if two of the injuries which he had described had not been treated the patient would die as a result of haemorrhage.

Although the accused was only charged with murder, the learned Judge in his charge to the jury directed them that if they found on the facts that the lesser offence was committed they could bring in a verdict on the lesser offence, and he explained the law both in regard to culpable homicide not amounting to murder and to grievous hurt. The jury brought in a unanimous verdict of not guilty on the charge of murder and also on the charge of culpable homicide not amounting to murder, and they brought in a divided verdict of not guilty by six to three on the charge of grievous hurt. On this verdict the accused was acquitted of the charge of murder and culpable homicide not amounting to murder. With regard to the verdict on the charge of grievous hurt, the learned Judge disagreed with the jury, but instead of discharging the jury he felt bound by a decision given by Mirza J. in 55 Bom.



520<sup>1</sup> and came to the conclusion that the accused could not be tried again on the charge of grievous hurt and therefore directed the accused to be acquitted and discharged.

From this order of Divatia J., the Government of the Province of Bombay have appealed both on facts with leave obtained from the Court of Appeal and also on a question of law. It has been conceded by Mr. Munshi on behalf of the Crown, as indeed it was conceded by counsel for the prosecution before Divatia J., that there was no case on the charge of murder, but Mr. Munshi has pressed us to interfere with the verdict of the jury on the charge of culpable homicide not amounting to murder. It must be remembered that we are dealing with a unanimous verdict of not guilty arrived at by the jury on the charge of culpable homicide not amounting to murder, and the Court must always be reluctant to interfere with a verdict of the jury especially when it is a unanimous verdict. The Court must be satisfied that it is a perverse verdict, and the line of demarkation between a perverse verdict and an erroneous appreciation of evidence must be clearly and sharply drawn. The Court must be satisfied that no reasonable body of men could have arrived at the verdict at which the jury arrived. It is not sufficient that we reading the evidence might have come to a conclusion different from the one that the jury arrived at. We must be satisfied that the only possible view on the evidence was the view that the accused was guilty and that the jury were manifestly perverse in the decision at which they arrived. We have carefully considered the evidence and in our opinion it is not possible to contend that in the circumstances of this case the verdict of the jury was manifestly perverse. Three or four considerations might be looked at. In the first place, the weapon with which the injuries were inflicted was not found, nor was there any evidence that the accused was carrying any weapon when the fight took place. Apart from the dying declaration and the statements made by the deceased to the two police officers to which I have referred, no witness was called before the jury who deposed to having actually seen the accused stabbing the deceased. Further, on the evidence it seems quite possible that it was Balwantsing and not the accused who was the aggressor. Balwantsing and his companions were seen on the opposite side of the road, the accused

was going to the urinal on the other side, and it has been established on the evidence that the fight took place not on the side of the road on which Balwantsing and his companions were seen but on the side where the accused was proceeding on his way to the urinal. This seems to indicate that Balwantsing and his companions had crossed over and possibly they were the aggressors in the fight which ultimately ensued. Further, the line between culpable homicide not amounting to murder and grievous hurt is a very thin and subtle one. In the one case the injuries must be such as are likely to cause death; in the other, the injuries must be such as endanger life; and it is difficult for us to say that on the medical evidence it was not possible for the jury to take the view that the accused was not guilty of culpable homicide not amounting to murder. As a matter of fact, as we have pointed out, the learned Judge himself directed the jury that on the facts it was possible for them to come to a conclusion that the accused was guilty neither of murder nor of culpable homicide not amounting to murder, but only of grievous hurt. Under the circumstances we refuse to interfere with the unanimous verdict of not guilty arrived at by the jury on the charge of culpable homicide not amounting to murder.

The question of law that arises is whether the accused having been acquitted on the charge of murder he can be tried again for the lesser offence of grievous hurt or whether he is protected under s. 403, Criminal P. C. It is urged on behalf of the accused that inasmuch as no specific charge was framed against him for grievous hurt and as he was charged only for murder, his acquittal on the charge of murder bars a fresh trial on the charge of grievous hurt. In order to appreciate this argument one must consider the scheme of the Criminal Procedure Code with regard to the framing of charges. Ordinarily an accused person must be specifically charged with every offence which he is alleged to have committed and the charge must be set out with sufficient particularity. That undoubtedly is the ordinary rule, namely that the accused cannot be convicted of any offence with which he is not charged. But to this ordinary rule there are two exceptions contained in ss. 237 and 238. Under s. 236, Criminal P. C., when the prosecution is doubtful as to what offence has been committed on certain facts being proved, it is open to them to charge the accused in the alternative or

1. (31) 18 A.I.R. 1931 Bom. 309 : 55 Bom. 520 : 134 I. C. 1219, *Emperor v. Abala Isak*.



with additional charges with having committed offences which might be proved on the facts alleged by the prosecution. Section 237 then goes on to provide that even though the accused may not be charged under S. 236, if it appears in evidence that he committed a different offence for which he might have been charged under the provisions of S. 236, then he can be convicted of the offence. Section 238 provides that although an accused may not be charged with a minor offence he can still be convicted of it, and the necessary implication of S. 238 is that if the accused is acquitted of a major offence he is deemed to be acquitted of all the minor offences which are included in it, unless he is convicted under S. 238.

Now turning to the Sessions trial and the provisions of law as contained in the Criminal P. C., the position is that under S. 299, sub-s. (3), it is the duty of the jury to decide which view of the facts is true and then to return the verdict which under such view ought, according to the direction of the Judge, to be returned. Therefore, it is the function of the jury to find the facts, but as to the law applicable to those facts they must take the direction of the Judge and return the verdict accordingly. Therefore, if the Judge in his summing up directs the jury that on a certain finding of facts they would be bound to return the verdict on a minor offence, it would be the duty of the jury to return such a verdict although the accused was not charged with the minor offence. Then under S. 305, sub-s. (3) of the Code, if the Judge disagrees with the majority of the jury, he shall at once discharge the jury. And under S. 308, whenever the jury is discharged, the accused shall be detained in custody or on bail (as the case may be), and shall be tried by another jury unless the Judge considers that he should not be retried, in which case the Judge shall make an entry to that effect on the charge, and such entry shall operate as an acquittal. Therefore, it is clear, reading S. 305, sub-s. (3), and S. 308 together, that if the Judge disagrees with the majority of the jury and does not make an entry as provided by S. 308 the trial of the accused does not come to an end, but continues with another jury, and the trial of the accused by another jury is not a new or a fresh trial but a continuation of the same trial. We must point out with great respect to the learned Judge that technically the form of the order he made was incorrect. The order he made was acquitting the accused, whereas what he should

have done was to have discharged the jury, and if he felt bound by the judgment of Mirza J., he should have made an entry against the charge as provided by S. 308 that in his opinion the accused should not be retried. But in substance the effect is the same, namely that the accused has been acquitted by Divatia J.

Now turning to S. 403 which provides that a person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under S. 236, or for which he might have been convicted under S. 237. Now, in order that the accused can avail himself of the protection of S. 403, sub-s. (1), two conditions are necessary. There must be a conviction or an acquittal and there should be a new trial for the same offence or for an offence for which he might have been charged under S. 236 or might have been convicted under S. 237. It is true that in the case before us there is an acquittal of the accused on the charge of murder and this acquittal would undoubtedly protect the accused not only with regard to the charge of murder but on all minor offences included in that major offence from being tried again in a new trial. But as we have pointed out, in our opinion, a retrial resulting from the disagreement by the Judge with the jury under S. 305 and as provided by S. 308 is not a new trial as contemplated by S. 403, and therefore the order of acquittal on which Mr. Baptista relies on behalf of the accused does not give him the protection under S. 403 of not being liable to be tried again for that offence or for minor offences included in that major offence of murder.

Mr. Baptista's contention before us has been that Divatia J., if he took the view that on the facts disclosed it was open to the jury to bring in a verdict on a minor charge, should have framed additional charges under S. 227, sub-s. (1) of the Code, and according to him, inasmuch as the learned Judge failed to frame such additional charges and that there was no specific charge with regard to grievous hurt, the acquittal on the charge of murder should afford the accused protection under S. 403. Now, there is no obligation on the Court or on the Judge presiding over the Sessions to frame a specific charge with regard to a minor offence; the law so pro-



vides under S. 238, and therefore we do not see why there was any obligation upon the learned Judge to frame a specific charge with regard to grievous hurt under S. 227, Criminal P. C. The whole of Mr. Baptista's argument comes to this that if there had been a specific charge with regard to grievous hurt and the learned Judge had disagreed with the verdict of the jury and ordered a retrial, he could not have availed himself of S. 403, but inasmuch as there was no specific charge and the jury brought in a verdict on a minor offence without the accused being specifically charged therefor, therefore, the accused is protected under S. 403. In our opinion, the position in law cannot possibly be altered by reason of the fact that there was no specific charge of the offence of grievous hurt and that the position is the same whether there was a specific charge or the accused was convicted on a minor charge under the provisions of S. 238, Criminal P. C.

Turning now to the judgment of Mirza J. in 55 Bom. 520<sup>1</sup> which has created the difficulty; in that case the accused was tried before Kemp J. and a special jury on charges connected with the offence of robbery and murder. On the charge of murder, there was a verdict of not guilty and the jury brought in a verdict of five to four on the offence of culpable homicide not amounting to murder. They also brought in a similar divided verdict on the charge connected with robbery; and the learned Judge ordered the jury to be discharged and ordered a retrial. The accused was placed before Mirza J. presiding over the Sessions, and it was urged on behalf of the accused that he was protected by S. 403, and he could not be tried on the charge of culpable homicide not amounting to murder he having been acquitted on the charge of murder. The learned Judge accepted that contention and in his judgment observed (page 525) :

"In this case there were no specific charges before the jury of culpable homicide not amounting to murder and abetment of culpable homicide not amounting to murder. The jury were not bound to return a verdict in respect of those offences unless they were of opinion that the accused could be held guilty of these offences instead of murder and abetment of murder. Had the specific charges been framed in the original trial, the jury would be bound to return a verdict on them."

With great respect to the learned Judge, he overlooked the provisions both of S. 299 and also of S. 238. The learned Judge did not consider that under the provisions of S. 299 it was the duty of the jury to bring in a verdict on the minor offence if they were so directed by the learned Judge on the evi-

dence that was led before them. Further, the learned Judge has emphasised the absence of specific charges with regard to the offence of culpable homicide not amounting to murder. There again he did not take into consideration the provisions of S. 238 which enables the Court to convict an accused on a minor offence if he is charged with the major offence although no specific charge in regard to the former is framed against him. We are of the opinion, that the case decided by Mirza J. was wrongly decided and that it is not good law.

Our attention has been drawn to a decision of the Calcutta High Court in 41 Cal. 1072.<sup>2</sup> In that case the accused was charged with the murder of a police officer and also for murder and culpable homicide of another person. With regard to the murder of the police officer the jury brought in a verdict of not guilty. With regard to the other person the jury brought in a verdict of not guilty on the charge of murder, but brought in a verdict of five to four on the charge of culpable homicide. The jury was discharged and the accused was put up before another jury. It was urged before Stephen J., the presiding Judge, that the case fell under S. 403. That argument was rejected by the learned Judge. The learned Judge was dealing there with a case where there was a specific charge with regard to the offence of culpable homicide, and the learned Judge goes on to observe (page 1083) :

"If he had been charged with murder alone, no doubt a verdict of 'not guilty' would protect him from another trial for culpable homicide; and should he be acquitted of culpable homicide he will be protected from a trial for any offence involving hurt: but where a charge was made, the case fell outside the provisions of the law dealing with cases where it might have been made."

Now, these observations of Stephen J. have been strongly relied upon by Mr. Baptista and it seems also that these observations influenced Mirza J. in arriving at the decision to which we have just referred. But Stephen J. was only dealing with two cases: one, where there is a specific charge and the jury brings in a divided verdict, and the other where there is only a charge for a major offence and the jury brings in a verdict of not guilty. It is perfectly true that in the latter case when the accused is charged with murder and the jury brings in a verdict of not guilty he cannot be tried again for a minor offence. But the learned Judge was not dealing with the case which we have before us where not

2. ('14) 1 A. I. R. 1914 Cal. 901 : 41 Cal. 1072 : 24 I. C. 340, *Emperor v. Nirmal Kanta Roy*.



only the accused was charged with a major offence but on the direction of the learned Judge the jury actually brought in a verdict on the minor charge which it was possible for them to do under S. 238. Therefore, the observations of the learned Judge in this case are restricted to the two cases which he was contemplating. We may draw attention to the other observations of this learned Judge which are very pertinent and which are reported at the foot of page 1083 :

"Also for the purposes of S. 403, I do not consider that the accused is being 'tried again'. He is being tried on the original indictment, and I consider that he is being tried on his first plea of 'not guilty'. The duty of the Court is to continue the trial of the accused before another jury ; and the process may continue till a verdict is passed on all the counts without the accused being 'tried again' under S. 403. I am aware that S. 308 refers to the accused being 'retried', but this does not affect the construction of S. 403."

Similarly here it is the duty of the Court to continue the trial of the accused before another jury if the learned Judge disagrees with the majority verdict of the jury, and the trial does not come to an end till the final verdict is given and accepted by the learned Judge. Finally we were referred to a judgment of the Madras High Court in A.I.R. 1943 Mad 737.<sup>3</sup> In that case the accused was first charged for the offence of murder and the jury brought in a verdict of not guilty by a majority of six to three. He was ordered to be retried. At the second trial the jury brought in a verdict of not guilty on the charge of murder, but brought in a verdict of guilty on the charge of causing grievous hurt by five to four. The learned Judge directed that he should be re-tried on the charge of grievous hurt. Before King J. when the accused was put up for his trial, objection was taken to the maintainability of the trial in view of the provisions of S. 403, and the learned Judge sustained the objection and ordered the accused to be acquitted. In his judgment the learned Judge came to the conclusion that the offence of grievous hurt was covered by S. 237 and was not a minor offence within the meaning of S. 238, and he took the view that as S. 403 afforded a protection for offences in respect of which the accused could have been charged under S. 237, the objection raised by the accused to the trial must prevail. Now, with great respect to the learned Judge, he did not at all consider the question whether, when the accused was being retried the learned Judge having disagreed with the

majority verdict, it was a new trial within the meaning of S. 403, Criminal P. C. Nor do we appreciate or agree with the reasoning of the learned Judge as to the distinction between S. 237 and S. 238. The learned Judge seems to take the view that S. 403 only affords protection against the accused being tried for the same offence or for offences with which he might have been charged under S. 237, but the section affords no protection against a new trial in respect of a minor offence under S. 238. As we have pointed out, minor offences are included in the major offence, and if the accused is sought to be tried at a new trial on a minor offence when he has been acquitted on a major offence, he would be tried for the same offence as provided by S. 403 and the new trial would be barred under S. 403. Therefore the protection given under S. 403 does not merely apply to cases falling under S. 237, but also to cases falling under S. 238.

In the case before us Divatia J. disagreed with the jury and he was not of the opinion that the accused should not be retried under S. 308. The only reason why the learned Judge passed the order of acquittal was because he felt he was bound by the decision of Mirza J. That was the only impediment which came in the way of his ordering a retrial. Now that we have held that the judgment of Mirza J. was wrong, the result must follow that the learned Judge having disagreed with the verdict of the jury under S. 308, there must be a retrial of the accused. We therefore direct that the accused should be tried under S. 326 at the current Sessions.

**Lokur J.** — I agree and have nothing to add.

**Rajadhyaksha J.** — I agree and have nothing to add.

G.N.

*Retrial ordered.*

[ Case No. 11.]

**A. I. R. (33) 1946 Bombay 44**

**STONE C. J. AND KANIA J.**

*D. V. Arur — Assessee*

v.

*Commissioner of Income-tax, Bombay.*

Income-tax Ref. No. 20 of 1944, Decided on 23rd March 1945.

**Income-tax Act (1922), Ss. 4 (3) (i) and 41 (1) — Charitable purpose explained — Trust for scholarships to family members is not for charitable purpose but is of private scope — Income of such trust is taxable at maximum rate under S. 41 (1).**

A charitable purpose which is not of a religious character must contain the element of benefiting

3. (43) 30 AIR 1943 Mad 737 : 212 IC 97, In re Arumugham.



the public. So that a trust, the object and scope of which is limited to the education of the members of a family, would not come within the definition of a charitable purpose. Something which is for the benefit of the community of a Province is a matter of public utility. Public utility must always be a matter of degree, so that circumstances must be examined to ascertain whether the section or class of the community to be benefited can be said to be public as opposed to being private. Hence a trust for the benefit of the members of a family or for the descendants or a named individual imports a conception of notion of something which is private and not something which is public: ('41) 28 A.I.R. 1941 Mad. 535 (S.B.); (1942) 10 I. T. R. 512 (Cal.) and ('44) 31 A.I.R. 1944 Mad. 292, *Rel. on.*; *Case law considered.* [P 47 C 1,2]

[The trust in this case, though educational in character, was held to be of a private limited scope.] [P 46 C 2]

The income of such a trust is taxable at the maximum rate under the first proviso to S. 41 (1) of the Act. [P 48 C 1]

*Sir Jamshedji Kanga and G. P. Murdeshwar* — for Assessee.

*M. C. Setalvad* — for Commr. of Income-tax.

**Stone C. J.** — This is a reference under S. 66 (1), Income-tax Act, 1922. The assessment year is the year 1939-40 in respect of the accounting year, which in this case is the year ending 31st May 1938. The assessee is a trustee, and the amount in dispute is the sum of Rs. 1263, which is the income for the accounting year of a trust fund created by a settlement dated 10th February 1924. The questions referred to us are as follows :

"(1) Whether the income of the trust fund called Shri Kailaje Umamaheshwar Vidya Nidhi is income derived from property held under trust or other legal obligation wholly for charitable purposes within meaning of S. 4 (3) (i), Income-tax Act ?

(2) Whether the income of the trust is taxable at the maximum rate under the first proviso to S. 41 (1) of the Act ?"

The answer to the first question must depend solely on whether the trusts or the settlement are wholly for charitable purposes within the meaning of S. 4 (3) (i), Income-tax Act. That sub-section is as follows :

"(3) Any income, profits or gains falling within the following classes shall not be included in the total income of the person receiving them :

(i) Any income derived from property held under trust or other legal obligation wholly for religious or charitable purposes, and in the case of property so held in part only for such purposes, the income applied, or finally set apart for application, thereto."

At the end of all the clauses of sub-s. 4 (3) there is the following definition of "charitable purpose" :

"In this sub-section 'charitable purpose' includes relief of the poor, education, medical relief and the advancement of any other object of general public utility, but nothing contained in cl. (i), cl. (i-a) or cl. (ii) shall operate to exempt from the provisions of this Act that part of the income of a private religious trust which does not enure for the benefit of the public."

It is to be observed that this definition is not an exclusive or exhaustive one such as is to be found in many of the definitions contained in S. 2 of the Act where the word "means" is used instead of the word "includes." The trust deed of 10th February 1924, is a settlement by two Brahmins of the one part and one of them and four other persons (thereinafter called 'the trustees') of the other part. It recites that the donors have given a donation of a sum of Indian Government Promissory Stock Note of Rs. 36,000, the interest of which is to be appropriated to awarding scholarships in accordance with cl. (12) (a) of the scheme written hereunder in para. 6 and a sum of Rs. 650 in cash to be utilised as directed in cl. (12) (b) of the said scheme. The operative part of the deed directs that the trustees are to hold the trust fund upon trust to administer and control the same and apply and devote the nett annual income of the said Vidya Nidhi in and towards the objects and purposes described and mentioned in and in accordance with the scheme hereunder written in para. 6, which scheme is to be considered as part and parcel of the deed. The first ten clauses and cls. (16) and (17) of para. 6 deal with administrative matters. Clauses (11), (12), (13), (14), (15), (18), (19), (20) and (21) are as follows :

"(11) (a) The interest accrued on the 36,000 rupees in G. P. Stock Notes shall be utilised in awarding scholarships as shown in cl. (12) below to young men or women who are descendants of the Arurkar family (which expression shall mean descendants in the male line of Devapana Arur the founder of Shri Umamaheshwar Temple of Kailaje near Karkal, in South Kanara District . . . provided always they bear good moral character and are otherwise deserving of encouragement. Provided further that in the case of females the eligibility shall extend to only 3 degrees through male or female, computed from donor No. 1 (Venkatrao Narayan Arur).

(b) In case the interest accrued on the Nidhi Fund is not exhausted by award of scholarships to deserving youths in the Arurkar family, as indicated in (a) above, the surplus if any up to 50 p.c. of it at the discretion of the trustees may be devoted to award scholarships to deserving applicants in the Saraswat community (owing allegiance to Shri Chitrapur Mutt) the balance if any being added on to the corpus of the Nidhi.

(12) (a) The interest on the Fund shall be distributed in scholarships in the following manner:—

- i. 5 scholarships of the value of Rs. 5 each a month ;
- ii. 3 scholarships of the value of Rs. 10 each a month ;
- iii. 1 scholarship of the value of Rs. 20 a month; and
- iv. 1 scholarship of the value of Rs. 25 a month.

Provided, however, the trustees are empowered where necessary to accumulate two or more scholarships in favour of one scholar or to split the



existing number of scholarships into a greater number or to alter the amount or the number of scholarships in their discretion, after ascertaining the needs of the students.

(b) The cash amount of Rs. 650 mentioned in para. 2 above shall be utilised for the award of the scholarships duly every month until the realisation of the half yearly interest on Rs. 36,000 in G. P. Stock Note and it shall be recouped as soon as the interest is realised and it shall be utilised for a similar purpose whenever necessary.

(13) The scholarships contemplated are to be defrayed from the interest accruing on the Fund of Rs. 36,000. If after allowing the scholarships any surplus interest has accumulated, the trustees out of such accumulation may where necessary and expedient make reasonable advance of money to a scholar of the Arurkar family to start in life. The scholarships and the advance of money to start in life should be within the amount of interest accrued on the Fund of Rs. 36,000 without in any way affecting its corpus.

(14) In the case of scholarships to youths, who are outside the Arurkar family as defined above in (11) (a) the trustees have power in fit cases to adopt measures to ensure return by the recipients of money spent on them from the Nidhi. And in the case of advance of money to youths to start in life as contemplated in cl. (13) above, the trustees shall take sufficient guarantee to secure the return of the amount. For these purposes suitable agreements in writing may be taken from such recipients or their guardians so as to ensure repayment of the money with or without interest and in such time and manner as the trustees deem expedient. The money so recovered shall be added to the corpus of the Nidhi.

(15) The fund of the endowment is intended for help in education in Arts, Science, Industries, technical subjects like Engineering, Commerce, Agriculture, Medicine, fine arts like drawing, painting, photography, and any vocational studies, all which will be useful to the scholars to earn a decent livelihood. The trustees shall have the power of selecting the subject of study and the institution for it in particular cases, regard being had to the aptitude and constitution of the scholar. The age limit of the scholar is left to the discretion of the trustees.

(18) The trustees shall give due consideration to poverty, moral character, intelligence, aptitude and the physical fitness and constitution of the applicant.

(19) In case of competition for scholarships among two or more students, those who are nearer in blood to the Donors shall have preference over those who are more remote.

(20) The scholarships will ordinarily be tenable in each case for one year only, but the trustees shall have power to continue it to the same recipient if he shows sufficient progress or in the opinion of the trustees deserves further encouragement.

(21) The trustees shall have power at all times to discontinue the payment of any scholarships in cases of moral delinquency or deviation from the Sanatan Dharma on the part of the recipient, the decision of trustees being final in the matter."

No question arises with regard to this trust being for a religious purpose, but it is submitted on behalf of the assessee that the trust is educational in character and, therefore, is of a charitable purpose within the

meaning of sub-s. 4 (3) (i) of the Act. Whilst reliance was placed upon the fact that by sub-cl. (ii) (b) of para. 6 of the trust-deed it is permissible to award scholarships outside the Arurkar family, provided that the applicants are deserving and in the Saraswat community, it is not suggested that any part of the Rs. 1263 was so applied. Looking at the scheme of the trust-deed as a whole, it is clear that the dominant object is the provision of scholarships for young members of the Arurkar family, in the case of females limited to three degrees of relationship from the donor. The power to use surplus income for scholarships for deserving members of the Saraswat community and the power to make advances to enable a start in life to be made by a scholar are subsidiary objects. In my opinion the trust though educational in character is of a private and limited scope. Great reliance was placed by Sir Jamshedji Kanga on behalf of the assessee on the English case in (1944) 60 T. L. R. 485,<sup>1</sup> which if the laws of India and England were the same, it would be difficult to distinguish from the present case. In that case there was a bequest in the will of the testator for the benefit of the children of three designated persons in the following terms: "for the Education of C and P and M children, but C and P children are to have the preference as scholarships for the time thought best by the trustees not over the age of 26 years. It is not to be used as a pension or income for any one and is to be held as scholarships at the pleasure of the trustees. It is to be used to fit the children as servants of God serving the nation not as students for research of any kind."

There were living twenty-eight persons who could qualify as members of the class in that case and Cohen J. felt himself bound by the earlier English cases to which he referred and came to the conclusion that he had no other course than to hold that the trusts in that case were charitable. Since this case was argued before us and we reserved our judgment upon it, (1944) 60 T. L. R. 485<sup>1</sup> has been taken to the Court of Appeal in England where it was overruled. No report of the decision of the Court of Appeal has yet reached this country. However, as Mr. Setalvad on behalf of the Crown has pointed out, the conception of charitable purposes in England and in India is not necessarily the same. In England a great array of judicial decisions have invested the Statute of Elizabeth with an imposing mantle of judge-made law, into which is woven the legal conception of charity. In

1. (1944) 60 T. L. R. 485, Overruled in (1945) 1 Ch. 123, *In re Compton*; *Powell v. Compton*.



India the popular notion of a charitable purpose is almost unlimited in its scope. But during the last eighty years numerous statutes concerning taxation, civil procedure, transfer of property and charitable endowments have laid down a legal conception of charitable purposes so far as those statutes are concerned, which considerably curtails the popular ideology of what is charitable.

The earliest statute appears to be the Civil Procedure Code of 1857. In the Code of 1877 the expression used is a trust for public charitable purposes; in the Transfer of Property Act of 1882 the restrictions imposed by certain sections of that Act "shall not apply to property transferred for the benefit of the public, for the advancement of religion, knowledge, commerce, health, safety or any other object beneficial to mankind;" in the Income-tax Act of 1886 by sub-s. 5 (1) "nothing in s. 4 shall render liable to tax . . . any income derived from property solely employed for religious or public charitable purpose;" in the Charitable Endowments Act of 1890, s. 2 "charitable purpose" includes "relief of the poor, education, medical relief and the advancement of any other object of general public utility, but does not include a purpose which relates exclusively to religious teaching and worship;" in the Civil Procedure Code of 1908, s. 92, which concerns the commencement of proceedings for an alleged breach of express or constructive trusts "created for public purposes of a charitable or religious nature;" in the Income-tax Act of 1918, s. 3 (2) provides that the Act shall not apply to certain classes of income including income derived from property held under trust or other legal obligation wholly for religious or charitable purposes and in that section "charitable purpose" includes relief of the poor, education, medical relief and the advancement of any other object of general public utility. The preamble to the Charitable and Religious Trusts Act of 1920 refers to trusts "created for public purposes of a charitable or religious nature." In the Income-tax Act of 1922 the definition of "charitable purpose" contained in s. 4 (3) (ix) is the same as that in the 1939 Act quoted above without the qualification that nothing contained in cl. (1), cl. (1) (a) and cl. (ii) shall operate to exempt from the provisions of this Act that part of the income of a private religious trust which does not enure for the benefit of the public.

In my opinion, looking at the definitions in the various Acts, a charitable purpose which is not of a religious character must

contain the element of benefiting the public. So that a trust, the object and scope of which is limited to the education of the members of a family, would not come within the definition of a charitable purpose contained in the Income-tax Act either as it stood in 1922 or as amended in 1939. What we have to do is to construe the statute, no doubt the public nature of the trust can be satisfied by benefit conferred on a substantial section of the community. In 41 Bom. L. R. 1150,<sup>2</sup> a person who owned a press and a newspaper created a trust by his will in respect thereof "to maintain the said press and newspaper in an efficient condition, and to keep up the liberal policy of the said newspaper, devoting the surplus income of the said press and newspaper after defraying all current expenses in improving the said newspaper and placing it on a footing of permanency." Delivering the judgment of the Judicial Committee Sir George Rankin said (page 1159) :

"But their Lordships, having before them material which shows the character of the newspaper as it was in fact conducted in the testator's lifetime, have arrived at the conclusion that questions of politics and legislation were discussed only as many other matters were in this paper discussed, and that it is not made out that a political purpose was the dominant purpose of the trust.

They think that the object of the paper may fairly be described as 'the object of supplying the Province with an organ of educated public opinion' and that it should *prima facie* be held to be an object of general public utility."

That case decides that something which is for the benefit of the community of a Province is a matter of public utility. Public utility must always be a matter of degree, so that circumstances must be examined to ascertain whether the section or class of the community to be benefited can be said to be public as opposed to being private. In my opinion a trust for the benefit of the members of a family or for the descendants of a named individual imports a conception or notion of something which is private and not something which is public. This view is supported by various cases in the Indian High Courts and in particular by (1941) 9 I. T. R. 375,<sup>3</sup> (1942) 10 I. T. R. 512<sup>4</sup> and (1944)

2. ('39) 26 A. I. R. 1939 P. C. 208 : I.L.R. (1939) Lah. 475 : I. L. R. (1939) Kar. P. C. 337 : 66 I. A. 241 : 182 I. C. 882 : 41 Bom. L. R. 1150 (P.C.), Trustees of Tribune Press, Lahore v. Commissioner of Income-tax, Punjab.

3. ('41) 28 A. I. R. 1941 Mad. 535 : I.L.R. (1941) Mad. 862 : 196 I. C. 13 : (1941) 9 I. T. R. 375 (S.B.), Commr. of Income-tax, Madras v. Jamal Mahamad.

4. ('42) 1942-10 I. T. R. 512 (Cal.), In re Mercantile Bank of India (Agency) Ltd.



12 I. T. R. 179.<sup>5</sup> Accordingly, in my opinion, the first question should be answered in the negative. With regard to the second question, I have had the advantage of reading the judgment about to be delivered by my learned brother Kania with which I entirely agree and there is nothing I desire to add with regard to the second question beyond what is stated by him. I agree that the question should be answered in the affirmative.

**Kania J.** — The first question submitted by the Tribunal for the Court's opinion involves the true construction of the expression "charitable objects" within the meaning of S. 4 (3) (i), Income-tax Act, and the decision whether the settlement in question results in vesting the trust property in the trustees wholly for charitable objects. In respect of the first point it has been argued on behalf of the assessee that relief of the poor, education and medical relief are by themselves objects of charity, and the words "advancement of any other object of general public utility" denote a class by itself. The contention is that for the relief of poor, education and medical relief the element of public benefit is not required, because those objects, even when limited to a small class or even a family, are recognised as conducive to general public benefit. In this connexion counsel strongly relied on (1944) 60 T. L. R. 485.<sup>1</sup> In that case Cohen J. had occasion to consider a bequest in the following terms:

"... the money which was not brought into the family by my mother is to be invested ... under a trust for ever ... for the education of C and P and M children, but C and P children are to have the preference as scholarships for the time thought best by the trustees not over the age of 26 years. It is not to be used as a pension or income for any one and is to be held as scholarships at the pleasure of the trustees. It is to be used to fit the children as servants of God serving the nation not as students for research of any kind ..."

The testatrix defined C, P and M children as the lawful descendants of three specified persons. Of these three persons there were living at the date of the summons twenty-eight lawful descendants, all of whom were not yet twenty-six years old. The learned Judge at first notices (1802) 7 Ves. 423,<sup>6</sup> (1810) 17 Ves. 371<sup>7</sup> and (1877) 7 Ch. D. 745.<sup>8</sup> In the first two cases a bequest for the benefit of the testator's poor kinsmen and kinswomen

and among their offspring in perpetuity was upheld. In the last case the bequest was considered to contain a general charitable intent and preference was given to the poor relations of the settlor. The next point considered by the learned Judge was whether there was a difference between cases of poverty and cases of education. Relying on (1869) 4 Ch. A. 722<sup>9</sup> in which the bequest of lands to the college for the only use, education in piety and learning of ten descendants of the brothers and sisters of the testator and of his two wives and in default of such to their poor kindred, was upheld as a charitable bequest, he held that the same principle applied to education also. From the judgment of Cohen J. it is clear (as he in terms stated) that but for the current of authorities which compelled him to hold that the trust was a valid charitable trust he would have held otherwise.

On the other side it is contended that on the construction of the word "charity" English decisions are of no use here. As pointed out by the Privy Council in 47 Bom. L. R. 233,<sup>10</sup> the meaning of the word "charity" in England has developed according to the decisions of English Courts and there is no statute which defines that word. It was pointed out that where, as in India, there exists a statute which in terms defines the word "charity," it is improper to attempt to go through a series of English cases to find out the meaning of the word "charity." As regards the definition of "charity" contained in the judgment of Lord Macnaughten in 1891 A. C. 531,<sup>11</sup> it was pointed out that, in India, the last heading, instead of being "for purposes beneficial to the community," was (as found in S. 4 (3)) "for the advancement of any other object of general public utility," and the inclusion of the word "public" was of importance. In that case the Court held that the object of the settlement was to benefit the poor agriculturists. It was charitable both under the heading "relief of poor" and as the advancement of an object of general public utility. Having regard to those observations it was urged that the Court should not consider the halting decision of Cohen J. in (1944) 60

5. ('44) 31 A. I. R. 1944 Mad. 292 : I.L.R. (1944) Mad. 837 : (1944) 12 I. T. R. 179, Commr. of Income-tax, Madras v. Aga Abbas Ali Shirazi.

6. (1802) 7 Ves. 423, *White v. White*.

7. (1810) 17 Ves. 371, *Attorney-General v. Price*.

8. (1877) 7 Ch. D. 745 : 47 L. J. Ch. 569 : 26 W. R. 586 : 38 L. T. 245, *Attorney-General v. Duke of Northumberland*.

9. (1869) 4 Ch. A. 722:38 L. J. Ch. 656, *Attorney-General v. Sidney Sussex College*.

10. ('44) 31 A. I. R. 1944 P. C. 88 : I.L.R. (1945) Bom. 153: 71 I. A. 159: 47 Bom.L.R. 233 (P.C.), *All India Spinners Association v. Commissioners of Income-tax*.

11. (1891) 1891 A. C. 531 : 61 L. J. Q. B. 265 : 65 L. T. 621, *Commissioners for special purposes of the Income-tax v. John Fredrik Pemsel*.



T. L. R. 485<sup>1</sup> as binding. It was argued that on a plain construction of the definition of 'charitable objects' given in the Indian Income-tax Act the Court should construe the words "relief of the poor, education and medical relief" as relating also to a section of the public at least, because in the last clause the words are "any other object of general public utility." It was contended that the previous words should be construed *ejusdem generis*. It had to be conceded that although the words "general public" *prima facie* would mean the public at large and not merely a section, in view of the decision of the Privy Council in 41 Bom. L. R. 1150<sup>2</sup> if the object of the charity was to benefit a fairly large number of public it was sufficient. In that case the spreading of news amongst the English-reading public of the Punjab was considered an object falling under the class "for the advancement of any other object of general public utility." It was further pointed out that in (1941) 9 I. T. R. 375<sup>3</sup> a Full Bench of the Madras High Court had held that a settlement for the poor relations of the settlor did not fall under S. 4 (3) (i), Income-tax Act, and that case was followed by the same Court in (1944) 12 I. T. R. 179.<sup>5</sup> In the same way the Calcutta High Court in (1942) 10 I.T.R. 512<sup>4</sup> held that relief of poor must be also of the public or a specific section of it, and if it was limited to a family, it was not for a charitable object within the meaning of S. 4 (3) (i). Counsel further relied on S. 14, T. P. Act, which contained the rule against perpetuity. The exception is provided in respect of charity in S. 18 in these terms:

"The restrictions in S. 14. . . shall not apply in the case of a transfer of property for the benefit of the public in the advancement of general knowledge, commerce, health, safety or any other object beneficial to mankind."

It was contended that having regard to this provision in the Transfer of Property Act unless the settlement was for the benefit of mankind and was covered by the words of S. 18, the transfer would be bad in law and no question could arise under the Income-tax Act in respect of the income of such settlement beyond the period prescribed by S. 14, T. P. Act. In my opinion the arguments advanced on behalf of the Commissioner are sound. In England there is no definition of "charity" and the meaning of that word, attempted to be extended by judicial decisions, is not helpful, when we are considering specific sections of the Income-tax Act. The observations of Lord Wright in 47 Bom. L. R. 233<sup>10</sup> must be

accepted as final in that connexion. I should point out that the definition of charitable objects in the Income-tax Act is an inclusive definition and therefore cannot be considered an exhaustive one. The Privy Council have considered the word "public" as important in that definition. The sections of the Transfer of Property Act are also material to be considered, because when the Legislature thought of saving transfer of property in perpetuity it saved only such transfers whose object was the benefit of public. Private settlements for the relief of poor relations, or for the education and medical relief of members of the family, would therefore be excluded, under the Transfer of Property Act, from the class of charitable settlements. The two Madras and the Calcutta cases mentioned above also show that Indian High Courts have construed the words 'charitable objects' as limited to settlements made for the benefit of a section of the public only. They have excluded settlements made for poor relations of the family from the class of settlements saved from taxation under the Income-tax Act. I agree with that view on the principle that in the construction of an All India Act, so far as possible, there should be uniformity, and unless the Court was clearly of a different view an interpretation by one Court should be followed by others. I think we should also accept the construction put by the other Courts on those words in this case. The decision of Cohen J. is not binding on this Court and the learned Judge himself arrived at a conclusion against his own personal convictions, because he felt bound by the authorities in England. That decision has now been reversed by the Court of appeal. In my opinion, therefore, to exempt the income from taxation, on the true construction of the settlement in question, the Court must find that the object of education was for a section of the public at least. The settlement may claim exemption in that case, even though the members of the family may be given preference in the selection of scholars.

In respect of the question of construction of the trust deed the relevant portions are set out in the judgment of the learned Chief Justice. It was argued on behalf of the assessee that the name itself indicates that it is an education fund, not limited to the members of the family. That argument cannot help in the true construction of the deed of settlement because the Court has to find whether the property is held under



trust wholly for charitable purposes. Counsel for the assessee relied on cl. 2 to show that in the recital it was stated that interest of the fund was to be appropriated in awarding the scholarships mentioned in cl. 12 (a) of the scheme (written hereunder in para. 6) and that under cl. 12 there was no restriction to give the scholarships only to members of the family. While cl. 12 mentions how many and what amounts were to be given, it does not indicate to whom the same were to be given. This argument, therefore, does not help the assessee. The relevant clause is cl. 5 where it is expressly stated that the amount was transferred to the trustees "upon trust to collect the interest of such investments upon trust to apply and devote the net collections in the manner set out in cl. 6." Lower down in the same clause it is stated that the trustees stood possessed of the fund upon trust to administer and control the same and apply and devote the net annual income in and towards the objects and purposes described in cl. 6. It is, therefore, necessary to turn to cl. 6 to find out the objects for which the income was to be spent. It is clear that in the scheme, cl. 11 first prescribes the obligation on the trustees to award scholarships as shown in cl. 12 to any men or women who are descendants of the Arurkar family of which a genealogical tree was annexed as No. 2 to the scheme. That is an absolute obligation. It is true that the eligible persons must have good moral character and should otherwise be deserving of encouragement. But these are general words of qualifications. Sub-clause (b) is a matter of discretion left to the trustees and contains no obligation on them to apply the 50 per cent. of the surplus for giving scholarships to applicants of Saraswat community. If the trustees do not act under this clause, the balance of the income must go to augment the fund of the endowment.

Counsel for the assessee strongly relied on cl. 15 for the contention that the fund of the endowment was intended for the education of the public. At one time I was impressed by the words of that clause considerably. A close scrutiny, however, shows that even there it was provided that the education was to be in an institution which will be useful to a scholar to earn a decent livelihood. The repeated use of the word "scholar" three times in that clause indicates that the scholar was to be one defined in the previous cl. 11, and I am unable to read that word as importing a scholar from the public at large, or as referring to a scholar of the

Saraswat Hindu community only. It is further provided in cl. 19 that in case of competition for scholarships between two or more students those who were nearer in blood to the donors should have preference over those more remote. Reading the scheme as a whole it seems to me that this settlement was for awarding scholarships to the members of the Arurkar family, and to emphasize this object the genealogical tree was annexed to the scheme. I do not think the number of those eligible at the date of the settlement matters, because the initial object is for the benefit of the descendants of named persons, and under the circumstances the idea of benefiting a section of the public in any way is excluded. It has been recognized that the line dividing public and private settlements is difficult to define, but on a true construction of this deed it seems clear that the settlement was for the education of the members of the Arurkar family of which Devappaya was the founder. On the true construction of the words "charitable objects" therefore this settlement does not fall within the class of excepted settlements under the Income-tax Act.

Moreover, the words of S. 4 (3) (i) require that the settlement should be wholly for charitable purposes. Clause 13 of the scheme allows the trustees, out of the accumulations of interest, where necessary and expedient, to make a reasonable advance of money to a scholar of Arurkar family to start in life. Although under cl. 14 it is provided that sufficient guarantee should be taken to secure the return of the amount, it is clear that cl. 13 provides an object which is clearly not a charitable one. To start a person in life cannot be considered a charitable object within the meaning of the Income-tax Act. That loan again is limited to scholars of the Arurkar family. It is, therefore, clear that as this is one of the objects of the settlement mentioned in the scheme, the property is not held by the trustees for wholly charitable objects. Under the circumstances the income cannot be exempted under S. 4 (3) of the Act. I therefore agree that the first question should be answered in the negative.

The second question relates to the maximum tax levied on the income in the hands of the trustees under S. 41 (1) of the Act. The total income of the fund is Rs. 1263. As the same is below the minimum limit, ordinarily, it would have been exempt from tax. Counsel on behalf of the assessee contended that if this trust-deed was void the trustees should be assessed as individuals in their own



right and they cannot be assessed at the highest rate under S. 41, sub-s. (1). That argument cannot be accepted because S. 14, T. P. Act, does not invalidate the settlement as a private settlement for the life of the beneficiaries in existence at the date of the transfer. Those beneficiaries are determined, but having regard to the words used in cl. 12 of the scheme it cannot be stated that the beneficiaries have any specified interest. The trustees are given power to select out of those eligible persons scholars to whom they would give scholarships, and the amounts of the scholarships are also left, under cl. 12, to their discretion. They are at liberty to reduce the amount or group together several scholarships and make it into one scholarship for an individual scholar. Under the circumstances the case clearly falls under S. 41 (1). It was argued that on the exercise of discretion by the trustees the names and shares of the beneficiaries will get determined. That however is a wrong approach, because the question is not about the position arising after the trustees have exercised their discretion, but whether on a perusal of the trust-deed the beneficiaries and their individual shares can be determined. I therefore think that the Tribunal was right in its conclusion and the answer to the second question should be in the affirmative.

**Per Curiam.** — The assessee must pay the costs of the reference.

R.K. *Reference answered.*

[ *Case No. 12.* ]

**A. I. R. (33) 1946 Bombay 51**

**KANIA AND CHAGLA JJ.**

*Premier Construction Co. — Assesseees*  
v.

*Commissioner of Income-tax.*

Income-tax Reference No. 28 of 1945, Decided on 27th March 1944.

Income-tax Act (1922), Ss. 4 (3) (viii) and 2 (1)—Agricultural income—Assesseees managing agents of company exempted for part of income as derived from agriculture — Agents remunerated by commission on percentage basis subject to certain minimum commission — Remuneration held not exempt under S. 4 (3) (viii).

The assesseees were the managing agents of a company. They were appointed managing agents under a contract under which they were to get a commission at the rate of ten per cent. per annum on the annual nett profits of the company, provided that such commission was not in any year to amount to a sum less than rupees ten thousand. The company derived its income from several sources, one of which was manufacture of sugar. The cane that was used in manufacture was partly grown on

the company's own farms and partly bought from outside. A part of the company's income from this source, i. e., the part that was attributable to the manufacture from the cane grown on the company's farms was exempted from income-tax, under Section 4 (3) (viii) of the Act, as agricultural income within the meaning of S. 2 (1). The assesseees contended that as under their managing agency agreement they were entitled to a percentage of the nett profits of the company, the remuneration received by them, so far as the same could be apportioned for work done in respect of agricultural business of the company, was agricultural income:

*Held* that since the ten per cent. were not necessarily payable out of the profits if in any year the company made no profits, this sum had to be paid by the company, even out of its capital. Therefore on the face of this clause itself, there was nothing to connect it necessarily with the agricultural income of the company. Under the terms of the managing agency agreement, the balance of the agricultural income in the hands of the company was not to be divided between the company and the managing agents in a stated proportion. It could not be stated that the managing agents received any portion of the agricultural income, when they received remuneration for services rendered for managing the affairs of the company, only one part of whose business was agriculture. The remuneration was, therefore, not exempt from assessment under S. 4 (3) (viii): ('44) 31 A. I. R. 1944 Bom. 5 and (1919) 2 Ch. 254, *Expl.* and *Disting.*; (1938) 2 K.B. 220 and ('43) 30 A.I.R. 1943 P. C. 20, *Rel. on.* [P 54 C 1; P 55 C 1; P 56 C 1]

*Sir Jamshedji Kanga* — for Assesseees.

*M. C. Setalvad and G. N. Joshi* —

for the Commissioner.

**Kania J.** — This is a reference made under S. 66 (1), Income-tax Act, by the Tribunal of appeal. The question submitted for the Court's opinion is in these terms:

"Whether in the circumstances of this case, that portion of the income received by the assessee from the principal company of Marsland Price & Co., Ltd., which is proportionate to the agricultural income earned by the principal company is agricultural income, within the meaning of S. 2 (1), Income-tax Act, 1922, and exempt from assessment under the provisions of S. 4 (3) (viii) of the Act?"

The relevant material facts are these: The assesseees, a limited company, are the managing agents of Messrs. Marsland, Price & Co., Ltd., (referred to as the principal company in the reference). The assesseees were appointed managing agents under a contract. Clause 2 of that contract is as follows:

"A commission at the rate of ten per cent. per annum on the annual nett profits of the said company after making all proper allowances and deductions from revenue for working expenses chargeable against profits but without making any deduction for depreciation or in respect of any amount carried to reserve or sinking fund or any payment on account of super-tax or any deduction for expenditure on capital account, provided that such commission shall not in any year amount to a less sum than rupees ten thousand."

The original agreement was between the principal company and the Tata Construction Co., Ltd., which was the trade name of



the assessee, before the one now adopted by them. The principal company derives its income from several sources, one of which is manufacture of sugar. The cane that is used in manufacture is partly grown on the company's own farms and partly bought from outside. In the statement of case it is noted that a part of the principal company's income from this source, i. e., the part that is attributable to the manufacture from the cane grown on the company's farms is exempted from income-tax, under S. 4 (3) (viii) of the Act as agricultural income within the meaning of S. 2 (1). The assessee contends that as under their managing agency agreement they are entitled to a percentage of the nett profits of the principal company, the remuneration received by them, so far the same can be apportioned for work done in respect of agricultural business of the principal company, is agricultural income. It is contended that an agreement containing a clause for remuneration similar to the one before us has been held to be an agreement for participation in profits between the share-holders and the managing agents. It was, therefore, argued that when their share of profits was received by the assessee, the character of the receipt was not changed and it continued to be agricultural income. In support of this contention it was argued that in the assessment of the principal company an apportionment of the expenses between its agricultural business and other business was made by the taxing authorities. Therefore, as the expenses of the agricultural business would include a proportionate payment to the managing agents, that payment in the hands of the managing agents should be considered agricultural income and exempt from tax. In support of the first contention that an agreement of this kind is an agreement for participation in profits, our attention has been drawn to 45 Bom. L. R. 951.<sup>1</sup> That was a reference made to the Court for deciding whether the remuneration payable to the managing agents was to be ascertained before or after deduction of the excess profits tax payable by the principal company. That case did not deal with the nature of the receipt of the remuneration by the managing agents. The clause about the remuneration was substantially the same as in the present case. On the construction of the agreement, the Court held

that it was a profit-sharing agreement and the intention of the parties was that remuneration of the agents was to be calculated after the excess profits tax payable by the principal company was deducted out of the profits. The Court considered three English decisions on the question whether the excess profit tax should be deducted before ascertaining the profits divisible between the company and the managing agents. I do not think that that case is helpful to the present discussion as the point before the Court was quite different. The Court pointed out that the decision must rest on the true meaning to be given to the agreement between the parties as to the stage at which the division of profits was to be made.

In (1919) 2 Ch. 254,<sup>2</sup> there was an agreement under which the defendant was appointed the works manager of the business of the plaintiff company at a salary. The company agreed also to pay him at the end of each business year of the company and within seven days of the holding of the annual general meeting a further sum by way of commission being a percentage upon the nett profits for the year. There was a proviso that the certificate of the company's auditors should be conclusive as to what constituted the nett profits at the end of any such business year. The Court had to construe the meaning of the words "nett profits." The question before the Court was whether in arriving at the nett profits the excess profit duty which was a debt of the company to the Crown should be deducted first. The Court came to the conclusion that the excess profit duty should be deducted before the nett profits, a percentage of which was to be paid to the works manager, came to be determined. The Court emphasized that the facts, that payment was to be made within seven days of the holding of the meeting and that certificate of the auditors was to be conclusive, showed that the nett profits intended to be divided on a stated percentage basis were the nett profits arrived at after deducting the excess profit duty. It was observed that excess profit duty was, for the purpose of ascertaining what was payable to the share-holders of the company, an outgoing, and had to be paid before it could be ascertained what were the profits distributable amongst the share-holders of the company by way of dividend. This case is also on the question of determining the amount of profits out of which remuneration agreed

1. ('44) 31 A. I. R. 1944 Bom. 5 : I. L. R. (1944) Bom. 105 : 213 I. C. 275 : 45 Bom. L. R. 951, *Walchand & Co., Ltd. v. Hindustan Construction Co., Ltd.*

2. (1919) 2 Ch. 254 : 88 L. J. Ch. 398 : 121 L. T. 9, *Patent Castings Syndicate, Ltd. v. Etherington*.



to be paid on a percentage basis was to be calculated. It has no bearing on the construction of the clause here.

*British Sugar Manufacturers, Ltd. v. Harris*<sup>3</sup> is material for the proper approach to the question of profits. In that case a company carrying on a manufacturing business agreed with two other companies to pay them a stated percentage of its nett profits, in consideration of their giving to the company the full benefit of their technical and financial knowledge and experience. The nett profits were to be ascertained after payment of all expenses of the company and after providing for interest on debentures but before making any provisions for depreciation and in case of dispute as to these amounts, the certificate of the auditors was to be final and binding. It was held that in computing its profits for the purposes of income-tax, the company was entitled to deduct the sums so paid as being money wholly and exclusively laid out or expended for the purpose of trade. In other words the decision was that although it was an agreement to pay a stated percentage of the nett profits, having regard to the particular clause it was not a profit-sharing agreement and the amounts paid to the two companies were to be treated as expenses of the principal company. *Greene M. R.* at p. 104 considered the distinction between a case of service and a case of payment by participation in profits. It was pointed out that in order to be real participant in the profits there would be one profit fund only. There would not be two profit funds to be ascertained for different purposes. There would be one profit fund, and nobody would have any interest in anything until that profit fund was ascertained and fell to be divided. It was pointed out that that was not the position in the case before the Court. By the terms of the agreement two funds of the so-called profits came into picture. The first was a fund which was to be ascertained for the purpose of calculating 20 per cent. payable to the companies who rendered services. In that fund, as such, the shareholders had no concern. It was used for the purpose and only for the purpose of ascertaining what would be paid to the service rendering companies. When that amount was ascertained the fund ceased to have any usefulness at all, and it next became necessary to ascertain what were the divisible profits and for that purpose to take another account, which not

only would bring in depreciation but would also take into account the sum that had been paid to the service rendering companies.

Strong reliance was placed on this case to show that it was not a profit-sharing agreement, as contended by the principal company. In the present case the clause about remuneration is distinctly framed so as to create an artificial account, the resultant profits of ten per cent. of which have to be paid to the assesseees by the principal company for their remuneration. Once that is paid the account so prepared had no further utility for the shareholders. A totally different account, which would include items of depreciation, the amount carried to reserve fund, sinking fund, and deductions for expenditure on capital accounts, in particular, will have to be prepared and after making all these deductions the nett profits divisible amongst the shareholders will be ascertained. (1939) 7 I. T. R. 101<sup>3</sup> is again useful to explain certain observations of Lord Macmillan in 58 I. A. 239<sup>4</sup> at p. 251. In that case Lord Macmillan had observed that a payment out of profits and conditional on profits being earned, cannot accurately be described as a payment made to earn profits. It assumes that profits have first come into existence. But profits on their coming into existence attract tax at that point, and the revenue is not concerned with the subsequent application of profits. *Greene M. R.* explained those observations as referable to profits ascertained at two different stages and the misunderstanding caused by reading the word "profits" as meaning the same thing in all the circumstances. He observed as follows (p. 107) :

"It is to be observed that Lord Macmillan in that paragraph was clearly using the word 'profits' in one sense and one sense only; he was using it in the sense of 'the real nett profit' to which Lord Maugham referred. That he was doing that is, I think, abundantly clear when the nature of the contract there in question is considered, which was merely a contract under which a percentage of profits was payable by the railway company to the French Government. There was no question of services or anything of that kind in the case; it was merely a sum payable out of profits."

Having regard to these observations it is next necessary to consider the exact import of the clause about remuneration between the assesseees and the principal company. The question is whether the remuneration is agricultural income, which is defined in section 2 (1) as

3. (1939) 1939-7 I.T.R. 101 : (1938) 2 K.B. 220 : 107 L.J.K.B. 472 : 159 L.T. 365 : (1938) 1 All.E.R. 149.

4. (1931) 18 A.I.R. 1931 P. C. 165 : 54 Mad. 691 : 58 I. A. 239 : 132 I. C. 619 (P.C.), Pondicherry Ry. Co. v. Income-tax Commissioner.



"any rent or revenue derived from land which is used for agricultural purposes, and is either assessed to land-revenue in British India or subject to a local rate assessed and collected by officers of the Crown as such."

Under the agreement the managing agents could be participators in profits, as ordinarily understood, perhaps, if they divided in a stated percentage an agreed fund. They could not be participators if the profits divisible amongst the shareholders constituted one fund and they got a percentage of a fund which was differently calculated and therefore in fact a different fund. It must first be noticed that the ten per cent. are not necessarily payable out of the profits. It is a calculation to be made on the annual nett profits. The nett profits are, again, not what one ordinarily finds in the company's balance sheets. They are nett profits only for the purpose of calculation, to be worked out strictly on the lines specifically mentioned in that clause. It is obvious that several deductions which are not permitted under the clause would be made in preparing the balance sheet and ascertaining the nett profits of a commercial corporation. Moreover, the commission was not in any year to amount to a sum less than Rs. 10,000. Therefore, if in any year the company made no profits, this sum had to be paid by the principal company, even out of its capital. If in any given year there was no agricultural income, the remuneration, with a minimum of Rs. 10,000, will still have to be paid out of the profits earned through the other activities of the principal company. It is, therefore, clear that, on the face of this clause itself, there is nothing to connect it necessarily with the agricultural income of the principal company. The contention that in the assessment of the principal company a portion is allocated towards the agricultural expenses is not relevant for the present discussion. What may be deducted in the assessment of the principal company does not necessarily bear the same character when the payment is received by an employee. This view is supported by the decision in (1943) 11 I.T.R. 295.<sup>5</sup> In that case one of the ancestors of the assessee had constituted a wakf of agricultural properties, but no remuneration was provided by the wakf-deed for the post of mutwalli. A suit was filed by some relators for the removal of the assessee from his office and for accounts. On a compromise a scheme

for the administration of the wakf was framed and it provided inter alia as follows:

"The remuneration of the mutwalli payable from the wakf shall be rupees two thousand five hundred monthly, together with a fixed allowance of rupees five hundred monthly for his conveyance . . . and personal charges incidental to his position."

It was found as a fact that all the income of the wakf was agricultural income within the meaning of S. 2 (1). When the reference came before the Calcutta High Court it was contended by the mutwalli that the remuneration received by him was also agricultural income, and therefore exempt from tax. The Court rejected that contention. On appeal, the same contention urged before the Judicial Committee of the Privy Council was also rejected. It was argued before the Court that (1935) 3 I. T. R. 305<sup>6</sup> supported the contention that the amount received by the mutwalli was agricultural income. In that case (which is known as the Durbhanga case) a loan was advanced on the usufructuary mortgage of certain agricultural properties for a period of fifteen years. The mortgagee was put in possession and after allowing a certain amount as tika rent to the mortgagor, he was allowed to take the balance of the profits which the mortgagee appropriated towards interest and the excess for principal. It was contended on behalf of the taxing authorities that the receipt by the mortgagee lost the character of agricultural income, because the mortgagee was doing money-lending business and the receipts should be considered as falling under the head "business" under S. 6. This contention was rejected because of the peculiar position the mortgagee held under the mortgage-deed. The following passage, taken from the judgment of the Chief Justice, was emphasized in the judgment of Lord Macmillan, who decided the issue against the taxing authorities. The learned Chief Justice observed as follows (p. 307) :

"The mortgagee lessee was to be in possession of both properties, and, in his relation to the cultivators of the soil he stood in the position of landlord dealing directly with them and collecting the rents. He had, moreover, to pay the Government revenue cesses and taxes and his name was registered in the land registration department. He alone was able to sue for rent whether current or arrears ; to sue for enhancement or for ejection and was able to settle lands with raiyats and tenants in all the properties; in fact he was in a position to take all proceedings which the mortgagor would have been able to take in the ordinary course (as) if the lands

5. (43) 30 A. I. R. 1943 P. C. 20 : I. L. R. (1943) 1 Cal. 367 : I. L. R. (1943) Kar. P.C. 28: 70 I.A. 14 : 205 I. C. 518 : (1943) 11 I. T. R. 295 (P.C.), *Habibulla v. Commr. of Income-tax, Bengal*.

6. (35) 22 A. I. R. 1935 P. C. 172 : 14 Pat. 623 : 62 I. A. 215 : 157 I.C. 289 : (1935) 3 I.T.R. 305 (P.C.), *Commr. of Income-tax v. Sir Kameshwar Singh*.



leased and mortgaged had remained in her khas possession."

Those observations were repeated by Lord Thankerton in (1943) 11 I. T. R. 295<sup>5</sup> as distinguishing the position of a manager, who was paid remuneration for services rendered. Lord Thankerton observed (page 298):

"The position of the appellant is very different: the recovery of the rents depends on the rights of the wakf estate, and on the appellant's performance of his duties of management as mutwalli, and the amount of his remuneration does not depend either on the nature of the properties or assets which constitute the wakf estate, nor on the amount of the income derived therefrom by the wakf estate. If, as might possibly happen, the whole or a portion of the wakf property ceased to be represented by agricultural lands, it is clear that the remuneration fixed by the Art. 15 of the scheme would not be affected."

Those observations are particularly applicable to the facts here. In the present case the managing agents would receive the remuneration irrespective of the nature of the business of the principal company. They are paid for their work as managing agents. The assets of the principal company are not vested in them. They are not the persons who could sue for amounts due to the principal company in their own name. They are only agents for management. It seems, therefore, clear that, under the terms of the managing agency agreement, the balance of the agricultural income in the hands of the principal company is not to be divided between the principal company and the managing agents in a stated proportion.

In (1943) 11 I. T. R. 295<sup>5</sup> their Lordships kept open the question whether the receipts in the hands of the manager would be agricultural income, if the agreement was to pay on a percentage basis. This was due to certain observations of Pankridge J. in the same case in (1941) 9 I. T. R. 292<sup>7</sup> from which the appeal was preferred to the Privy Council. In the present case it is clear that the total income of the principal company is not wholly agricultural. The percentage is not necessarily payable out of the agricultural income. In fact, as I have pointed out, whether there were profits or no profits to the principal company, the managing agents were entitled to their remuneration. Therefore, I do not propose to consider the question of a remuneration payable on a percentage basis when the total income of the principal company is wholly agricultural. Sufficient to say that that is not the case here and it is not necessary to decide it for the present reference. *Mohammad Esa v. Commr. of*

*Income-tax*<sup>8</sup> was relied upon to support the contention that if agricultural income, earned by a principal company, is passed on to the next party, it does not alter the character of the receipt. It was argued that if there was a farm and an employee was promised remuneration for working on the farm at the rate of 10 per cent. of the nett earnings, the amount received by the workman would be agricultural income. In the case in question the assessee, a mutwalli, was authorised under a wakf-deed to appropriate the balance, remaining after the purposes of the trust, for his personal expenses, and under another deed to appropriate the balance in lieu of his services. The income from the wakf properties consisted both of agricultural and non-agricultural income. The question was whether the sums thus received by the mutwalli out of the income of the trusts, either as remuneration for services rendered as one of the trustees or in his capacity as a beneficiary, can be regarded as agricultural income in his hands. It was held that in the circumstances of the case so much of the sum received by the assessee which represented his share of the surplus income in the year of assessment as bore the same proportion to the whole of such sums received by him, as the agricultural income bore to the non-agricultural income of the wakf properties in the year of assessment, must be regarded in his hands as agricultural income within the meaning of S. 2 (1). That decision is clearly explicable. The Court carefully noted the fact that the balance was paid to the mutwalli as a beneficiary. The simple position before the Court, therefore, was of a trust, the income whereof was partly agricultural and payment was made to the beneficiary, as provided by the trust-deed. The payment did not lose the character of being agricultural income because it passed through the hand of the trustees or mutwalli. Except that proposition the Court decided nothing more, as it was not necessary for it to decide. This aspect of the case is emphasized clearly in the judgment of Braund J. at page 280 where he observed:

"I think, therefore, that in both cases the assessee is entitled to be treated as a 'beneficiary' and not as a servant of trust by contract. The position would, I think, have been quite different, had the assessee been a mere employee of the wakf by contract deriving a 'salary' which was payable (ordinarily, at least) out of the income of the wakf properties."

7. ('41) 28 A. I. R. 1941 Cal. 598: 196 I. C. 883: (1941) 9 I. T. R. 292, In re K. Habibulla.

8. ('42) 29 A. I. R. 1942 All. 194: I. L. R. (1942) All. 425: 200 I. C. 758: (1942) 10 I. T. R. 267 (S. B.).



It seems, therefore, clear that none of the authorities relied on by the assessee supports the contention that in respect of an agreement, containing a clause like the one before us, it was held that the remuneration received by the managing agents was agricultural income. In my view, the conclusion of the Tribunal is correct. On the true construction of the clause in question it cannot be stated that the managing agents received any portion of the agricultural income, when they received remuneration for services rendered for managing the affairs of the principal company, only one part of whose business is held to be agriculture. The answer to the question will therefore be in the negative. The assessee to pay the costs of the reference.

**Chagla J.**—I agree. The question which we have to decide is whether any portion of the remuneration received by the assessee as the managing agents of the principal company under the agreement between them and the principal company constitute agricultural income and is exempt from payment of tax. Under S. 4 (3) in the total income of an assessee agricultural income is not to be included. "Agricultural income" is defined in S. 2 (1) as any rent or revenue derived from land which is used for agricultural purposes, and the question, therefore, which arises for determination is whether any portion of the remuneration received by the assessee is rent or revenue derived from land which is used for agricultural purposes. In my opinion it is clear that the remuneration received by the assessee is, under a contract between it and the principal company, remuneration for services to be rendered by the assessee as the managing agents of the principal company. That contract has nothing whatever to do with income earned by the principal company from agricultural sources. It is also clear from the contract that what the principal company contracted with the managing agents was to pay them a sum of Rs. 10,000 or ten per cent. of the profits computed in a particular manner whichever sum was larger. Sir Jamshedji's contention throughout this reference has been that the assessee was sharing the profits of the principal company and to the extent that it shared the profits derived from agricultural sources payments in the hands of the assessee became agricultural income and should be exempted from tax. The whole of Sir Jamshedji's argument was based upon the decision of this High Court in 45 Bom. L. R. 951.<sup>1</sup> The Court was construing a par-

ticular agreement which I admit was practically similar in terms to the agreement before us, and all that that case decided was that the amount of excess profits tax should be deducted in ascertaining the annual nett profits of the company for the purpose of calculation of the managing agents' commission. Now in the course of his judgment Beaumont C. J. did use the expression that that agreement was a profit sharing agreement. But the question is in what profits did the managing agents share? It is clear that the profits in which the managing agents shared were not the same profits in which ultimately the shareholders had a right to share or the profits which ultimately became divisible amongst the shareholders. With respect to the learned Chief Justice a confusion is created by using the expression profits which has different connotations in different contexts. The possibility of such confusion is drawn attention to and pointed out in (1938) 2 K. B. 220.<sup>3</sup> In the case before us it is perfectly evident that what the assessee was going to share in was an artificial fund which first came into existence. They received 10 per cent. of that fund. After that had been ascertained, the usefulness of that fund disappeared and a new fund came into existence by a different computation which was to be divisible amongst the shareholders as their own profits. If the assessee was sharing in the later fund which is divisible amongst the shareholders, then Sir Jamshedji's contention would be sound, because then what came to it was a share of the nett profits and to the extent that those nett profits were derived from agricultural income the assessee was exempted from the payment of tax. As I have pointed out under the agreement the assessee has nothing whatever to do with whether the principal company made a profit or not; whether their business was agricultural or not; it was entitled to receive Rs. 10,000 even if the principal company worked at a loss. It was entitled to receive Rs. 10,000 even if the principal company stopped all its agricultural business. It was only if the 10 per cent. of the artificial fund amounted to more than Rs. 10,000, then the managing agents became entitled to receive an amount larger than Rs. 10,000. Therefore in the language of Greene M. R. in (1938) 2 K. B. 220,<sup>3</sup> a line is capable of being drawn between a contract for payment of a share of profits *simpliciter* and payment of remuneration which is deducted, no doubt before profits which are divisible are ascertained. In this case what the assessee would



receive in the event of the principal company making profits was not the payment of a share in profits *simpliciter* but it would receive a remuneration which was deductible before the profits divisible were ascertained. With regard to the decision in (1919) 2 Ch. 254<sup>2</sup> a striking difference between the case there and the case before us has to be noted. There the defendant was appointed the manager of the business of the plaintiffs on a salary and over and above the salary the company agreed also to pay to him at the end of each business year of the company a percentage of the nett profits for the year. The salary was quite independent of the share in the nett profits and it was only with regard to his latter remuneration that the Court held that he was sharing in the fund which was divisible amongst the shareholders. It must be noted that the nett profits in which the manager was to share were arrived at after the remuneration payable to the manager had been deducted. In this case the fund in which the assessee has a share is a fund to be ascertained before the remuneration payable to the managing agents is ascertained. In the two cases relied upon by Sir Jamshedji, (1935) 3 I. T. R. 305,<sup>6</sup> (*the Darbhanga case*) and (1942) 10 I. T. R. 267<sup>8</sup>: in the first case the mortgagee stood in the shoes of the mortgagor and exercised all the rights of the landlord and also of the mortgagor. In the other case the Court made it perfectly clear that the income which was exempt from tax was the income received by the assessee as the beneficiary and not as the mutwalli. The Court pointed out that the assessee occupied two positions one of mutwalli and the other of beneficiary and it was only in his capacity as the beneficiary that the income which he received from the agricultural source was exempted from tax. Therefore, when we come to (1943) 11 I. T. R. 295<sup>5</sup> where we have a simple case of a mutwalli receiving remuneration from the trust estate consisting entirely of agricultural land and the income of which was wholly agricultural income, the Privy Council held that the income of the mutwalli was not agricultural income and therefore not exempt from tax. It is true, as Sir Jamshedji pointed out, that we have to consider the character of the income and not that of the assessee. If the income is agricultural income, it bears an indelible impression upon it and is exempt from tax. But, in my opinion, on the construction of the contract before us the remuneration of the assessee is for its services as the managing agents of the principal com-

pany; that is the character of its income. The character of its income is not that part of it is rent or revenue from land which is used for agricultural purposes. I, therefore, agree with my learned brother Kania that we should answer the question raised in the negative, and the assessee should pay the costs of the reference.

R.K. *Reference answered.*

[Case No. 13.]

**A. I. R. (33) 1946 Bombay 57**

MACKLIN AND LOKUR JJ.

*Bhikaji Ramchandra Shimpi —*

*Plaintiff — Appellant*  
v.

*Ajagarally Sarafally Bohori and others*  
— *Defendants — Respondents.*

First Appeal No. 355 of 1943, Decided on 29th June 1944, against decision of First Class Sub-Judge, Dhulia, in Special Suit No. 4 of 1942.

**Mahomedan law — Mother appointed guardian ad litem of her daughter—Leave obtained under O. 32, R. 7, Civil P. C., by mother to compromise—Sale in pursuance of compromise — Mother not appointed guardian and sale not sanctioned under Guardians and Wards Act, S. 29 — Sale is void with respect to minor's share — Even stranger can resist suit for possession.**

A Mahomedan mother is entitled to the custody of the person of her minor child but is not the natural guardian and has no higher powers to deal with her minor child's property than any outsider who happens to have charge of the minor for the time being. The leave to compromise given to the mother by the executing Court and her appointment by that Court as the guardian *ad litem* of her minor daughter does not make her the guardian of the minor's property. The leave under O. 32, R. 7, Civil P. C., merely approves of the proposed compromise as beneficial to the minor and authorises the guardian *ad litem* to give effect to it. However if that compromise includes the transfer of the minor's immovable property, then that transfer must be effected according to law. The mother has to be appointed a guardian of the minor's property under the Guardians and Wards Act before she could have any authority to deal with the minor's immovable property. The leave granted by the executing Court under O. 32, R. 7 may be sufficient to enable the District Court to sanction the sale under S. 29, Guardians and Wards Act, after she gets herself appointed as the guardian of the minor's property. Until such appointment, she, as the guardian *ad litem* in the execution proceedings, is in no better position than a *de facto* guardian for the purpose of selling the minor's immovable property, and the sale cannot be binding on the minor. The sale is not merely voidable but is void, to the extent of the minor child. Hence even a stranger who is himself a trespasser can resist an action in ejectment by a purchaser from the guardian *ad litem* : (32) 19 A. I. R. 1932 Bom. 23, *Not approved*; *Case law considered.* [P 58 C 2; P 59 C 1, 2]

*H. C. Coyajee and G. S. Gupte*—for Appellant.  
*A. G. Desai and Y. V. Dixit* — for Respondent  
(No. 1).



**Lokur J.**—This is an appeal against the decision of the First Class Subordinate Judge at Dhulia dismissing the plaintiff's suit to recover vacant possession of a land purchased by him from a Mahomedan widow and her minor daughter. The land originally belonged to one Abdul Rahiman who mortgaged it to the plaintiff and died leaving a widow Sugarabi and a minor daughter Nyamatbi. After his death the plaintiff obtained a decree on the mortgage against Sugarabi and Nyamatbi, and in execution of the decree in darkhast No. 178 of 1939 the papers were transferred to the Collector for sale of the mortgaged land. Sugarabi having refused to act as the guardian of her minor daughter Nyamatbi, the Nazir of the Court was appointed as her guardian *ad litem* in the darkhast proceedings. Before the sale was held by the Collector, the parties came to a compromise and Sugarabi made an application to the Court that she had agreed to sell the mortgaged land to the plaintiff (decree-holder) for Rs. 25,000 in full satisfaction of the decree, that she was willing to act as her minor daughter's guardian *ad litem*, that she should be appointed as such in place of the Nazir of the Court, that the arrangement was for the benefit of the minor, that permission should be granted to her under O. 32, R. 7, Civil P. C., to effect the compromise on behalf of the minor and that the proceedings should be recalled from the Collector. The application was granted on 22nd September 1941. On 26th September 1941, Sugarabi executed a sale-deed on behalf of herself and as the guardian of her minor daughter, conveying the land in suit to the plaintiff for Rs. 25,000. After the deed was registered, the plaintiff informed the Court that the decree was satisfied by the sale-deed, and on 14th October 1941, the darkhast was disposed of with a note that the decree under execution had been fully satisfied. The plaintiff then filed this suit against the defendants who were claiming to be in possession as lessees. On the pleadings twelve issues were raised in the lower Court, but the suit was dismissed on the ground that Sugarabi was neither the legal nor the certificated guardian of her minor daughter and the sale-deed passed by her was therefore void.

It is now urged by Mr. Coyajee for the plaintiff that the sale being voidable at the instance of the minor, it is not open to the defendants to impeach its validity and that in any case the leave granted by the executing Court under O. 32, R. 7, Civil P. C.,

was sufficient to clothe Sugarabi with power to sell the land as the guardian of her minor daughter. It is now well settled by the decision of the Privy Council in 39 I. A. 49<sup>1</sup> that under the Mahomedan law a person who has charge of the person or property of a minor without being his legal guardian, and who may, therefore, be conveniently called a *de facto* guardian, has no power to alienate the minor's immovable property and that a Mahomedan mother is entitled to the custody of the person of her minor child but is not the natural guardian and has no higher powers to deal with her minor child's property than any outsider who happens to have charge of the minor for the time being. The leave to compromise given to Sugarabi by the executing Court and her appointment by that Court as the guardian *ad litem* of her minor daughter did not make her the guardian of the minor's property. The leave under O. 32, R. 7, Civil P. C., merely approved of the proposed compromise as beneficial to the minor and authorised the guardian *ad litem* to give effect to it. If that compromise included the transfer of the minor's immovable property, then that transfer must be effected according to law. Sugarabi had to be appointed a guardian of the minor's property under the Guardians and Wards Act before she could have any authority to deal with the minor's immovable property. The leave granted by the executing Court under O. 32, R. 7, may be sufficient to enable the District Court to sanction the sale under S. 29, Guardians and Wards Act, after she got herself appointed as the guardian of the minor's property. Until such appointment, she, as the guardian *ad litem* in the execution proceedings, is in no better position than a *de facto* guardian for the purpose of selling the minor's immovable property. Mr. Coyajee relies upon the ruling in 35 C.L.J. 206,<sup>2</sup> where a lease for a term of seven years given by the certificated guardian of a minor in accordance with a compromise in a suit entered into with the sanction of the Court was held to be valid without the sanction of the District Judge under S. 29, Guardians and Wards Act. But in that case the lease was effected by a guardian who had been appointed by the District Court and had, therefore, power to deal with the minor's immovable property. The only question there was whether after

1. ('12) 34 All. 213 : 39 I. A. 49 : 13 I. C. 976 : 15 O. C. 49 (P.C.), *Mata Din v. Ahmad Ali*.

2. ('22) 35 C. L. J. 206 : 68 I. C. 997, *Abdur v. Khandkar*.



the Court held the lease to be for the benefit of the minor and gave leave to the guardian *ad litem* to effect it under O. 32, R. 7, Civil P. C., a further permission of the District Court which had appointed the mother as the guardian was required to be taken under S. 29, and it was held that as the lease had been made in accordance with the compromise and had been duly sanctioned as being for the benefit of the minor, no further sanction under S. 29, Guardians and Wards Act, was necessary. But in the present case Sugarabi was not a certificated guardian, and, therefore, had no power whatever to deal with her minor daughter's property. Had she been appointed as a guardian of the property of her minor daughter by the District Court under the Guardians and Wards Act, then it would not have been necessary for her to take a further permission to carry out the terms of the compromise under S. 29 of that Act. As she had no such power to deal with her daughter's property, the sale cannot be binding on the minor. If, however, such a sale is voidable at the option of the minor, and the minor has not avoided it, then the defendants would not be entitled to challenge its validity. But in our opinion the sale is void and not merely voidable. This question was raised in 39 I. A. 49<sup>1</sup> but was left open. Lord Robson who delivered the judgment in that case observed (p. 55) :

"There has been much argument in this case in the Courts below, and before their Lordships, as to whether, according to Mahomedan law, a sale by a *de facto* guardian, if made of necessity, or for the payment of an ancestral debt affecting the minor's property, and if beneficial to the minor, is altogether void or merely voidable. It is not necessary to decide that question in this case."

The question again arose before the Privy Council in 45 I. A. 73,<sup>3</sup> and after reviewing several cases, their Lordships proceeded to consider the three propositions laid down in 37 Mad. 514.<sup>4</sup> The one with which we are concerned is the third proposition, viz., that "dealings by a *de facto* guardian are neither void nor voidable, but are 'suspended' until the minor on attaining majority exercises his option of either ratifying the transaction or disavowing it." Dealing with this proposition, their Lordships, after quoting extracts from Hedaya, Fatawai Alamgiri, and Majma-ul-Anhar, observed as follows (p. 90):

"In their Lordships' opinion the Hanafi doctrine relating to a sale by an unauthorised person re-

maining dependent on the sanction of the owner refers to a case where such owner is *sui juris*, possessed of the capacity to give the necessary sanction and to make the transaction operative. They do not find any reference in these doctrines relating to *fazuli* sales, so far as they appear in the Hedaya or the Fatawai Alamgiri, to dealings with the property of minors by persons who happen to have charge of the infants and their property — in other words, the *de facto* guardians."

"The Hanafi doctrine about *fazuli* sales appears clearly to be based on the analogy of an agent who acts in a particular matter without authority, but whose act is subsequently adopted or ratified by the principal which has the effect of validating it from its inception. The idea of agency in relation to an infant is as foreign, their Lordships conceive, to Mahomedan law as to every other system."

Their Lordships then cited a passage from the "Book on Pledges" (*Kitab-ur-Rahn*) of the Fatawai Alamgiri, which says (p. 92) :

"the mother : if she pledges (mortgages) the property of her infant child, it is not lawful, unless she be the executrix [of the father] or be authorised therefor by the guardian of the minor; or the Judge should grant her permission to pledge the infant's property. Then it is lawful ;"

Their Lordships observed that the power to sell could not be wider than the power to mortgage. After a consideration of various texts and rulings their Lordships concluded (p. 92) :

"For the foregoing considerations their Lordships are of opinion that under the Mahomedan law a person who has charge of the person or property of a minor without being his legal guardian, and who may, therefore, be conveniently called a '*de facto* guardian,' has no power to convey to another any right or interest in immovable property which the transferee can enforce against the infant; nor can such transferee, if let into possession of the property under such unauthorised transfer, resist an action in ejectment on behalf of the infant as a trespasser."

From this Mr. Coyajee argues that it is only the infant who can resist the transferee's action for ejectment. But their Lordships did not stop short at that, but further observed (p. 93) :

"It follows that, being himself without title, he cannot seek to recover property in the possession of another equally without title."

This leaves no doubt that even a stranger who is himself a trespasser can resist an action in ejectment by a purchaser from an unauthorised person like the mother of a Mahomedan infant. Their Lordships thus held such a transfer to be absolutely void and not merely voidable. After this decision of the Privy Council the Madras High Court also has held such sales to be void: A.I.R. 1933 Mad. 806<sup>5</sup> and A. I. R. 1935 Mad. 1059.<sup>6</sup> A Full Bench of the Allahabad High Court has

3. (18) 5 A. I. R. 1918 P. C. 11 : 45 Cal. 878 : 45 I. A. 73 : 47 I. C. 513 (P.C.), *Imambandi v. Mutsaddi*.

4. (14) 1 A. I. R. 1914 Mad. 495 : 37 Mad. 514 : 15 I. C. 576, *Aderman Kutti v. Sayed Ali*.

5. (33) 20 A. I. R. 1933 Mad. 806 : 147 I.C. 83, *Kannusami Chetti v. Rabiath Ammal*.

6. (35) 22 A.I.R. 1935 Mad. 1059 : 159 I.C. 1021 *Moideen v. Kunhalikutti*.



also taken the same view and held in I.L.R. (1937) ALL. 195<sup>7</sup> that a transaction amounting to an alienation of immovable property belonging to a Mahomedan minor by his de facto guardian is void and as such there can be no question of ratification of the transaction by the minor upon his attaining majority. Mr. Coyajee has drawn our attention to the following remark made by Madgavkar J., (sitting alone) in 33 Bom. L.R. 603<sup>8</sup> (p. 606) :

"A Mahomedan mother has no power to alienate the immovable property of the son : 45 I. A. 73.<sup>3</sup> At the same time, the previous case law and even the observations of the Privy Council in that case show that it is not a transaction forbidden by law and void in that sense but rather one outside the powers of the mother though it may be justified by cases of extreme necessity, as appears from the observations of Mr. Ameer Ali in the same case."

This observation was really unnecessary for the decision of that case as it was decided against the minor on the ground of adverse possession for more than twelve years. With respect, we think that the observation is not justified by what has been said by Mr. Ameer Ali in delivering the judgment of the Privy Council in 45 I. A. 73.<sup>3</sup> Madgavkar J. has not referred to the particular observations of Mr. Ameer Ali from which he has arrived at his conclusion. On the other hand, in Mr. Ameer Ali's valuable book on Mahomedan Law, Vol. 2, Edn. 5, 1929, at p. 543, the learned author has referred to the judgment of the Privy Council delivered by himself and observed :

"A mother is not a natural guardian. The extent of her powers has been discussed by the Judicial Committee in 45 I. A. 73<sup>3</sup> and the principle governing her acts clearly explained. Unless she is appointed by the father as the guardian of his minor children's estate, or is so appointed by the Judge, she has no power to intermeddle with their immovable property (*akar*). All her dealings with *akar* are *ipso facto* void."

It must, therefore, be held that the sale of the share of Nyamatbi in the land in suit by Sugarabi is void and the plaintiff has not acquired any title to that share by the sale-deed taken by him from Sugarabi. This finding, however, does not dispose of the plaintiff's claim altogether. The lower Court, with manifest hurry, dismissed the suit wholly without deciding the other issues. The minor Nyamatbi was not the sole owner of the land in suit and on issue 2 the lower Court has recorded a finding that Sugarabi has a two annas share in the land. It has, however, given no reason for that finding. If Sugarabi and Nyamatbi are the only

heirs of Abdul Rahiman, then in addition to two annas share as a sharer, Sugarabi would be entitled to something more by "return." The lower Court has given no reason why the plaintiff is not entitled to Sugarabi's share in the land, though the minor's share may not be affected by the sale-deed. Sugarabi's share has, therefore, to be determined correctly and appropriate relief granted to the plaintiff in respect of that share, if he succeeds on the remaining issues. For this purpose the case has to be sent back to the lower Court.

It is unfortunate that having taken a sale-deed for Rs. 25,000 in good faith after obtaining the leave of the executing Court under O. 32, R. 7, Civil P. C., and after allowing his decree to be certified as fully satisfied and the *darkhast* to be disposed of, the plaintiff has to lose a major portion of the land by reason of his not getting correct legal advice regarding a Mahomedan mother's power to dispose of her minor daughter's property. But we feel no doubt regarding the legal position and cannot allow sympathy to defeat the law. The appeal is partially allowed. The decree of the lower Court is set aside. The finding of the lower Court on the second part of issue 2 that Sugarabi has only a two annas share in the land in suit and the finding on issues 7 and 11 are set aside. The other findings recorded by the lower Court are maintained and the suit is remanded to the lower Court for determining whether and what relief the plaintiff is entitled to in respect of Sugarabi's share and for passing a fresh decree in the light of this judgment, after deciding all the other necessary issues. Both the parties are at liberty to adduce further evidence. The appellant shall pay three-fourths of the costs of the respondents in this Court and bear his own.

R.K.

*Case remanded.*

[Case No. 14.]

**A. I. R. (33) 1946 Bombay 60**

KANIA AND CHAGLA JJ.

*Killick Nixon & Co. — Assessee*  
v.*Commissioner of Income-tax.*

Income-tax Reference No. 27 of 1944, Decided on 28th March 1945, made by the Income-tax Appellate Tribunal, Bombay.

Excess Profits Tax Act (1940), S. 6, Sch. 1, Rr. 1 and 5—Object of—Computation of excess profit — Standard profits how to be calculated explained — Increase in capital income how to be arrived at, stated.

7. (36) 23 A. I. R. 1936 All. 837 : I. L. R. (1937) All. 195 : 166 I.C. 61 (F.B.), *Anto v. Reoti Kuar*.

8. (32) 19 A.I.R. 1932 Bom. 23 : 134 I.C. 366 : 33 Bom. L. R. 603, *Shidlingava v. Rajava*.



The object of the Excess Profits Tax Act is to tax the excess profits over the standard profits. The scheme of S. 6 is to compare the average amount of capital during the standard period with the average amount of capital during the chargeable accounting period, and make adjustments in the standard profits on the footing of the increase in the capital during the chargeable accounting period. For this purpose two figures only are relevant and they are the average amount of capital for the standard period and not the amount of capital ascertained as in use on the last date of the standard period. The object of Sch. 2, as found in the definition of the average amount of capital and the heading of the schedule, is to prescribe rules for computing the average amount of capital. If R. 2 alone existed, all borrowings will have to be excluded. By virtue of R. 5 of Sch. 1, the Legislature has, however, provided that borrowings from banks of the type mentioned in the rule and in the shape of debentures issued to the public, should not be excluded in arriving at the average amount of capital for the chargeable accounting period. The opening words of R. 5 of Sch. 1 deal with the increase contemplated after the closure of the standard period. It does not deal with the question of amount at all. The word "increase" necessarily means "more than", but the answer to the question "more than what" is not found in R. 5 of Sch. 1. The natural reading of R. 5 is that the Legislature had granted a certain privilege to the assessee, who had increased his capital after the standard period had come to an end. The interest, which is mentioned in the first part of R. 5 is to be calculated not as at the end of the year but on the borrowings throughout the year. The interest paid by the assessee in respect of that portion of the increased capital (which consists of borrowings from the banks mentioned in the rule and the debentures) has to be retained on the debit side and not excluded as it would have to be done if the borrowings were totally excluded. There is nothing inconsistent in the first and second part of R. 5. The plain meaning of Sch. 1, R. 1 is that the profits of a business shall be computed according to S. 10, Income-tax Act, 1922, but subject to the rules which are found in the schedule. [P 62 C 2; P 63 C 1, 2]

*Sir Jamshedji Kanga and R. J. Kolah—*  
for Assessee.  
*M. C. Setalvad and G. N. Joshi —*  
for Commissioner.

**Kania J.** — This is a reference made by the income-tax appellate tribunal under S. 66 (1), Income-tax Act, and the question referred for our opinion is in these terms :

"Whether, in the circumstances of the case, the profits of the assessee company liable to excess profits tax have been rightly computed by taking into account the average of the bank overdraft and debenture loans during the standard period, viz., Rs. 12,31,008, under R. 5, Sch. 1, read with S. 6, Excess Profits Tax Act?"

The question appears to have come for consideration by the Tribunal in respect of three charging periods, namely, from 1st September 1939 to 31st December 1939 and the calendar years 1940 and 1941. In the statement of case it is observed that the agreed facts are as follows :

The average of the bank overdraft and debentures for the standard period ... Rs. 12,31,008  
Total of the bank overdraft and the debentures loan on the last date of the standard period, i.e., 31st December 1938, is ... Rs. 5,29,313  
Average of the bank overdraft and debenture loans for the 1st chargeable accounting period (1st September 1939 to 31st December 1939) ... Rs. 10,61,661  
Average of the bank overdraft and debenture loans for the 2nd chargeable accounting period (1st January 1940 to 31st December 1940) ... Rs. 19,18,586  
Average of the bank overdraft and debenture loans for the 3rd chargeable accounting period (1st January 1941 to 31st December 1941) ... Rs. 48,58,880

The rival contentions are these. The assessee contends that under S. 6, Excess Profits Tax Act, the taxing authorities have to ascertain the average amount of capital and the profits during the standard period. The taxing authorities have also to ascertain the average amount of capital during the chargeable accounting period and make adjustment of the standard profit according to the increased capital employed by it (the assessee) in the chargeable accounting period. In order to do so, the taxing authorities must take the capital as it existed on the last day of the standard period and work out the increase in capital over that figure. To support this line of reasoning, the assessee relies on Sch. 1, R. 5, and Sch. 2, R. 2, read with the opening words of Sch. 1, R. 1. It is argued that the increase in capital has to be computed only having regard to the rules found in the schedule and not in the sections of the Act. The contention on behalf of the Commissioner is that the scheme of the Excess Profits Tax Act must be seen first. The object is to tax the excess profits. The first question is, excess over what? The answer clearly is, over the standard profit. The first step, therefore, is to ascertain what is the standard profit. Ordinarily it is not difficult to find that. The next step is to ascertain the profit during the accounting period. That is not also difficult ordinarily to find. The two figures having been thus ascertained, the assessee would contend that the profits in



the chargeable accounting period, although more, are largely attributed to the fact that there was an increase in capital. Therefore, in order to compare the standard profit, you must take the average amount of capital during the standard period and the average amount of capital during the chargeable accounting period. That is what is provided by Proviso 1 to S. 6 (1), Excess Profits Tax Act. That proviso enables the authorities to make adjustments, and if it is found that the average amount of capital during the chargeable accounting period is more than the average amount of capital during the standard period, the standard profit is increased by a statutory percentage. It is, therefore, argued on behalf of the Commissioner that when the assessee contends that his average amount of capital during the chargeable accounting period was more, one has to turn to the schedule to find out if the contention is true; and if so, to what extent. Section 2, sub-s. (3), defines "average amount of capital" as the average amount of capital employed in any business as computed in accordance with Sch. 2. Section 2, sub-s. (19), defines "profits" as profits determined in accordance with Sch. 1. In order, therefore, to determine what is the average amount of capital during the chargeable accounting period, one must turn first to Sch. 2. Amongst other rules, the relevant portion of R. 2 of Sch. 2 is in these terms: "Any borrowed money and debt shall be deducted. . . ." Therefore, if this rule stood by itself, in ascertaining the increased capital, if any borrowings were found, they must be excluded. But the assessee in that event would contend that provision is made in Sch. 1 in respect of certain class of borrowings, and if these borrowings fell under that class, such borrowings cannot be excluded. It is, therefore, next necessary to turn to Sch. 1, R. 5, which deals with this argument. That rule runs as follows:

"If at any time after the close of the standard period, any increase in the capital employed in a business has been effected by means of a loan from a bank carrying on a bona fide banking business, or by means of a public issue of debentures secured on the property of the company, the interest on so much of the loan or debentures as has been utilised in effecting the increase in the capital shall not be deducted in computing the profits for the purposes of excess profits tax and, notwithstanding the provisions of R. 2 of Sch. 2, that amount of such loan or debentures shall not be deducted in arriving at the amount of the capital employed in the business."

It is argued that if the assessee is thus able to show that the borrowings consist of loans

from such a bank or by the public issue of debentures, so as to fall within the words of R. 5, such borrowings should not be excluded in computing the average amount of capital for the chargeable accounting period. Having thus computed the average amount of capital for the chargeable period, a comparison must be made, as provided by S. 6, and the standard profit increased or decreased by the statutory percentage. That is the scheme of the Act. It is contended that this view creates no complications and makes R. 5 perfectly intelligible. The argument of the assessee against these contentions is that S. 6 is quite independent and has nothing to do with R. 5 of Sch. 1. The contention is that having regard to the opening words of R. 5 the amount of capital of the standard period should be ascertained as of the last date of that period and would include the borrowings from banks on the last date. That should be accepted as the figure over which the increase in the chargeable accounting period should be considered.

In my opinion the contention of the Commissioner is correct. The object of the Excess Profits Tax Act is to tax the excess profits over the standard profits. The scheme of S. 6 is to compare the average amount of capital during the standard period with the average amount of capital during the chargeable accounting period, and make adjustments in the standard profits on the footing of the increase in the capital during the chargeable accounting period. For this purpose two figures only are relevant and they are the average amount of capital for the standard period and not the amount of capital ascertained as in use on the last date of the standard period. The object of Sch. 2, as found in the definition of the average amount of capital and the heading of the schedule, is to prescribe rules for computing the average amount of capital. If R. 2 alone existed, all borrowings will have to be excluded. By virtue of R. 5 of Sch. 1, the Legislature has, however, provided that borrowings from banks of the type mentioned in the rule and in the shape of debentures issued to the public, should not be excluded in arriving at the average amount of capital for the chargeable accounting period. In respect of the increase of capital there will thus arise two questions: (1) increase over what sum and (2) increase as compared to what date or period?

The opening words of R. 5 of Sch. 1 deal with the last question, namely, that the in-



crease mentioned therein is the increase contemplated after the closure of the standard period. It does not deal with the question of amount at all. The word "increase" necessarily means "more than", but the answer to the question "more than what" is not found in R. 5 of Sch. 1. It is argued on behalf of the assessee that the words "after the close" in R. 5 would be useless if that interpretation is given to the rule. I do not think so. When the Legislature uses the word 'period', it must describe the termination of the period, as at the close. It cannot state the date. This is obvious because individual assesseees may select different periods for their assessment. Moreover the ascertaining of the exact amount of capital (and not the average amount) in use at the end of the standard period is not material for any purpose of the Act whatsoever. It is contended that it is material for the purpose of R. 5 itself. I do not agree. The natural reading of R. 5 is that the Legislature had granted a certain privilege to the assessee, who had increased his capital after the standard period had come to an end. It is argued that interest, which is mentioned in the first part of R. 5, must be calculated as at the end of the year. I do not see why it should be so done. It must be on the borrowings throughout the year. The interest paid by the assessee in respect of that portion of the increased capital (which consists of borrowings from the banks mentioned in the rule and the debentures) has to be retained on the debit side and not excluded as it would have to be done if the borrowings were totally excluded. In my opinion there is nothing inconsistent in the first and second part of R. 5. It is true that better drafting might have provided for the non-exclusion of such borrowings in computing the average amount of capital for the chargeable accounting period in a rule in Sch. 2. However, as Sch. 1 is framed for computation of profits, R. 5 is not completely out of place because in computing the profits, the increase or decrease of capital has to be considered, and on the ascertainment of that the statutory percentage to the standard profit has to be applied.

The argument that R. 1 of Sch. 1 provides that the computation of capital has to be according to the schedule is not a proper reading of R. 1 at all. The rule says that the profits of a business during the standard period, or during any chargeable accounting period, shall be separately computed, and shall, subject to the provisions of the schedule, be computed on the principles on which

the profits of a business are computed for the purposes of income-tax under S. 10, Income-tax Act, 1922. The plain meaning of that rule is that the profits of a business shall be computed according to S. 10, Income-tax Act, 1922, but subject to the rules which are found in the schedule. It is, therefore, not correct to say that no reference should be made to the Income-tax Act to ascertain the profits under the Excess Profits Tax Act. In my opinion, the conclusion arrived at by the Tribunal is correct, and the answer to the question is in the affirmative. The assessee to pay the costs of the reference.

**Chagla J.** — The construction of R. 5 is not free from difficulty, and it is not without some hesitation that I have arrived at the same conclusion as my learned brother. It is our duty to give effect to the plain language of the rule. We are not concerned with the intention of the Legislature or what result the Legislature might have aimed at; but in construing the rule, we must try and avoid patent absurdities and incongruities and, as far as possible, give a construction to the rule as would fit it in the general scheme of the Act. Schedule 1 deals with rules for the computation of profits for purposes of excess profits tax; and Sch. 2 deals with rules for computing the average amount of capital. But if R. 5 of Sch. 1 was confined to dealing with the interest which had to be paid by an assessee on the loans borrowed from a bank or on debentures, then I should have been strongly inclined to favour the construction put upon the rule by Sir Jamshedji Kanga. Logically R. 5 should have been confined to that only because the schedule, as I have pointed out, deals with computation of profits; and what the first part of R. 5 says is that when you compute profits, if there is an increase in the capital effected by means of loans from banks or debentures at any time after the close of the standard period, then you must not deduct from those profits the interest which you have to pay on such loans or debentures. But R. 5 does not stop there. It goes on to deal with a subject which should logically have been dealt with in Sch. 2 either under R. 2 itself or under any other appropriate rule; and the second part of R. 5 says that notwithstanding the provisions of R. 2 of Sch. 2 the increased amount of loan or debentures shall not be deducted in arriving at the amount of the capital employed in the business. Now this portion of the rule undoubtedly refers to the capital employed



in the business during the chargeable accounting period. But one cannot take the average of the capital used in the chargeable accounting period and compare it with the moneys borrowed from a bank or on debentures at one fixed point of time in the standard period. Such a construction would lead to absurdities and incongruities and, therefore, on the whole I think the construction suggested by Mr. Setalvad on behalf of the Commissioner is more consistent with the general scheme of the Act. I, therefore, agree that the question should be answered as suggested by my learned brother.

R.K.

*Reference answered.*

[Case No. 15.]

**A. I. R. (33) 1946 Bombay 64****CHAGLA J.***Keshav Ramchandra — Applicant*

v.

*Municipal Borough, Jalgaon and others — Opponents.*

Civil Revn. Appln. No. 256 of 1944, Decided on 22nd February 1945.

Civil P. C. (1908), S. 115 — No revision lies against order of Judge acting under S. 15, Bombay Municipal Boroughs Act (1925).

A Judge acting under S. 15, Bombay Municipal Boroughs Act, is not a Court but a *persona designata*, and the High Court has, therefore, no jurisdiction to revise his order under S. 115, Civil P. C., or to correct any mistake committed by him whether he exercises jurisdiction not vested in him or fails to exercise jurisdiction vested in him or acts with material irregularity in the exercise of his jurisdiction: ('44) 31 A.I.R. 1944 Bom. 203, *Dissent*. [P 64 C 1, 2]

Y. V. Dixit — for Applicant.

G. S. Gupte; S. G. Patwardhan; and B. N. Gokhale — for Opponents (Nos. 1; 2; and 3 and 4, respectively).

**Order.**—The petitioner is a defeated candidate at an election held on 26th April 1943 for the Municipal Borough, Jalgaon. On 7th May 1943 he applied under S. 15, Bombay Municipal Boroughs Act, 1925, questioning the validity of the election on several grounds and praying that the election might be set aside. The learned Assistant Judge, Jalgaon, heard the application, and on 28th February 1944 he dismissed it holding that the result of the election had not been materially affected. It is from this order of the learned Assistant Judge that this revisional application has been preferred.

It is contended by both Mr. Gupte and Mr. Gokhale that the application is not maintainable. Now it is conceded by Mr. Dixit that the learned Assistant Judge of Jalgaon is a *persona designata* under the Bombay Municipal Boroughs Act, 1925, for the purpose of deciding election disputes. I

fail to see how if the learned Judge is a *persona designata* the High Court can exercise any revisional powers. Section 115, Civil P. C., in terms refers only to Courts subordinate to the High Court in respect of which revisional powers of the High Court can be exercised. Mr. Dixit says that the learned Assistant Judge has failed to exercise the jurisdiction vested in him under the Act. Be that as it may, this Court has no jurisdiction to correct any mistake committed by a *persona designata* whether he exercises jurisdiction not vested in him or fails to exercise jurisdiction vested in him or acts with material irregularity in the exercise of his jurisdiction. The applicant may have other remedies to get his wrongs redressed. But as far as the High Court's revisional powers are concerned under S. 115 of the Code, as I have already observed, they can only be exercised against a Court subordinate to the High Court.

My attention has been drawn to a judgment of Macklin J. in 46 Bom. L. R. 371.<sup>1</sup> The learned Judge held in that case that the High Court can exercise its powers of revision in a case in which the Judge though acting as a *persona designata* goes beyond the powers given to him by the Legislature. With great respect to the learned Judge, I do not find it possible to agree with that view of the law. Ordinarily I should have found myself bound by a decision of a Single Judge. But there is a judgment of the Divisional Bench of this Court in 35 Bom. L. R. 89<sup>2</sup> following 21 Bom. 279<sup>3</sup> and 28 Bom. L. R. 519,<sup>4</sup> where Murphy and Nanavati JJ. held that a Judge acting under S. 15, Bombay Municipal Boroughs Act, 1925, is not a Court but a *persona designata*, and the High Court has, therefore, no jurisdiction to revise his order under S. 115, Civil P. C. Once that principle is accepted, it makes no difference what the nature of the order made by the *persona designata* is. It is impossible to distinguish one order from another. Whether the order is without jurisdiction or in excess of jurisdiction, it is not for the High Court to correct that order. I, therefore, discharge the rule with costs.

R.K.

*Rule discharged.*

1. ('44) 31 A.I.R. 1944 Bom. 203 : 214 I. C. 111 : 46 Bom. L. R. 371, Hifzurrahman Ansarsaheb v. Hasansahab Abansahab.
2. ('33) 20 A.I.R. 1933 Bom. 105 : 142 I. C. 378 : 35 Bom. L. R. 89, Jagmohan v. Venkatesh.
3. (97) 21 Bom. 279, Balaji Sakham v. Merwanji.
4. ('26) 13 A.I.R. 1926 Bom. 344 : 50 Bom. 357 : 94 I. C. 660 : 28 Bom. L. R. 519, Gangadhar v. Hubli Municipality.



[Case No. 16.]

**A. I. R. (33) 1946 Bombay 65**

BHAGWATI J.

*In re Dhruvarajsing Vishwanathsing.*

Criminal Petn., Decided on 5th May 1945.

(a) Defence of India Rules (1939), R. 129—Police officer having suspicions need not arrest detenu personally—Important thing is decision to arrest, actual arrest is merely execution of such decision.

No doubt according to the true construction of R. 129 (1), the officer who is empowered to arrest the detenu is one who entertains a reasonable suspicion that the detenu has acted in a manner prejudicial to the public safety or to the efficient prosecution of war, but it is not necessary that the police officer should effect the arrest of the detenu personally. If the conditions which invested him with the power to arrest the detenu are fulfilled, viz., that he reasonably suspects the detenu of having acted in a manner prejudicial to the public safety or to the efficient prosecution of war, he has the power to arrest the detenu without a warrant. The person who determines whether the detenu should be arrested is the police officer who is thus vested with the power on those conditions being fulfilled, but the physical act of arrest need not be necessarily done by that officer. He may arm his subordinate with the authority to effect the arrest on his behalf. The subordinate actually effecting the physical arrest of the detenu would thus be the mere instrument of carrying the resolution of the officer in execution. What is important is the decision arrived at by the officer to arrest the detenu without a warrant. He may issue a warrant or he may not issue one. If he chooses to issue a warrant, then it is his own hand that signs it, and the person who executes the warrant is merely the instrument for the purpose of effecting the physical arrest. If he does not choose to sign the warrant, it is nonetheless his decision and his order which is communicated to the person who actually effects the physical arrest of the detenu.

[P 70 C 2; P 71 C 1]

(b) Legislation — Liberty of subject can be encroached upon since individual liberty must give way to national safety.

The liberty of the subject is in existence in so far as it is sanctioned and controlled by law. The Legislature has full power to enact measures which would encroach upon the liberties of the subject. By proper enactments in that behalf the Legislature can deprive a subject of his liberty of person or his rights of property and various other liberties which are his priceless treasures. The realm of law is supreme; *salus populi est suprema lex*. All individual liberty must give way to consideration of national safety. Even though the liberty of the subject has got to be jealously preserved, Legislature is supreme, and if Legislature enacts certain provisions which have the effect of curtailing the liberties of the subject, the subject has to submit to such encroachments.

[P 76 C 1, 2]

(c) Interpretation of statutes — Emergency legislation—If only one meaning not possible, construction supporting object and intentment of legislation should be adopted though strained or unnatural.

In an emergency legislation if the words used are capable of only one meaning, the Court should

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not go out of their way to adopt an unnatural or a strained meaning from what may be presumed to be the object and intentment of the particular piece of legislation, because encroachment on the liberty of the subject is countenanced only in so far as the same is warranted by the strict letter of the law. If, however, the words used are capable of more than one meaning, the Courts should lean while construing the emergency legislation towards a construction which supports rather than defeats the object and the intentment of the emergency legislation and should even adopt a construction which might appear strained or unnatural in times of peace though quite appropriate and suitable to the occasion when emergency powers are sought to be granted to particular individuals in times of great national emergency. However irresponsible the executive might be, whatever excesses the executive might commit, howsoever atrocious their conduct in particular cases may be, looked at from one point of view, one has only got to look to the four corners of the particular piece of legislation in order to see what are the powers vested in the executive or the police officers. If the powers that are vested in them are such as encroach upon the liberties of the subject, the law is there and has got to be administered by the Courts irrespective of whether such wide and absolute powers which are vested in the executive or police officers are liable to be abused or not. If the executive or the police officers act within the strict letter of the law and within the scope of the powers which have been given to them under R. 129 (1), there cannot be any question of impeaching the exercise of those powers by them.

[P 77 C 1, 2; P 78 C 1]

(d) Defence of India Rules (1939), R. 129—Action of officer can be impeached if he acts with ulterior purpose since the act would be fraud upon Defence of India Act and Rules—But if materials exist on which he entertains reasonable suspicion, Court has no jurisdiction to challenge detention

Where the executive officer or police officer has purported to act under R. 129 (1) his action is liable to be impeached. In cases where the executive officer or the police officer though purporting to act under R. 129 (1) really acts with ulterior purposes, not in furtherance of the objects which are prescribed in the preamble of the Defence of India Act and in S. 2 thereof as elaborated in R. 129 (1) the action of the executive officer or the police officer concerned would be outside the scope of that provision, would be a fraud upon the Act and the Rules framed thereunder, would be wrongful and mala fide and would certainly be liable to be impeached: 1942 A. C. 206; ('45) 32 A. I. R. 1945 Nag. 8; ('46) 33 A. I. R. 1946 Bom. 32 and ('44) 31 A. I. R. 1944 Lah. 373, *Rel. on*.

[P 80 C 1]

But once it is brought to the notice of the Court that the officer concerned had materials or information before him on a consideration of which he came to the conclusion that there was ground for entertaining reasonable suspicion about the detenu within the meaning of R. 129 (1), it would not be possible to challenge the apprehension and detention of the detenu. The reasonable suspicion which the police officer entertains or has entertained as a condition precedent to the exercise of that power need not be an objective fact and a subjective fact merely is sufficient.

[P 72 C 1]

P 79 C 2; P 80 C 1; P 81 C 1]

(e) Defence of India Rules (1939), R. 129—"Reasonably" in R. 129 explained—If it can



be shown that officer is acting arbitrarily or capriciously, he acts outside scope of R. 129—Whether suspicion is reasonable and whether grounds for same are sufficient is to be determined by the officer and not by Court.

The use of the word "reasonably" in R. 129 as contrasted with the absence thereof in R. 26 does not make any difference. The words "reasonably suspects" are used in R. 129 (1) with a view to connote the state of mind of the officer concerned, of which state of mind he is the sole judge. It is left to his sole discretion as to whether the grounds on which he entertained the suspicion about the conduct of the detenu were in fact in existence and whether the same grounds did constitute reasonable grounds for suspecting the detenu of having acted in a manner prejudicial to the public safety or to the efficient prosecution of war, the only difference is that if it could be demonstrated before the Court in the event of the arrest and detention of the detenu by the officer concerned in exercise of the powers vested in him under R. 129 (1) that the officer concerned arbitrarily or capriciously or dishonestly suspected the detenu of having acted in a manner prejudicial to the public safety or to the efficient prosecution of war, the officer would be acting outside the powers vested in him under R. 129 (1) much more so if it could be demonstrated that he used those powers for purposes extraneous to the purpose for which he was invested with the same or exercised those powers with ulterior or indirect motives because in that event it would be a fraud on the provisions of the Defence of India Act and the Defence of India Rules framed thereunder. In the matter of the exercise of the powers vested in the executive officer or the police officer under R. 129 (1) the question whether there are sufficient grounds or materials in fact which would enable the officer concerned to entertain a suspicion about the conduct of the detenu and whether the suspicion entertained by the officer concerned on those grounds or materials is a reasonable one or not falls to be determined by the officer concerned and not by the Court before which the order of the officer concerned might be challenged by the detenu on proceedings taken in that behalf. [P 81 C 2; P 82 C 1]

(f) Defence of India Rules (1939), Rr. 129 and 26—Allegations in affidavit on behalf of detenu not traversed in affidavit by officer concerned—Allegations in affidavit of detenu are presumed to be correct.

Where an order made by an officer concerned under R. 129 (1) is challenged before the Court, the Court is entitled to presume the correctness of the allegations contained in the affidavit made by the detenu and is entitled to act as if these were the only materials before the officer concerned when he came to exercise powers vested in him under R. 129 (1) in the absence of any averment in the affidavit of the officer concerned that besides those materials which were set out in the affidavit made by the detenu he had materials before him which in his opinion were sufficient to enable him to entertain the reasonable suspicion that the detenu had acted in a manner prejudicial to the public safety or to the efficient prosecution of war. [P 84 C 2]

(g) Defence of India Rules (1939), R. 129—Order by Bombay Police Commissioner to detain person for handing him over to U. P. Police and consequent order of detention by Provincial Government are illegal.

An order of detention under R. 129 by order of the Commissioner of Police of Bombay with a view to arrest the detenu and transfer him within the jurisdiction of the U. P. Government is a fraud on the powers invested in the Commissioner of Police under R. 129 (1) and the same is illegal and hence under R. 129 the further detention of the detenu under the order of the Government of Bombay following upon such illegal detention of the detenu is illegal. [P 85 C 2]

(h) Defence of India Rules (1939), R. 129 sub-rr. (2) and (4)—Provincial Government is invested with powers to detain for two months.

Reading proviso (i) to sub-r. (2) and sub-r. (4) of R. 129 it should be concluded by necessary implication that the Provincial Government has been invested with the power of making such orders as to the temporary detention of the detenu as may be necessary in the opinion of the Provincial Government not exceeding a period of two months from the date of the arrest of the detenu pending the final orders to be made by the Government for the detention, release, or residence or any other matter concerning him as might appear to the Government in the circumstances of the case to be reasonable or necessary. [P 86 C 1, 2]

*D. B. Desai* — for Petitioner.

*C. K. Daphtary, Advocate-General and M. V. Desai* — for the Crown.

**Order.** — This is petition filed by one Talukdarsing Ramsumersing Kshatriya, the uncle of the detenu Dhruvarajising Vishwanathsing, under S. 491, Criminal P. C., 1898, for an order that the detenu who is at present detained in the Worli Temporary Prison be brought in person before this Court to be dealt with according to law and that he be set at liberty on the ground that the arrest of the detenu effected on 10th April 1945 and the subsequent detention of him was invalid and improper and was without lawful authority. The petitioner has urged in his petition that the detenu is a rent farmer (collector) of the Right Honourable Dr. M. R. Jayakar and has been in such employ since 1938, that the detenu is a member of the Hindu Maha Sabha, that the house of the detenu was searched by the police on 10th April 1945, but nothing incriminating was found from the said place by the police, that the detenu was to the petitioner's knowledge and belief not taking any part in the political movement and was a very peaceful and respectable person spending a peaceful life in the employ of the Right Honourable Dr. M. R. Jayakar and had not taken part in any prejudicial activities at any time, that the detenu had during his employment as aforesaid not gone to his native place Jaunpur, U. P., for the last many years except for a month or two to enjoy vacation and had not been to Jaunpur, U. P., since 1942 except for about four or five weeks in connection with his wedding which took



place sometime in November 1943. The petitioner submitted that the detention of the detenu under R. 129, Defence of India Rules, 1939, was not bona fide and was illegal, ultra vires and beyond the powers conferred by R. 129 or any other rule of the Defence of India Rules, that no order under cl. (a) or (b) of sub-r. (1) of R. 129, Defence of India Rules, was served on the detenu and therefore his detention was in any event illegal and without lawful authority. The petitioner further submitted that the said arrest was unlawful inasmuch as the police-officer arresting the detenu had not satisfied himself that the detenu was likely to act in a manner prejudicial to the public safety, the defence of India or to the efficient prosecution of war, that the said police officer had not carried out any personal investigation and had acted merely on instructions received by him and that therefore no question of his being satisfied as required by R. 129 about the conduct of the detenu could possibly arise. The petitioner further submitted that the application of R. 129 to the present case was misconceived and improper.

This petition was filed by the petitioner on 13th April 1945. The petitioner made an affidavit in support of the petition in common form. Before this petition was presented, a further affidavit was made by the petitioner on 16th April 1945, incorporating therein the statements as regards the police officer who arrested the detenu not having satisfied himself that the detenu had acted or was likely to act in a manner prejudicial to public safety, defence of India and efficient prosecution of war. This affidavit was evidently in support of the allegations which had been made by way of an amendment in the petition made on 16th April 1945, adding this as a further ground by reason of which it was alleged that the arrest of the detenu was unlawful. These allegations were the subject-matter of paragraph 9 (a) of the petition. The petition was presented on 16th April 1945 before Rajadhyaksha J., who granted a rule and stay order in terms of cl. (f) of the petition. The rule was made returnable on 24th April 1945, and was directed to be served on the Commissioner of Police and the Superintendent, Worli Temporary Prison. The rule came on for hearing before me on 26th April 1945 when the petitioner asked for leave to file his affidavit dated 24th April 1945 in rejoinder traversing the allegations which had been made by Balaram Shamrao Kothare, Superintendent of Police, Special Branch I,

C. I. D., on behalf of the Commissioner of Police, in his affidavit dated 23rd April 1945. The said affidavit of the petitioner, however, besides controverting the said allegations, made by Balaram averred certain new facts which were sought to be relied upon in support of the petition. These facts were set out in para. 2 of this affidavit and they were:

"I have now ascertained that the said Dhruvarajising Vishwanath was arrested at the instance of the Police authorities of the United Provinces who made a request to the Police authorities of Bombay to effect the arrest of the said Dhruvarajising Vishwanathsing. I have further ascertained that the Police authorities of the United Provinces wanted to arrest the said Dhruvarajising Vishwanathsing because the said Dhruvarajising Vishwanathsing helped in collecting funds for the families of the persons in the United Provinces detained in jail either as detenus or prisoners. The said Dhruvarajising Vishwanathsing belongs to the United Provinces and in helping the collection of funds as aforesaid he was actuated by humanitarian motives. The said funds were collected in Bombay and sent to the Honourable Babu Purshotamdas Tandon, the Speaker of the United Provinces Legislative Assembly. I submit that the said funds were raised for a lawful purpose, in a lawful manner and with lawful motives. I repeat that the said Dhruvarajising Vishwanathsing is not in any way connected or associated directly or indirectly to or with any political or subversive movement. Under the circumstances I submit that the Police authorities of the United Provinces in seeking the arrest of the said Dhruvarajising Vishwanathsing were not acting bona fide. I therefore submit that the arrest and detention of the said Dhruvarajising Vishwanathsing is mala fide and illegal."

On the application of Mr. D. B. Desai for the petitioner, I allowed him leave to file this affidavit containing these fresh materials and gave leave to the respondents to file an affidavit in rejoinder to the fresh facts stated in that affidavit if so advised. The rule was accordingly adjourned to 1st May 1945 for hearing and final disposal.

In his affidavit dated 23rd April 1945, Balaram had stated that he was attending to the matter relating to the detenu and the facts relating to the case and arrest were within his personal knowledge and that he had been authorised and directed by the Commissioner of Police, Bombay, to make that affidavit. He stated that the detenu was properly arrested under orders issued by the Commissioner of Police, Bombay, under R. 129, Defence of India Rules, as he was reasonably suspected of having acted in a manner prejudicial to the public safety and the efficient prosecution of war, that the information on which he was arrested had been considered carefully by the Commissioner and by himself and that it was under his orders that the detenu was arrested. In this affidavit Balaram Shamrao Kothare



mixed up the part which he took in the consideration of the case of the detenu with that taken by the Commissioner of Police. He identified himself with the Commissioner of Police under whom he was working as the Superintendent of Police, Special Branch I, C. I. D., and in more places than one in this affidavit it appears that the Commissioner of Police as well as himself inquired into the case of the detenu and directed his arrest under R. 129, that both the Commissioner of Police and himself suspected the detenu of having acted in a manner prejudicial to the public safety or to the efficient prosecution of war. He also stated that the information received and considered by the Commissioner of Police and himself led both of them to the reasonable conclusion that the detenu had acted and was acting in the manner aforesaid. He further stated that the information received by the Police could not be disclosed as it was of a secret nature and it was against the public interest to disclose the same. He submitted that the arrest and detention could not be challenged and were valid in law and that the detenu would be dealt with according to law. He finally submitted that the arrest was made on careful consideration, on proper materials and should not be disturbed. After I had granted leave to the petitioner to file his affidavit in rejoinder dated 24th April 1945, Balaram made a further affidavit in rejoinder dated 1st May 1945, wherein he pointed out that para. 2 of the petitioner's affidavit in rejoinder contained various allegations which were not included in the petition. With reference to those new allegations he submitted that the information upon which action was taken against the detenu was confidential and was a State secret and could not be disclosed. He submitted that the allegations were, therefore, otherwise irrelevant and were made merely as an attempt to draw information which was confidential and that, therefore, he was advised that there were no facts which were either necessary or proper to reply. He reiterated that the information upon which the police authorities acted could not be disclosed and repeated that the Commissioner of Police and he had considered the matter on the materials before them and they reasonably suspected him of having acted and acting in a manner prejudicial to the public safety or to the efficient prosecution of war.

The arrest of the detenu was effected on 10th April 1945 by Sub-Inspector Antia acting under the orders of Balaram who in

his turn, as is stated by the Advocate-General, acted under the orders of the Commissioner of Police. It was the Commissioner of Police who, according to the Advocate-General, reasonably suspected the detenu of having acted in a manner prejudicial to the public safety or to the efficient prosecution of war and who in exercise of the powers given to him under R. 129 (1), Defence of India Rules, arrested the detenu without a warrant on 10th April 1945. The Commissioner of Police delegated the task of physical arrest under his orders to his subordinate Balaram, the latter in his turn delegating the task of actual physical arrest to Sub-Inspector Antia, who actually effected the physical arrest of the detenu on the same day. After his arrest as aforesaid the Commissioner of Police detained the detenu in the Worli Temporary Prison under his order dated 10th April 1945. On 13th April 1945, an order was issued by the Assistant Secretary to the Government of Bombay, Home Department (Political), to the effect that the consent of the Government of the United Provinces had been obtained to the transfer of the detenu to Lucknow in the United Provinces and that therefore in exercise of the powers conferred by sub-r. (5) of R. 129, Defence of India Rules, the Government of Bombay was pleased to direct that the detenu be removed to Lucknow and delivered into the custody of the Superintendent of Police, Lucknow. As I have already stated, Rajadhyaksha J. issued a rule on 16th April 1945, which was served on the Commissioner of Police as well as the Superintendent, Worli Temporary Prison. After that order was made, it appears that the Secretary to the Government of Bombay, Home Department, issued another order dated 18th April 1945, in supersession of the previous order dated 13th April 1945 to the effect that the Government of Bombay in exercise of the powers conferred by sub-r. (2) of R. 129, Defence of India Rules, was pleased to direct that the detenu who was arrested and committed to jail custody under sub-rr (1) and (2), respectively, of R. 129 on 10th April 1945 should be detained in such custody, pending further orders, for a period not exceeding two months from the date of his arrest. The previous order which had been passed by the Government of Bombay for the removal of the detenu to Lucknow and delivery of the detenu into the custody of the Superintendent of Police, Lucknow, was thus superseded and the detenu continued in the Worli Temporary Prison.



Mr. D. B. Desai for the petitioner has urged that the orders for arrest and detention of the detenu made by the Commissioner of Police are not bona fide and has attacked the same on various grounds. He has, firstly, urged that under R. 129 (1) the power to arrest without warrant was given to the police officer actually effecting the arrest, provided such officer reasonably suspected the detenu of having acted in a manner prejudicial to the public safety or to the efficient prosecution of war, that the officer actually arresting the detenu was Sub-Inspector Antia, who admittedly was not such an officer, he not having personally investigated the case of the detenu and he not being a person who reasonably suspected the detenu of having acted in a manner prejudicial to the public safety or to the efficient prosecution of war. He, therefore, urged that Sub-Inspector Antia was not entitled to arrest the detenu as he did on 10th April 1945, and that the arrest of the detenu by Sub-Inspector Antia was illegal. Without prejudice to his aforesaid contention, Mr. D. B. Desai next urged that if the arrest of the detenu be deemed to have been effected by the Commissioner of Police, the Commissioner of Police had no grounds for reasonably suspecting the detenu of having acted in a manner prejudicial to the public safety or to the efficient prosecution of war, that the question whether the suspicion entertained by the Commissioner of Police was reasonable or not was an objective fact to be determined by the Court and was not merely a subjective fact resting in the sole discretion of the Commissioner of Police, that the Commissioner of Police had not placed before the Court any materials for the purpose of arriving at a conclusion whether the suspicion which he entertained as regards the detenu having acted in a manner prejudicial to the public safety or to the efficient prosecution of war was reasonable and that in the absence of such materials placed by the Commissioner of Police before the Court, the Court was entitled to arrive at the conclusion that, as the matter stood, there were no grounds for the Commissioner of Police entertaining a reasonable suspicion in that behalf which was a condition precedent to the exercise of the powers vested in the Police Commissioner under R. 129 (1), Defence of India Rules. He, therefore, urged that the order of arrest passed by the Commissioner of Police pursuant to which the detenu was arrested on 10th April 1945, was illegal.

Without prejudice to his aforesaid conten-

tion, Mr. D. B. Desai further contended that even assuming that the question whether there were sufficient grounds for the Commissioner of Police entertaining reasonable suspicion as to the detenu having acted in a manner prejudicial to the public safety or to the efficient prosecution of war was a subjective fact within the sole discretion of the Commissioner of Police, having regard to the affidavit in rejoinder which the petitioner filed on 24th April 1945, and the fresh facts which were set out in para. 2 thereof and the non-traverse thereof by Balaram Shamrao Kothare in his affidavit in rejoinder dated 1st May 1945, the Court should come to the conclusion that the facts alleged by the petitioner in para. 2 of his affidavit in rejoinder should be taken as admitted by the Commissioner of Police and in the absence of anything contained in the affidavit of Balaram Shamrao Kothare in rejoinder dated 1st May 1945, which would go to show that besides those facts alleged in para. 2 of the petitioner's affidavit dated 24th April 1945, there were any other facts or materials before the Commissioner of Police which would enable him to entertain the reasonable suspicion that the detenu had acted in a manner prejudicial to the public safety or to the efficient prosecution of war, the Court should presume that the facts so stated in para. 2 of the petitioner's affidavit were the only facts which were before the Commissioner of Police when he passed the order for the arrest of the detenu on 10th April 1945; that those facts were not at all such as would be sufficient to enable the Commissioner of Police to entertain a reasonable suspicion about the detenu having acted in a manner prejudicial to the public safety or to the efficient prosecution of war, that in any event the action of the Commissioner of Police in arresting the detenu on 10th April 1945, having been actuated not by any information or materials which he had at his disposal but merely with the desire to assist the U. P. Police in arresting the detenu and transferring him to Lucknow in purported exercise of the powers vested in him under sub-r. (5) of R. 129, Defence of India Rules, was not bona fide but was actuated by indirect or ulterior motives and was a fraud on the powers vested in him under R. 129 (1), Defence of India Rules, and that therefore the arrest of the detenu by the Commissioner of Police on 10th April 1945, was illegal. Mr. D. B. Desai lastly contended that the order purported to be made by the Government of Bombay on 18th April 1945



under R. 129 (2) for temporary detention of the detenu for a period not exceeding two months from the date of his arrest was also illegal inasmuch as R. 129, Defence of India Rules, did not contemplate any order for temporary detention of the detenu. On all the grounds abovementioned Mr. D. B. Desai contended that the orders for the arrest and detention of the detenu by the Commissioner of Police were not bona fide and were illegal, *ultra vires* and beyond the powers conferred on the Police by R. 129 or any other rule of the Defence of India Rules, and that therefore the detenu should be set at liberty.

In support of his first contention Mr. D. B. Desai pointed out that on the facts as admitted it was Sub-Inspector Antia who actually arrested the detenu on 10th April 1945, that Sub-Inspector Antia was merely the vehicle of the oral order purporting to have been passed by the Commissioner of Police and communicated by him through Balaram to Sub-Inspector Antia for the purpose of execution. It is common ground that there was no written order for arresting the detenu which was communicated by the Commissioner of Police to Sub-Inspector Antia through Balaram. What appears to have been done was that the Commissioner of Police and Balaram decided that the detenu should be arrested under R. 129 (1), Defence of India Rules, and Balaram passed on that order of the Commissioner of Police to Sub-Inspector Antia for execution. It is also common ground that Sub-Inspector Antia had not applied his mind at all to the case of the detenu, nor had he any materials before him to entertain any suspicion, much less reasonable suspicion, that the detenu had acted in a manner prejudicial to the public safety or to the efficient prosecution of war. Sub-Inspector Antia merely performed the function of physically arresting the detenu, the mind behind the arrest being that of the Commissioner of Police. It is argued that on a true construction of R. 129 (1), Defence of India Rules, it is the police officer who actually effects the arrest who should reasonably suspect the detenu of having acted in a manner prejudicial to the public safety or to the efficient prosecution of war. The officer who arrests must be a person who reasonably suspects the detenu of having acted in that manner. The detenu must be the person whom the officer who arrests him reasonably suspects of having acted in such manner. The words used are not that the police

officer may arrest without warrant any person who is reasonably suspected or about whom there is reasonable suspicion but the words are that the police officer may arrest the detenu whom *he* reasonably suspects of having acted in such manner. It is further urged that the words used are that the police officer may arrest, not that he should direct the arrest of the detenu. On these considerations it is urged that it is only the police officer who entertains the reasonable suspicion of the detenu having acted in a manner prejudicial to the public safety or to the efficient prosecution of war that has the power to arrest the detenu without a warrant as prescribed in R. 129 (1), Defence of India Rules. In further support of this argument, Mr. D. B. Desai drew my attention to a passage from Halsbury's Laws of England, Hailsham edition, Vol. 9, p. 84, para. 111, where it is stated that

"Arrest consists of the actual seizure or touching of a person's body with a view to his detention. The mere pronouncing of words of arrest is not an arrest, unless the person sought to be arrested submits to the process and goes with the arresting officer."

He also drew my attention to the case in (1704) 6 Mod. Rep. 173,<sup>1</sup> where it was held that an arrest must be by corporal seizing or touching the defendant's body, and therefore if a bailiff only pronounces words of arrest and shows his warrant and the defendant escapes the Court will not grant an attachment for rescue, for he was not legally arrested. He also drew my attention to s. 46, Criminal P. C., where in sub-s. (1) it is laid down that in making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested unless there is submission to the custody by word or action.

This contention of Mr. D. B. Desai, however, is not at all sound. No doubt, according to the true construction of R. 129 (1), Defence of India Rules, the officer who is empowered to arrest the detenu is one who entertains a reasonable suspicion that the detenu has acted in a manner prejudicial to the public safety or to the efficient prosecution of war, but it is nowhere laid down nor is it consonant with reason or common sense that the police officer who reasonably suspects the detenu of having acted in such manner and is thus empowered to arrest the detenu without warrant by virtue of the provisions of R. 129 (1) should effect the

1. (1704) 6 Mod. Rep. 173, *Genner v. Sparks*.



arrest of the detenu personally. If the conditions which invested him with the power to arrest the detenu are fulfilled, viz., that he reasonably suspects the detenu of having acted in a manner prejudicial to the public safety or to the efficient prosecution of war, he has the power to arrest the detenu without a warrant. The person who determines whether the detenu should be arrested is the police officer who is thus vested with the power on those conditions being fulfilled, but the physical act of arrest need not be necessarily done by that officer. It may be that by reason of the exigencies of time and space the officer who determines that the detenu should be arrested without a warrant may arm his subordinate with the authority to effect the arrest on his behalf. The subordinate actually effecting the physical arrest of the detenu would thus be the mere instrument of carrying the resolution of the officer in execution, as Sub-Inspector Antia was in the case before me.

What is important is the decision arrived at by the officer to arrest the detenu without a warrant. He may issue a warrant or he may not issue one. If he chooses to issue a warrant, then it is his own hand that signs it, and the person who executes the warrant is merely the instrument for the purpose of effecting the physical arrest. If he does not choose to sign the warrant, it is nonetheless his decision and his order which is communicated to the person who actually effects the physical arrest of the detenu. It is nonetheless an arrest decided upon and effected by the officer, though the hand which actually physically effects the arrest is the hand of the subordinate to whom the task of actually effecting the arrest is entrusted by the officer. The absurdity of this contention would be apparent if we took up an illustration. A police officer reasonably suspecting that the detenu has acted, is acting or is about to act in a manner prejudicial to the public safety or to the efficient prosecution of war might decide that he should arrest the detenu. The detenu might be at some distance from the officer. The officer might in that case ask a subordinate of his who is standing by his side to run and apprehend the detenu who might be at a distance or who might be running away after doing that particular act. Can it be said that in that event the officer should acquaint his subordinate who is asked to apprehend the detenu by either running after him or otherwise, with the facts of the particular case and the reasonable suspicion

which he entertains about the detenu having acted in such manner before the subordinate would be entitled within the meaning of R. 129 (1), Defence of India Rules, to actually physically arrest the detenu?

Take another illustration. The detenu may be accompanied by others who if the officer himself went alone for arresting the detenu might create trouble for him and in a particular case it may be necessary for the officer to have posse of constables or other subordinates to help him in effecting the arrest. If he takes the posse of constables or subordinates for the purpose of effecting the arrest, can it be said that it is necessary for him in the event of any other police officer actually effecting the physical arrest to have actually in advance acquainted that person or all such persons who accompanied him for the purpose of effecting that arrest, with the facts of the case and with the fact of his having entertained a reasonable suspicion that the detenu had acted in a manner prejudicial to the public safety or to the efficient prosecution of the war? Even here the reasonable suspicion which would be entertained would be one entertained by the police officer himself. The persons to whom he communicated that would be merely the repositories of his confidence. They would not necessarily be persons who would entertain reasonable suspicion about the detenu having acted in a manner prejudicial to the public safety or to the efficient prosecution of war, and in a conceivable case even though this information might have been communicated by the officer to all or some of his subordinates whose help he sought in effecting the arrest of the detenu, it may be that a person to whom such information was communicated may not entertain the reasonable suspicion in the conduct of the detenu as the officer who communicated that information did. The above illustrations go to show the absurdity of holding that the officer who decides that he should arrest the detenu without warrant under the circumstances mentioned in R. 129 (1), Defence of India Rules, should be the person who actually physically arrests the detenu, or vice versa that the person who actually physically effects the arrest of the detenu should be the person who should have entertained a reasonable suspicion that the detenu had acted in a manner prejudicial to the public safety or to the efficient prosecution of war.

The authorities which are cited by Mr. D. B. Desai also do not help him for the



reason that they lay down what is the actual act of arrest *qua* the arrested person. These authorities go to determine that in order that there may be a complete and effectual arrest either the arrested person should be physically touched and apprehended by the person who arrests him or he should submit to the process by word or action. These authorities have no bearing on the question whether the person who "arrests" should be the person who actually physically touches the arrested person in the act of such arrest. The person who arrests can either effect the arrest personally or may delegate the actual function of effecting physical arrest to any one duly authorised by him in that behalf, and there is nothing in any of the authorities cited by Mr. D. B. Desai before me which supports his contention that it is only the person who physically arrests and touches the body of the arrested person who can be said to have arrested the person within the meaning of R. 129 (1), Defence of India Rules. In my opinion, therefore, this contention of Mr. D. B. Desai fails.

The next contention urged by Mr. D. B. Desai, however, raises an important question of law. Under R. 129 (1), Defence of India Rules, the power to arrest without warrant is given to any police officer or any other officer of Government empowered in this behalf by general or special order of the Central Government, or of the Provincial Government, the condition precedent to the exercise of such power being that the person arresting the detenu should reasonably suspect the detenu of having acted, of acting, or of being about to act in a manner *inter alia* prejudicial to the public safety or to the efficient prosecution of war. On a literal meaning of this provision, the power can be exercised by any police officer including even a police constable, and it is urged with great force and vehemence by Mr. D. B. Desai that when a person who is the last in the hierarchy of the police officers, viz., the police constable, might also exercise such a power, the reasonable suspicion which he entertains or has entertained as a condition precedent to the exercise of that power should be an objective fact and not a subjective fact merely. The existence of grounds for the entertaining of such suspicion and the reasonableness of such suspicion entertained by him should fall to be determined by the Court as objective facts really existing before the police officer can act as contemplated by R. 129 (1). It is pointed out that if the subjective fact was

the only fact to be taken into consideration in this behalf, the police officer who might be even a police constable would be the sole judge of the existence of grounds on which he bases his suspicion and also of the reasonableness of the suspicion which he entertains on those grounds, a power and discretion which having regard to the fact that the provisions of R. 129 encroach upon the liberty of the subject should not be left to the sole determination of such police officer, even a police constable, in whose status, capacity and judgment no implicit confidence can ever be reposed. It is, therefore, urged that the ordinary canon of construction which has been adopted in all cases where such powers have been in normal times vested in police officers or other officers of the Government should be adopted and the questions whether there are sufficient grounds for entertaining suspicion and whether the suspicion entertained is reasonable or not should fall to be determined by the Court as objective facts to be investigated and pronounced upon by the Court before the action taken by the police officer can ever be justified. It is urged that the liberty of the subject is a very precious treasure which should not be encroached upon by any member of the executive without legal justification for the same, and he who encroaches upon such liberty should justify the encroachment upon the same. The officer who says he reasonably suspects the detenu of having acted in a manner prejudicial to the public safety or to the efficient prosecution of war should, when his act is challenged, put before the Court sufficient materials to enable the Court to come to the conclusion whether there were sufficient materials for him to entertain that suspicion and whether the suspicion which he entertained was reasonable under the circumstances of the case. Both these should be put before the Court as objective facts to enable the Court to come to the conclusion whether he was justified in exercising the powers which were vested in him under those circumstances.

As against this, it has been urged by the Advocate-General for the respondents that the Defence of India Act and the Rules made thereunder are emergency legislation, that whilst construing the Defence of India Act and the Rules made thereunder the ordinary canon of construction which is adopted in normal times should not be resorted to but regard should be had to the object and intendment of the emergency



legislation which has its sanction in the emergency which exists and the necessity of taking preventive measures *inter alia* to ensure the public safety or the efficient prosecution of war, that under those circumstances when the words which are used in the particular provision of law are capable of more than one meaning, the meaning which should be adopted by the Court should be that which can carry into effect the object and intendment of the emergency legislation, that even a strained construction of the provisions should be resorted to if it may be necessary in order to carry into effect the objects and the intendment of the emergency legislation, that when the words "whom he reasonably suspects" are capable of an objective as well as a subjective meaning, the subjective meaning should be resorted to as more in consonance with the object and intendment of the emergency legislation, that the officer who is under the special circumstances therein mentioned empowered to effect the arrest of the detenu without warrant should be the sole judge of the existence of the grounds which would enable him to entertain the suspicion as well as of the reasonableness of the suspicion which he entertains on the basis of those grounds, that the materials which may exist before the officer taking such action may be confidential in their character and may not be at all such as could ever be disclosed before the Court of law, if the Court of law ever had the power to determine on their existence as well as on the reasonable nature of the suspicion entertained by the officer on those materials and that the disclosure of such confidential materials or State secrets could not be enforced by any Court with the result that in a majority of cases, if not all, even if the Court had power to determine these questions as objective facts, the Court would be absolutely without any materials for the purpose of enabling it to determine those questions with the result that in cases of detenus who are most dangerous and the disclosure of the materials in connection with whom would be the most objectionable from point of divulging the State secrets those detenus would be released in the absence of such materials as would be considered sufficient by the Court to justify the action of the officer concerned which has been impugned and that therefore the Court should lean on such construction as is in consonance with the spirit and the object and intendment of the emergency legislation and adopt the subjective fact as

determining whether the officer concerned entertained reasonable suspicion that the detenu was acting in a manner prejudicial to the public safety or to the efficient prosecution of war.

These are the two rival contentions vehemently urged by Mr. D. B. Desai for the petitioner and the Advocate-General for the respondents. Mr. D. B. Desai has placed reliance on A. I. R. 1945 Nag. 8<sup>2</sup> decided by Bose and Sen JJ., as also on the speech of Lord Atkin, who delivered a dissenting opinion in (1942) A. C. 206.<sup>3</sup> The Advocate-General on the other hand has relied very strenuously on the speeches of the majority of the law Lords in the same case in (1942) A. C. 206<sup>3</sup> and on the case in A. I. R. 1945 Pat. 44,<sup>4</sup> a Full Bench decision of the Patna High Court. He also relied upon two recent judgments of our Appeal Court in applications under S. 491, Criminal P. C., the one delivered by the Chief Justice and Lokur J. in 47 Bom. L. R. 669<sup>5</sup> and other by Chagla and Gajendragadkar JJ. in 47 Bom. L. R. 675.<sup>6</sup> The question raised before me is a very important one and has not been the subject-matter of adjudication by our High Court. The relevant provisions of the Defence of India Act in this behalf are :

"Section 2. (1) The Central Government may, by notification in the Official Gazette, make such rules as appear to it to be necessary or expedient for securing the defence of British India, the public safety, the maintenance of public order or the efficient prosecution of war, or for maintaining supplies and services essential to the life of the community.

(2) Without prejudice to the generality of the powers conferred by sub-s. (1), the rules may provide for, or may empower any authority to make orders providing for all or any of the following matters, namely :

\* \* \* \*

(x) the apprehension and detention in custody of any person whom the authority empowered by the rules to apprehend or detain as the case may be suspects, *on grounds appearing to such authority to be reasonable*, of being of hostile origin, or of having acted, acting, being about to act, or being likely to act in a manner prejudicial to the public safety or interest, the defence of British India, the maintenance of public order, His Majesty's relations with foreign powers or Indian States, the maintenance of peaceful conditions in tribal areas or the efficient prosecution of the war, or with respect to

2. ('45) 32 A. I. R. 1945 Nag. 8 : I. L. R. (1945) Nag. 6, *Vimlabai Deshpande v. Emperor*.

3. (1942) 1942 A. C. 206 : 110 L. J. K. B. 724 : 1941-3 All E. R. 338, *Liversidge v. Sir John Anderson*.

4. ('45) 32 A. I. R. 1945 Pat. 44 : 23 Pat. 968 (F.B.), *Basanta Chandra Ghose v. Emperor*.

5. ('45) 32 A.I.R. 1945 Bom. 533 : 47 Bom. L. R. 669, *Emperor v. Gajanan Krishna Yalgi*.

6. ('46) 33 A.I.R. 1946 Bom. 32 : 47 Bom. L. R. 675, *Emperor v. Bajirao Yamanappa*.



whom such authority is satisfied that his apprehension and detention are necessary for the purpose of preventing him from acting in any such prejudicial manner, the prohibition of such person from entering or residing or remaining in any area, and the compelling of such person to reside and remain in any area, or to do or abstain from doing anything; . . . .

(5) A Provincial Government may by order direct that any power or duty which by rule made under sub-s. (1) is conferred or imposed on the Provincial Government, or which, being by such rule conferred or imposed on the Central Government, has been directed under sub-s. (4) to be exercised or discharged by the Provincial Government, shall, in such circumstances and under such conditions, if any, as may be specified in the direction, be exercised or discharged by any officer or authority, not being (except in the case of a Chief Commissioner's Province) an officer or authority subordinate to the Central Government."

When we go to the rules framed under S. 2, Defence of India Act—which are called the Defence of India Rules—the only provisions relevant for the purposes of this case are R. 26 and R. 129. Rule 26 runs as under :

"The Central Government or the Provincial Government, if it is satisfied with respect to any particular person that with a view to preventing him from acting in any manner prejudicial to the defence of British India, the public safety, the maintenance of public order, His Majesty's relations with foreign powers or Indian States, the maintenance of peaceful conditions in tribal areas or the efficient prosecution of the war it is necessary so to do, may make an order;

(b) directing that he be detained; etc."

The rest of the provisions of this R. 26 are not relevant for the purposes of this case. Rule 129 runs as under :

"(1) Any police officer or any other officer of Government empowered in this behalf by general or special order of the Central Government, or of the Provincial Government, may arrest without warrant any person whom he reasonably suspects of having acted, of acting, or of being about to act,—

(a) with intent to assist any State at war with His Majesty, or in a manner prejudicial to the public safety or to the efficient prosecution of war;

(2) Any officer who makes an arrest in pursuance of sub-r. (1) shall forthwith report the fact of such arrest to the Provincial Government, and, pending the receipt of the orders of the Provincial Government, may subject to the provisions of sub-r. (3), by order in writing, commit any person so arrested to such custody as the Provincial Government may by general or special order specify:

Provided—

(i) that no person shall be detained in custody under this sub-rule for a period exceeding fifteen days without the order of the Provincial Government; and

(ii) that no person shall be detained in custody under this sub-rule for a period exceeding two months.

(4) On receipt of any report made under the provisions of sub-r. (2), the Provincial Government may, in addition to making such order, subject to

the second proviso to sub-r. (2), as may appear to be necessary for the temporary custody of any person arrested under this rule, make, in exercise of any power conferred upon it by any law for the time being in force, such final order as to his detention, release, residence or any other matter concerning him as may appear to the said Government in the circumstances of the case to be reasonable or necessary.

(5) Subject to the condition that nothing in this sub-rule shall be deemed to extend the limits of detention prescribed in the first and second provisos to sub-r. (2), the Provincial Government may direct that any person arrested under cl. (a) or cl. (b) of sub-r. (1) shall be removed to any other province of which the Provincial Government (hereinafter described as the second Government) has given its consent in this behalf, and thereupon such person shall be removed and the second Government shall take in respect of such person such action as may be lawful in like manner as if such person had been arrested within its province . . . ."

These are the relevant provisions of the Defence of India Act and the Defence of India Rules which call for consideration in this case. The Defence of India Act as its preamble shows is an Act to provide for special measures to ensure the public safety and interest and the defence of British India and the trial of certain offences, and it has been enacted because, it is stated, an emergency had arisen which renders it necessary to provide for special measures to ensure the public safety and interest and the defence of British India and for the trial of certain offences, and the Governor-General in his discretion has declared by Proclamation under sub-s. (1) of S. 102, Government of India Act, 1935, that a grave emergency exists whereby the security of India is threatened by war. This is the object and intent of the Defence of India Act. Various powers have been given to the Central Government, the Provincial Governments and to the various officers to whom the powers in that behalf are delegated by reason of the provisions of S. 2, Defence of India Act, with a view to secure the defence of British India, the public safety, the maintenance of public order or the efficient prosecution of war, or for maintaining supplies and services essential to the life of the community. The power to make rules for these purposes has been exercised by the Central Government and the Defence of India Rules prescribe the modes in which these various objects are sought to be achieved. It is significant to observe that in the rule-making power which has been given by virtue of the provisions of S. 2 (2), Defence of India Act, in cl. (x) of that sub-r. (2) the power expressly given is to frame rules for the apprehension and detention in custody of



any person whom the authority empowered by the rules to apprehend or detain as the case may be suspects, *on grounds appearing to such authority to be reasonable*, of being of hostile origin, or of having acted, acting, being about to act, or being likely to act in a manner prejudicial to the public safety or interest, the defence of British India, the maintenance of public order, His Majesty's relations with foreign powers or Indian States, the maintenance of peaceful conditions in tribal areas or the efficient prosecution of war; and the rule which is purported to have been framed for the purpose of carrying out this object is R. 129, Defence of India Rules.

If this rule-making power prescribes in so many words that the grounds on which the person is thus empowered to act in the matter of the apprehension and detention as the case may be should be grounds appearing to such authority to be reasonable, R. 129 framed in pursuance of such power should normally without any more discussion be read in a subjective manner and not an objective one as contended for by Mr. D. B. Desai. When Rule 129 prescribes that any police officer or any other officer of Government empowered in this behalf by general or special order of the Central Government, or of the Provincial Government, may arrest without warrant any person whom he reasonably suspects of having acted, etc., in a manner prejudicial to the public safety or to the efficient prosecution of war, that R. 129 cannot be construed as having enacted anything beyond what was warranted by the rule-making power contained S. 2 (2) (x), Defence of India Act. If the rule-making power was to be exercised in respect of the apprehension and detention of persons who are suspected on grounds appearing to the authority empowered by the rules to do so to be reasonable, merely because the words used in R. 129 (1) are "whom he reasonably suspects of having acted," those words in R. 129 (1) cannot be construed as meaning anything except what is warranted by the rule-making power contained in S. 2 (2) (x). Even though the words "whom he reasonably suspects" be capable of more than one construction, viz., from a subjective as well as an objective point of view, as hereinbefore discussed, the very purpose of the enactment of R. 129 (1), as can be gathered from the rule-making power provided in S. 2 (2) (x), Defence of India Act, was to constitute the authority empowered to make the order of apprehension or detention as the case may

be the sole judge of the reasonableness of the grounds on which he suspected the detenu of having acted in a manner prejudicial to the public safety or to the efficient prosecution of war. If this be the true construction of S. 2 (2) (x), Defence of India Act, and R. 129 (1), Defence of India Rules, all arguments as to the status or capacity, or judgment of the police officer, even a police constable, and the criticism levelled against the investing of such powers as would encroach upon the liberty of the subject in such officers who might be the last in the hierarchy of the police officers disappear. The Legislature has expressly given those powers and the rules have been made with a view to the exercise of those powers; any grievance which the subject may have as against the inefficiency of the officers concerned or the probable abuse of such powers can be against the Legislature which gave such powers to such persons and not against anybody else.

Assuming, however, that I were wrong in this construction which I have put upon S. 2 (2) (x), Defence of India Act, and Rule 129 (1), Defence of India Rules, the question that remains to consider is whether I should adopt the objective construction which is sought to be put upon the words "whom he reasonably suspects" in R. 129 (1), Defence of India Rules, as sought for by Mr. D. B. Desai or should adopt the subjective construction of the words "whom he reasonably suspects" as sought for by the Advocate-General. I have already stated that Mr. D. B. Desai has placed great reliance on the speech of Lord Atkin in (1942) A. C. 206<sup>3</sup> and the Advocate-General has placed equal reliance on the speeches of the other Law Lords in the very same case. In the speeches of all the Law Lords in that case it was taken as common ground that the legislation which the house was there concerned with was emergency legislation. The liberty of the subject was of course the primary concern of all the Law Lords, but in their approach to the question how far the liberty of the subject can be encroached upon in times of great national emergency the views of Lord Atkin on the one hand and the other Law Lords on the other were divergent. The observations of Lord Atkin at p. 244 in this connexion are very significant :

"I view with apprehension the attitude of Judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive. Their function is to give words their natural meaning, not, perhaps in war time leaning



towards liberty, but following the dictum of Pollock C. B., in (1850) 5 Ex. 378<sup>7</sup> cited with approval by my noble and learned friend Lord Wright in 1941 A. C. 378<sup>8</sup> at p. 395 : 'In a case in which the liberty of the subject is concerned, we cannot go beyond the natural construction of the statute.' In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the Judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law."

These observations deserve very great consideration, and it would be absolutely unjudicial and contrary to the traditions of British justice which have been maintained all throughout by our Courts here that Judges should view with complaisance any attempts at encroachment on the liberty of the subject by the executive. The Courts should not countenance any such encroachment unless the same be absolutely justified in law. The liberty of the subject is in existence in so far as it is sanctioned and controlled by law. The Legislature has full power to enact measures which would encroach upon the liberties of the subject. By proper enactments in that behalf the Legislature can deprive a subject of his liberty of person or his rights of property and various other liberties which are his priceless treasures. The realm of law is supreme; *salus populi est suprema lex*. All individual liberty must give way to considerations of national safety, and that is the principle which has been enunciated by Lord Wright in his observations which are to be found at p. 260 of that very case :

"What is involved is the liberty of the subject. Your Lordships have had your attention called to the evils of the exercise of arbitrary powers of arrest by the executive and the necessity of subjecting all such powers to judicial control. Your Lordships have been reminded of the great constitutional conflicts in the seventeenth century, which culminated in the famous constitutional charters, the Petition of Right, the Bill of Rights, and the Act of Settlement. These struggles did, indeed, involve the liberty of the subject and its vindication against arbitrary and unlawful power. They sprang (to state it very broadly) from the Stuart theory that the King was King by Divine Right and that his powers were above the law. Thus a warrant of arrest '*per speciale mandatum Domini Regis*' was claimed to be a sufficient justification for detention without trial. But by the end of the seventeenth century the old common law rule of the supremacy

of law was restored and substituted for any theory of royal supremacy. All the Courts to-day, and not least this House, are as jealous as they have ever been in upholding the liberty of the subject. But that liberty is a liberty confined and controlled by law, whether common law or statute. It is, in Burke's words, a regulated freedom. It is not an abstract or absolute freedom. Parliament is supreme. It can enact extraordinary powers of interfering with personal liberty. If an Act of Parliament, or a statutory regulation, like Reg. 18B, which has admittedly the force of a statute, because there is no suggestion that it is *ultra vires* or outside the Emergency Powers (Defence) Act, under which it was made, is alleged to limit or curtail the liberty of the subject or vest in the executive extraordinary powers of detaining a subject, the only question is what is the precise extent of the powers given. The answer to that question is only to be found by scrutinizing the language of the enactment in the light of the circumstances and the general policy and object of the measure. I have ventured on these elementary and obvious observations because it seems to have been suggested on behalf of the appellant that this House was being asked to countenance arbitrary, despotic or tyrannous conduct. But in the constitution of this country there are no guaranteed or absolute rights. The safeguard of British liberty is in the good sense of the people and in the system of representative and responsible government which has been evolved. If extraordinary powers are here given, they are given because the emergency is extraordinary and are limited to the period of emergency."

Though the safeguards of liberty which have been spoken of by Lord Wright to exist, viz., the good sense of the people and the system of responsible and representative Government which has been evolved may not exist in India to that extent to which they are supposed to exist in England, the observations of Lord Wright are none the less very apposite. They lay down that even though the liberty of the subject has got to be jealously preserved, Legislature is supreme, and if Legislature enacts certain provisions which have the effect of curtailing the liberties of the subject, the subject has to submit to such encroachments, and the Legislature is supreme. Even Lord Atkin in his observations at page 239 of his speech stated :

"No one doubts that the Emergency Powers (Defence) Act, 1939, empowers His Majesty in Council to vest any minister with unlimited power over the person and property of the subject. The only question is whether in this regulation His Majesty has done so."

He did not doubt the power of the Legislature to invest any authority with unlimited power over the person and property of the subject. Approaching the subject from this point of view, the next point to consider is what is the canon of construction which has to be adopted by the Courts in the matter of emergency legislations of the type I have before me. In this connexion the observa-

7. (1850) 5 Ex. 378 : 19 L. J. Ex. 337, *Bowditch v. Balchin*.

8. (1941) 1941 A. C. 378 : 110 L. J. K. B. 557 : 165 L. T. 308 : (1941) 3 All. E. R. 45, *Barnard v. Gorman*.



tions of Lord Macmillan at p. 251 of that case are apposite :

"In the first place, it is important to have in mind that the regulation in question is a war measure. This is not to say that the Courts ought to adopt in wartime canons of construction different from those which they follow in peace time. The fact that the nation is at war is no justification for any relaxation of the vigilance of the Courts in seeing that the law is duly observed, especially in a matter so fundamental as the liberty of the subject—rather the contrary. But in a time of emergency when the life of the whole nation is at stake it may well be that a regulation for the defence of the realm may quite properly have a meaning which because of its drastic invasion of the liberty of the subject the Courts would be slow to attribute to a peace time measure. The purpose of the regulation is to ensure public safety, and it is right so to interpret emergency legislation as to promote rather than to defeat its efficacy for the defence of the realm. That is in accordance with a general rule applicable to the interpretation of all statutes or statutory regulations in peace time as well as in war time."

To the same effect are the observations of Viscount Maugham at p. 219 in that case :

"My Lords, I think we should approach the construction of Reg. 18B of the Defence (General) Regulations without any general presumption as to its meaning except the universal presumption, applicable to Orders in Council and other like instruments, that, if there is a reasonable doubt as to the meaning of the words used, we should prefer a construction which will carry into effect the plain intention of those responsible for the Order in Council rather than one which will defeat that intention. My Lords, I am not disposed to deny that, in the absence of a context, the *prima facie* meaning of such a phrase as 'if A.B. has reasonable cause to believe' a certain circumstance or thing, it should be construed as meaning 'if there is in fact reasonable cause for believing' that thing and if A.B. believes it. But I am quite unable to take the view that the words can only have that meaning. It seems to me reasonably clear that, if the thing to be believed is something which is essentially one within the knowledge of A.B. or one for the exercise of his exclusive discretion, the words might well mean if A.B. acting on what he thinks is reasonable cause (and, of course, acting in good faith) believes the thing in question."

There is no doubt that if the words used were capable of only one meaning, the Courts should not go out of their way to adopt an unnatural or a strained meaning from what may be presumed to be the object and intendment of the particular piece of legislation, because encroachment on the liberty of the subject is countenanced only in so far as the same is warranted by the strict letter of the law. If, however, the words used are capable of more than one meaning, the Courts should lean while construing the emergency legislation towards a construction which supports rather than defeats the object and the intendment of the emergency legislation and should even adopt a construc-

tion which might appear strained or unnatural in times of peace though quite appropriate and suitable to the occasion when emergency powers are sought to be granted to particular individuals in times of great national emergency.

Considerable argument was addressed to me based on the observations of the Law Lords in 1942 A. C. 206<sup>3</sup> as to the status and position of the Secretary of State who in the regulation under consideration there was invested with plenary powers of detention of individuals under certain circumstances therein prescribed. In the speeches of the majority of the Law Lords stress was laid on the facts that it was not a subordinate officer or a police constable who was invested with those powers, that the Secretary of State was a highly placed and responsible officer in whom the public had confidence, that the Secretary of State was answerable to the Parliament and besides being guided in his deliberations by the advisory committees had to make reports to the Parliament every month as to the working of the regulation, and that the press and more so the Parliament could exercise control over the Secretary of State if the plenary powers vested in him were abused by him. It was pointed out that in contrast to the situation which thus obtained in England the position in India was not such as would inspire in the public minds any confidence in the executive or the police-officers in whom these powers were sought to be vested. The executive in India was not responsible to the Legislature, whether the Legislature as in the present times was functioning or not in certain Provinces. The only responsibility of the officers who would be empowered to act under R. 129 (1), Defence of India Rules, would be to their immediate superiors and to the Government which was also the executive, and there was nothing which would serve by way of check on the excesses of the executive either in the press or in the public opinion voiced through the Legislatures. There were absolutely no safeguards in the provisions of the Defence of India Act and the Defence of India Rules of the type which one found in Reg. 18B in operation in England. There were no advisory bodies, there was no responsibility to the Parliament, there was no public opinion to which the executive would be amenable. It was, therefore, pointed out that the considerations which weighed with the Law Lords in 1942 A. C. 206<sup>3</sup> in adopting the subjective construction of the words



"reasonable cause to believe" were not available at all in India, with the result that having regard to the encroachment which would of necessity be made on the liberties of the subject, the Courts should not countenance a construction which would not subject the exercise of the power by the executive or the police-officer to scrutiny by the Courts.

While recognising the strength of this criticism, one cannot run away from the fact that however irresponsible the executive might be, whatever excesses the executive might commit, howsoever atrocious their conduct in particular cases may be, looked at from one point of view, one has only got to look to the four corners of the particular piece of legislation in order to see what are the powers vested in the executive or the police-officers. If the powers which are vested in them are such as encroach upon the liberties of the subject, the law is there and has got to be administered by the Courts irrespective of whether such wide and absolute powers which are vested in the executive or police-officers are liable to be abused or not. If the executive or the police-officers act within the strict letter of the law and within the scope of the powers which have been given to them under R. 129 (1), there cannot be any question of impeaching the exercise of those powers by them. Whilst talking of the safeguards which have been provided in the Reg. 18B, which is in operation in England, one has also got to bear in mind that even here in India, in R. 129, Defence of India Rules, there are salutary checks provided to the exercise of the powers by the executive officers or the police-officers concerned. The only power which is given to the executive officer or police officer under R. 129 (1) is, in the event of his entertaining a reasonable suspicion that the detenu has acted in a manner prejudicial to the public safety or to the efficient prosecution of war, to arrest the detenu without warrant and that detention is only for a period of 15 days. The officer arresting the detenu has to forthwith make a report to the Provincial Government which would presumably contain all information though confidential, on the strength of which the officer arresting the detenu reasonably suspected him of having acted in a manner prejudicial to the public safety or to the efficient prosecution of the war. There is nothing in R. 129 to prevent the Provincial Government if it were so minded on a perusal of such report to order immediate release of the detenu. If, however,

the Provincial Government on the receipt of such report thinks that further investigation be necessary, or that further detention of the detenu be necessary, a temporary order can be made to detain the detenu for a period of two months from the date of arrest of the detenu. That order for temporary custody of the detenu is not operative for any period beyond two months of the date of the actual arrest of the detenu. That is the time limit given to the Provincial Government to make up its mind for the passing of final orders as regards the detenu, whether by virtue of the provisions of R. 26 or by any other law in force the Provincial Government will order the detention of the detenu for a particular period beyond that period of two months or will order his release and discharge or will impose such terms on the detenu as regards his activities in the future as might be considered by the Government to be reasonable or necessary. These are the safeguards which have been provided and immediately after the arrest of the detenu by the executive officer or the police officer the matter goes into the hands of the Provincial Government. The criticism which has been offered is that a police officer without having sufficient grounds before him to entertain a reasonable suspicion of the activities of the detenu might pass an order which might not be justified under the circumstances of the particular case, and arrest the detenu. Such deprivation of the liberty of the detenu is, however, warranted by R. 129 (1), Defence of India Rules. The same is, however, not an indefinite deprivation of liberty or a detention for any indefinite period. An order of the executive officer or police-officer in the first instance is only for a period of fifteen days and these are the limits of the power of the executive officer or the police-officer to detain the detenu. The officer concerned cannot detain the detenu for any period beyond fifteen days on his own initiative. If no orders are received from the Provincial Government after that period of fifteen days, the detenu is automatically released and nothing further need be done. It is only when after the receipt of the report the Provincial Government passes orders for the temporary custody of the detenu for a period not exceeding two months from the date of his actual arrest that the further detention of the detenu becomes lawful; and the Provincial Government has a duty laid down upon it by virtue of R. 129 (4) of passing final orders as to the release, detention,



or imposing of conditions on the detenu after that period. In my opinion, these are reasonable safeguards put on the powers of apprehension and detention conferred on the executive officers or police officers under R. 129 (1), Defence of India Rules. They may not bear any comparison with the safeguards which are available in England in the matter of the Reg. 18B which was the subject-matter of consideration in (1942) A. C. 206.<sup>3</sup> It would be idle, however, to compare the constitution in England with the constitution in India. We have to take the facts as they are. The Legislature is supreme both in England and in India and if the Legislature has enacted a provision which confers certain powers howsoever wide they may be, those powers have got to be enforced within the strict letter of the law.

It was urged by Mr. D. B. Desai that the decision in (1942) A. C. 206<sup>3</sup> was arrived at mainly on the consideration of the facts that the Secretary of State was a responsible officer in whom the public had confidence and there were proper safeguards to preserve the liberty of the subject, and had it not been so, it was apparent in the speeches of the Law Lords there and in particular the speech of Lord Macmillan at page 254:

"Were the person detained left without any safeguard, this might be an argument against holding that an absolute discretion has been conferred on the Secretary of State, but the argument is the other way when it is found, as it is in this regulation, that elaborate provision is made for the safeguarding of the detained person's interest."

that the decision might have been otherwise. This is only a partial statement of the true position. No doubt this was one of the important provisions which induced the Law Lords in that case to come to the conclusion that the Secretary of State was the sole judge of the existence of the facts and of the sufficiency of the materials as also of the reasonableness of the belief which he entertained on those materials. There is, however, another important aspect of the question which was equally emphasised by the Law Lords in that case, and it was that what the Secretary of State was exercising was an executive function which would involve not only questions of the appreciation of the materials before him but also of the policy which was followed by him. The Courts, on the other hand, were acting judicially and would weigh the materials not from the point of view of the Secretary of State but strictly in accordance with the rules of evidence and would have nothing before them to guide them in matters of the policy of the

State. It was, therefore, urged that the law Courts were the last tribunal before whom the state of mind of the Secretary of State could be canvassed. Another important consideration which was also urged was that the materials in the possession of the Secretary of State might be of a confidential nature and being State secrets, he could not be called upon by the Courts to disclose the same before them. It may be that in a particular case the Secretary of State may not be able to disclose any materials whatever. In other cases he might be able to make a partial disclosure of materials, the rest of the materials being confidential and such as could not be disclosed by him even before the Court of law. Would it be possible in such circumstances to arrive at any conclusion on the basis of the objective facts to be determined by the Court as hereinbefore stated in the absence of any materials or in the event of mere disclosure in part of the materials by the Secretary of State before the Court? In one case there will be no materials at all. In the other case the partial materials disclosed might afford a very incomplete version of the whole affair and the Court might as well come to the conclusion adverse to the Secretary of State which would not have been arrived at if the fuller materials could have been disclosed by the Secretary of State before the Court. It is well known that partial truth may be worse than the whole truth and the partial materials thus disclosed might be of the most unsatisfactory character. Can it be said that this would be a satisfactory state of affairs? It would be open to the Secretary of State to merely put forward his *ipse dixit* that he had materials before him, and that he had after considering those materials reasonable grounds for entertaining the belief under which he acted in detaining the detenu. If this is the position which may obtain whilst the Court may be called upon to determine the objective facts in the matter of the detention of the detenu, can it be said that that is the construction which the Court should lean to rather than the other construction which it was possible to adopt, viz., the one which brings into prominence the subjective factor in the determination of the question whether the detenu should be arrested by the officer authorised in that behalf?

Having regard to all the above observations, I have come to the conclusion that even though it was open to the Court to say that the words "whom he reasonably sus-



pects" are capable of two constructions, one the objective construction contended for by Mr. D. B. Desai and the other the subjective construction contended for by the Advocate-General, the Court should lean towards the subjective construction contended for by the Advocate-General, more so in view of the provisions of S. 2 (2) (x), Defence of India Act. This, however, does not mean that in all cases where the executive officer or police officer has purported to act under R. 129 (1), Defence of India Rules, his action is not liable to be impeached at all. In cases where the executive officer or the police officer though purporting to act under R. 129 (1) really acts with ulterior purposes, not in furtherance of the objects which are prescribed in the preamble of the Defence of India Act and in S. 2 thereof as elaborated in R. 129 (1), Defence of India Rules, the action of the executive officer or the police officer concerned would be outside the scope of that provision, would be a fraud upon the Act and the Rules framed thereunder, would be wrongful and mala fide and would certainly be liable to be impeached. No authorities are needed for this proposition as they have been fully discussed in (1942) A. C. 206<sup>3</sup> and also in A. I. R. 1945 Nag. 8.<sup>1</sup> I may nonetheless quote a passage from the judgment of Chagla J. in 47 Bom. L. R. 675<sup>6</sup> referred to by me above. There it was a question of an order made by the Provincial Government under R. 26, Defence of India Rules (p. 677):

"Section 10 of Ordinance 3 of 1944 provides that no order made under the Ordinance shall be called in question in any Court, and no Court shall have power to make any order under S. 491, Criminal P. C., in respect of any order made under or having effect under the Ordinance, or in respect of any person the subject of such an order. But it is clear that the jurisdiction of the Court is only taken away provided the order on which the Government is relying is an order 'made under the Ordinance.' It must be made by the detaining authority in the proper exercise of its powers. It would not be an order 'made under the Ordinance' if it was made merely in the colourable exercise of its powers or if the detaining authority exceeded the powers given to it under the Ordinance. The detaining authority must satisfy the Court that it has complied with all the rules of procedure laid down in the Ordinance and has observed all the safeguards. The order must not be made for an ulterior purpose — a purpose which has no connexion with the security of the State or the efficient prosecution of the war. The order must not be intended to override the ordinary powers of the police for the investigation of a crime nor to suspend the ordinary criminal tribunals of the land or prevent them from exercising their ordinary jurisdiction. The powers conferred on the executive under the Ordinance are for the purpose of preventive detention and they are not punitive in their nature. The executive

must not detain a subject in order to punish him for what he has already done but in order to prevent him from doing something which in the opinion of the executive is likely to affect the safety of the State or the efficient prosecution of the war. It is not competent to the Court to inquire into the sufficiency of the materials and the reasonableness of the grounds on which the detaining authority was satisfied that it was necessary to make the order. But if any reasons which influenced the detaining authority in making the order appear on the record, then the Court can scrutinise them in order to see what was the condition of the mind of the detaining authority when it made the order. These principles which I have stated clearly emerge from the various decisions of the Federal Court and the High Courts in India which have been cited at the bar. In 1944 F. C. R. 295,<sup>9</sup> Sir Patrick Spens C. J., delivering the judgment of the Federal Court, observed at p. 316 :

"In our judgment, no further curtailment of the power of the Court to investigate and interfere with orders for detention has been imposed by Ordinance 3 of 1944. The Court is and will be still at liberty to investigate whether an order purporting to have been made under R. 26 and now deemed to be made under Ordinance 3 or a new order purporting to be made under Ordinance 3 was in fact validly made, in exactly the same way as immediately before the promulgation of the Ordinance. If on consideration the Court comes to the conclusion that it was not validly made on any of the grounds indicated in any of the long line of decisions in England and this country on the subject, other than the ground that R. 26 was ultra vires, S. 10 of Ordinance 3 will no more prevent it from so finding than S. 16, Defence of India Act, did. Such an invalid order, though purporting to be an order, will not in fact be an 'order made under this Ordinance' or having effect by virtue of S. 6 as if made under this Ordinance at all for the purposes of S. 10."

Harries C. J. in A. I. R. 1944 Lah. 373<sup>10</sup> in the course of his judgment, said (pp. 375 and 376):

"In my judgment R. 129 . . . cannot be used legally for any purpose, other than that for what it was intended, namely, to ensure inter alia the security of the State and the efficient prosecution of the war.

To use it for some entirely different purpose, wholly unconnected with the security of the State or the efficient prosecution of the war, is in my view a misuse of the powers given by that rule and an order passed for such purposes cannot be said to be an order under R. 129, Defence of India Rules,

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It would in my view be extremely dangerous to hold that the police or the Provincial Government had any right to detain persons under R. 129 unless the order was made with the object of making it impossible for the person detained to interfere with matters connected with the defence of India or the efficient prosecution of the war."

The judgment of Harries C. J. in A. I. R. 1944 Lah. 373<sup>10</sup> is pertinent so far as it was on R. 129, Defence of India Rules, and if the

9. ('44) 31 A. I. R. 1944 F. C. 86 : 23 Pat. 678 : 1944 F. C. R. 295 : I.L.R. (1944) Kar. F. C. 172 (F.C.), Basanta Chandra Ghosh v. Emperor.

10. ('44) 31 A.I.R. 1944 Lah. 373 : 217 I. C. 162 Dilbagh Singh v. Emperor.



Court ever came to the conclusion that the power invested in the executive officer or police officer under R. 129 (1) was used for any purpose other than to ensure inter alia the security of the State and the efficient prosecution of war, it would be a misuse of the powers given by that rule and an order passed for such purposes could not be said to be an order passed under R. 129, Defence of India Rules. That is the only object with which the order can be made, and if it is not made for those objects, it is liable to be set aside. This is the scope of the authority of the Courts to interfere with orders which are made under R. 129 (1), Defence of India Rules. Save for that, I apprehend, the Courts have no jurisdiction to interfere, and once it is brought to the notice of the Court that the officer concerned had materials or information before him on a consideration of which he came to the conclusion that there was ground for entertaining reasonable suspicion about the detenu within the meaning of R. 129 (1), it would not be possible to challenge the apprehension and detention of the detenu.

Mr. D. B. Desai drew my attention to the difference in the expressions used in R. 26 and R. 129, Defence of India Rules. In R. 26 the condition precedent to the Government's acting under the said rule was, that it should be satisfied with regard to any particular person that with a view to preventing him from acting in any manner prejudicial to the defence of India, the public safety, or the efficient prosecution of the war, it was necessary so to make an order, whereas under R. 129 the condition precedent was that the officer concerned should reasonably suspect the detenu of having acted in a manner prejudicial to the public safety or to the efficient prosecution of war. In the one case it was that the Government should be satisfied and in the other case it was that the officer concerned should reasonably suspect the detenu of having acted in the manner specified therein. It was therefore urged that the insertion of the word "reasonably" in R. 129 made a difference to the whole position. It was argued that the word "reasonably" was advisedly put in in R. 129 with the object of having the existence of the grounds of suspicion and the reasonableness of the suspicion entertained on those grounds determined by the Court whereas no such word was to be found in R. 26. This argument was sought to be supported by the observations of Lord Atkin in his speech in (1942) A.C. 206<sup>3</sup> where the difference between these two expressions was

pointed out by Lord Atkin and the Noble Law Lord came to the conclusion on a contrast of those expressions used in the different contexts therein mentioned, that the word "reasonably" imported that the Court should determine the reasonableness of the suspicion entertained by the officer concerned. It is, however, necessary to observe that even as regards the construction of R. 26, Defence of India Rules, the word "satisfied" has been interpreted as reasonably satisfied as contrasted with arbitrarily or capriciously or dishonestly satisfied, the existence of which latter circumstance would vitiate the order altogether. Observations to this effect are to be found in both the judgments of our Appeal Court hereinbefore referred to by me as also in the observations of Lord Wright in the judgment in (1942) A.C. 206.<sup>3</sup> The use of the word "reasonably" therefore in R. 129 as contrasted with the absence thereof in Rule 26 does not, in my opinion, make any difference to the position. The words "reasonably suspects" are used in R. 129 (1) with a view to connote the state of mind of the officer concerned, of which state of mind he, as I have already stated above, is the sole judge, it being left to his sole discretion as to whether the grounds on which he entertained the suspicion about the conduct of the detenu were in fact in existence and whether the same grounds did constitute reasonable grounds for suspecting the detenu of having acted in a manner prejudicial to the public safety or to the efficient prosecution of war, the only difference being that if it could be demonstrated before the Court in the event of the arrest and detention of the detenu by the officer concerned in exercise of the powers vested in him under R. 129 (1) that the officer concerned arbitrarily or capriciously or dishonestly suspected the detenu of having acted in a manner prejudicial to the public safety or to the efficient prosecution of war, the officer would be acting outside the powers vested in him under R. 129 (1) much more so if it could be demonstrated that he used those powers for purposes extraneous to the purpose for which he was invested with the same or exercised those powers with ulterior or indirect motives because in that event it would be a fraud on the provisions of the Defence of India Act and the Defence of India Rules framed thereunder. This argument, therefore, based on the comparison of the words used in R. 26 and those used in R. 129, Defence of India Rules, does not carry the case of the petitioner any further.



Having regard to the above observations I do not think it necessary for me to discuss in detail the judgment of Bose and Sen JJ. in A. I. R. 1945 Nag. 8<sup>1</sup> or the speech of Lord Atkin in (1942) A. C. 206.<sup>3</sup> I respectfully dissent from the observations of the learned Judges of the Nagpur High Court as also the portions of the speech of Lord Atkin in so far as they are contrary to or inconsistent with the opinion hereinbefore expressed. It is also not necessary for me to refer any further to the observations of the Full Bench in (1944) F. C. R. 295<sup>9</sup> or the speeches of the majority of the Law Lords in (1942) A. C. 206.<sup>3</sup> Even though the observations of the Full Bench in (1944) F. C. R. 295<sup>9</sup> and the speeches of the majority of the Law Lords in (1942) A. C. 206<sup>3</sup> as also the observations of Chagla and Gajendragadkar JJ. in 47 Bom. L. R. 675<sup>6</sup> above referred to, were with reference to R. 26, Defence of India Rules, and the analogous provisions thereto obtaining in England in Reg. 18B which was the subject-matter of the decision in (1942) A. C. 206,<sup>3</sup> the principles there discussed are in consonance with the principles which I have discussed in the earlier portion of my judgment, and in view of that fact I need not discuss the same any further beyond observing that I respectfully agree with the same.

In the result, I reject the contention of Mr. D. B. Desai, accept the contention of the Advocate-General and am of opinion that in the matter of the exercise of the powers vested in the executive officer or the police officer under R. 129 (1), Defence of India Rules, the question whether there are sufficient grounds or materials in fact which would enable the officer concerned to entertain a suspicion about the conduct of the detenu and whether the suspicion entertained by the officer concerned on those grounds or materials is a reasonable one or not falls to be determined by the officer concerned and not by the Court before which the order of the officer concerned might be challenged by the detenu on proceedings taken in that behalf.

The next contention urged by Mr. D. B. Desai was that even assuming that the reasonableness of the suspicion was a factor to be determined by the officer concerned and not by the Court, in the circumstances of the present case the exercise of the powers by the officer concerned, viz., the Commissioner of Police, was not *bona fide*, was not within the four corners of R. 129 (1), Defence of India Rules, was made by him with indirect or ulterior motives and not for the purposes warranted by the provisions in the

rule and that it was a fraud on the Defence of India Act and the rules framed thereunder. In support of this contention Mr. D. B. Desai has urged that in his petition the petitioner had set out in detail the activities and the political ideas of the detenu and had further in para. 2 of his affidavit dated 24th April 1945 pointed out that it was only at the instance of the U. P. Police who wanted to apprehend the detenu by reason of the facts therein mentioned that the Commissioner of Police had purported to act in the exercise of the powers vested in him under R. 129 (1), Defence of India Rules, and that therefore the order for arrest and detention of the detenu made by the Commissioner of Police was illegal. Mr. D. B. Desai pointed out that the various allegations which the petitioner had made in his petition and in his affidavit dated 24th April 1945 had not been traversed by Balaram who purported to make the affidavit in rejoinder under the authority of the Commissioner of Police, and that in the absence of any traverse of those allegations the Court should hold that the said allegations should be deemed to have been admitted by the Commissioner of Police. If those allegations be deemed to have been admitted by the Commissioner of Police, it was further urged that these were the only materials before the Commissioner of Police before he exercised the power of arrest and detention of the detenu under R. 129 (1), and unless and until the Commissioner of Police satisfied the Court that there were other materials before him on the strength of which he came to entertain a reasonable suspicion that the detenu had acted in a manner prejudicial to the public safety or to the efficient prosecution of war, the Court was entitled to hold that the exercise of the powers reserved to him under R. 129 (1) by the Commissioner of Police under those circumstances was made by the Commissioner of Police with indirect or ulterior motives and not for the purposes specified in R. 129 (1), with the result that the exercise of the said powers was not *bona fide* and the arrest and detention of the detenu by the Commissioner of Police was illegal.

The Advocate-General replied by stating that it was not obligatory upon his clients either to make an affidavit, or if an affidavit was made, to aver that there were any materials besides those which were set out in the petition and para. 2 of the affidavit of the petitioner dated 24th April 1945, on the strength of which the Commissioner of Police entertained a reasonable suspicion that the



detenu had acted in a manner prejudicial to the public safety or to the efficient prosecution of war. He went a step further and urged that it was not at all necessary for his client the Commissioner of Police to traverse the allegations which had been made by the petitioner in his petition and in para. 2 of his affidavit dated 24th April 1945. He relied in this behalf upon the decision of the House of Lords in (1942) A. C. 284,<sup>11</sup> where it was held that the production of the Home Secretary's order, the authenticity and good faith of which were not impugned, constituted a complete answer to an application by the appellant for a writ of *habeas corpus*, and no affidavit by the Home Secretary justifying his cause of belief was necessary. He also relied upon the observations of the appeal Court in 47 Bom. L. R. 669<sup>5</sup> decided by the Chief Justice and Lokur J. on 9th April 1945, where also it was held, following the two cases in (1942) A. C. 206<sup>3</sup> and (1942) A. C. 284,<sup>11</sup> that if the order of the Secretary of State was proved or admitted, it must be taken *prima facie*, i. e., until the contrary was proved, to have been properly made and that the requisite as to the belief of the Secretary of State was complied with, and that once that was done, the only method of escape was to show that the alleged order was in fact no order at all or was a fraud on the provisions of the law enacted in that behalf. I do not agree with this contention of the Advocate-General. There is this difference between the orders made under R. 26 and the orders made under R. 129 (1), Defence of India Rules, that whereas in the case of the orders made under R. 26 there is a regular written order issued by the Provincial Government in that behalf which *ex facie* complies with the requirements and connotes the fulfilment of the conditions precedent to the exercise of the powers in that behalf, in the case of orders under R. 129 (1) there is no written order. There is no warrant. In fact there is nothing in writing to show that the officer concerned reasonably suspected the detenu of having acted in a manner prejudicial to the public safety or to the efficient prosecution of war. There is merely an arrest by the officer concerned or an oral order for arrest communicated by him to his subordinate for the arrest of the detenu and there is nothing *ex facie* in the circumstances of the case to enable the Court to presume that the officer

concerned acted *bona fide* within the four corners of R. 129 (1). In the case of orders under R. 26, the production of the order made by the Provincial Government thereunder would be sufficient compliance with the requirements of the situation and would be *ex facie* proof of the conditions of R. 26 having been fulfilled and therefore it would not be necessary for the Government to make any affidavit in that behalf. In the case of orders under R. 129 (1), however, there being nothing which would be *ex facie* proof of the conditions therein laid down having been fulfilled, it would be incumbent on the officer concerned who arrested the detenu under the circumstances therein prescribed to make an affidavit showing that he reasonably suspected the detenu of having acted in a manner prejudicial to the public safety or to the efficient prosecution of war. In that affidavit the officer concerned is not bound to disclose any confidential information or any State secrets. It might be sufficient for him to aver that he had grounds or materials before him which were sufficient within his own mind to create a suspicion as to the conduct of the detenu and that on a consideration of those grounds or materials before him he reasonably suspected the detenu of having acted in a manner prejudicial to the public safety or to the efficient prosecution of war. This would be sufficient in the normal course of affairs, for in the majority of cases the detenu being in the unfortunate position of not knowing at all what were the grounds or the materials before the officer concerned which enabled him to entertain the suspicion about his conduct, would not be in a position to make any averment in his petition or the affidavit filed in support thereof. He could only put forward what he knew about his own activities and of his not having taken any part in any activities which would by any process of reasoning or by any stretch of imagination be connected with activities detrimental to the public safety or to the efficient prosecution of war. In those cases it may not be necessary for the officer concerned to aver anything more than what I have already indicated above. The position is, however, different when, as in the present case, the petitioner is in a position to aver much more than mere protestations of his innocence or his political and other activities as I have hereinbefore stated. If the petitioner is in a position to aver specifically that according to the best of his knowledge, information and belief there was

11. (1942) 1942 A. C. 284 : 111 L. J. K. B. 24 : 166 L. T. 24 : (1941) 3 All E. R. 388, *Greene v. Secretary of State for Home Affairs*.



certain information which was the only information on which the officer concerned acted in the matter of his arrest and detention in the purported exercise of his powers under R. 129 (1), Defence of India Rules, it would not be enough for the officer concerned in the affidavit which he makes in the proceedings merely to aver that the statements made by the petitioner in his affidavit are irrelevant or that he is not bound to reply to the same. The officer concerned must, in my opinion, traverse the allegations made in the affidavit of the petitioner and if he does not so traverse them and does not state that besides those materials he had other materials on which he came to entertain the reasonable suspicion of the detenu having acted in a manner prejudicial to the public safety or to the efficient prosecution of war, the Court would be entitled as in the case of other litigants to presume the correctness of the allegations made by the petitioner in his affidavit and also to presume that there were no other materials before the officer concerned which would have enabled him to entertain a reasonable suspicion about the conduct of the detenu within the meaning of the provisions of R. 129 (1). It would then be open to the Court on the materials put before it to come to the conclusion whether the exercise of the power by the officer concerned was not *bona fide* or was made with indirect or ulterior motives or was a fraud upon the powers vested in the officer concerned under R. 129 (1). I am aware that in the judgment which he delivered in 47 Bom. L. R. 669<sup>5</sup> Lokur J. has observed (page 675):

"Moreover, Government is not bound to disclose all the materials on which such a conclusion was reached. In fact the Secretary to Government, Home Department, has stated in his affidavit that he has been advised not to disclose these materials, but that H. E. the Governor did apply his mind to them and come to the conclusion that the order of detention passed by him was necessary. Mr. Jahagirdar contends that it is not stated in his affidavit that there were any materials before H. E. the Governor other than the ten criminal cases against the petitioner, but even that need not be disclosed. There is no reason to presume that there were no other materials and that in regarding even these cases themselves to be sufficient to require the petitioner's detention in the interest of public safety or maintenance of public order, H. E. the Governor did not act in good faith. It is not disputed that H. E. the Governor did apply his mind to the materials before him and it is not for the Court to decide whether those materials were or were not reasonably sufficient."

With great respect I do not agree with these observations of Lokur J. in so far as they might be sought to be applied to any

order made by the officer concerned under R. 129 (1), Defence of India Rules. These observations of Lokur J. might be appropriate in a case like the one which the Appeal Court was considering in that criminal application, viz., an order under R. 26, Defence of India Rules, but they do not afford any guidance or any precedent for holding that where an order made by an officer concerned under R. 129 (1) is challenged before the Court, the Court should under the circumstances like those obtaining in the present case treat the affidavit of the officer concerned as sufficient compliance with the requirements of the situation and is bound to treat the non-traverse of the relevant allegations made by the petitioner in his affidavit as any different from the non-traverse of the said allegations if it had been made by an ordinary litigant appearing before the Court. The Court is in such circumstances entitled to presume the correctness of the allegations contained in the affidavit made by the petitioner and is entitled to act as if these were the only materials before the officer concerned when he came to exercise powers vested in him under R. 129 (1), Defence of India Rules, in the absence of any averment in the affidavit of the officer concerned that besides those materials which were set out in the affidavit made by the petitioner he had other materials before him which, in his opinion, were sufficient to enable him to entertain the reasonable suspicion that the detenu had acted in a manner prejudicial to the public safety or to the efficient prosecution of war.

In the case before me, the petitioner besides stating in the petition that the detenu was not guilty of any subversive or any activities which were detrimental to the public safety or to the efficient prosecution of war has specifically averred in para. 2 of his affidavit dated 24th April 1945 that the action of the Commissioner of Police was the result of the desire of the U. P. Police to apprehend the detenu by reason of the facts therein mentioned, that it was not the *bona fide* act of the Commissioner of Police himself being the result of any reasonable suspicion entertained by him that the detenu had acted in a manner prejudicial to the public safety or to the efficient prosecution of war, and that in the matter of the arrest and detention of the detenu the Commissioner of Police had acted not *bona fide* but with ulterior or indirect motives, viz., that of apprehending and handing over the detenu to the custody of the U. P. Police and the U. P. Government, and that there-



fore the orders of the Commissioner of Police as regards the arrest and detention of the detenu were illegal. In the affidavits filed by Balaram I do not find any traverse of these allegations. As I have already stated, it was necessary for the Commissioner of Police or Balaram, who made his affidavit in accordance with the directions of the Commissioner of Police, to aver either that these were not the materials before the Commissioner of Police or that besides those materials there were other materials before the Commissioner of Police which were sufficient to enable the Commissioner of Police to entertain a reasonable suspicion that the detenu had acted in a manner prejudicial to the public safety or to the efficient prosecution of war. In the absence of such averment, I am constrained to hold that the materials set out in the petition and in para. 2 of the affidavit of the petitioner dated 24th April 1945 were the only materials on which the Commissioner of Police acted in purported exercise of the powers vested in him under R. 129 (1), Defence of India Rules. I am further fortified in this conclusion of mine by the order which was passed by the Government of Bombay on 13th April 1945, within only three days of the arrest of the detenu by the Commissioner of Police directing the removal of the detenu to Lucknow and his delivery into the custody of the Superintendent of Police, Lucknow. This leaves no doubt in my mind that the arrest of the detenu under the orders of the Commissioner of Police on 10th April 1945, was with the view to hand him over to the U. P. Police and the U. P. Government as stated in para. 2 of the affidavit of the petitioner dated 24th April 1945, and that the purported exercise of the powers conferred by sub-r. (5) of R. 129 on the Government of Bombay in the matter of the removal of the detenu to Lucknow, and his delivery into the custody of the Superintendent of Police, Lucknow, was also in furtherance of the same design. If this is the true position, it cannot be stated that the purported exercise of the power of arrest and detention of the detenu by the Commissioner of Police on 10th April 1945 or the steps taken thereafter by the Government of Bombay were bona fide or were not actuated by indirect or ulterior motives, viz., that of arresting and detaining the detenu merely on information purporting to have been supplied by the U. P. Police and the U. P. Government to the Commissioner of Police, Bombay, and removing him, under guise of the purported

exercise of the powers under R. 129, Defence of India Rules, within the jurisdiction of the U. P. Government. It cannot be stated that the Commissioner of Police under these circumstances reasonably suspected the detenu of having acted in a manner detrimental to public safety, or to the efficient prosecution of war, or that the order for the arrest and detention of the detenu made by him was an order within the meaning of R. 129 (1), Defence of India Rules. The cancellation of the order of the Government of Bombay dated 13th April 1945, directing the removal of the detenu to Lucknow and his delivery into the custody of the Superintendent of Police, Lucknow, by the further order of the Government of Bombay dated 18th April 1945, does not in my opinion make any difference to the position. The latter order appears to have been made by the Government of Bombay after Rajadhyaksha J. granted the rule against the Commissioner of Police and issued the stay order in terms of cl. (f) of the petition. The materials set out in para. 2 of the petitioner's affidavit dated 24th April 1945, and the correctness thereof which I have presumed by reason of the non-traverse of the said allegations in the affidavit filed by Balaram Shamrao Kothare in rejoinder on 1st May 1945, taken along with the order of the Government of Bombay dated 13th April 1945, which I have hereinbefore set out, leave no doubt in my mind that what the Commissioner of Police purported to do on 10th April 1945, was not bona fide, was actuated by indirect motives of arresting the detenu and transferring him within the jurisdiction of the U. P. Government and was a fraud on the powers invested in the Commissioner of Police under R. 129 (1), Defence of India Rules. I have, therefore, come to the conclusion that the orders for arrest and detention of the detenu dated 10th April 1945, and the further detention of the detenu under the order of the Government of Bombay dated 18th April 1945, following upon such illegal detention of the detenu are illegal.

The only thing which remains for me to consider is whether the order made by the Government of Bombay under R. 129 (2), Defence of India Rules, for temporary detention of the detenu was illegal. This order of the Government of Bombay dated 18th April 1945 has been challenged as illegal on the ground that R. 129 (2), Defence of India Rules, does not empower the Provincial Government to make any orders for



temporary custody of the detenu who might have been arrested by the officer concerned under R. 129 (1). Mr. D. B. Desai has urged that no express powers have been given to the Provincial Government in this behalf under any of the provisions of R. 129, and that such powers for the temporary detention of a detenu cannot be read into R. 129 merely by necessary implication in that behalf. It has been pointed out by the Advocate-General that proviso (1) to sub-r. (2) of R. 129 implies that the detenu can be detained in custody under that sub-rule for a period exceeding 15 days under the order of the Provincial Government. The words used in that proviso are :

"No person shall be detained in custody under this sub-rule for a period exceeding 15 days without the order of the Provincial Government."

This necessarily implies according to the Advocate-General that he can be detained in custody for a period exceeding 15 days if the Provincial Government passed orders in that behalf. That this is the necessary implication of this proviso is made clear when one goes to the provisions of sub-r. (4) of R. 129 where it is expressly laid down that in addition to making such order, subject to proviso (ii) to sub-r. (2) — which lays down that no person shall be detained in custody under that sub-rule for a period exceeding two months — as may appear to be necessary for the temporary custody of any person arrested under this rule, the Provincial Government might make such final order as to his detention, release, residence or any other matter concerning him, etc., as may appear to the Government in the circumstances of the case to be reasonable or necessary. This sub-r. (4) of R. 129 makes a provision for a final order to be passed by the Provincial Government in relation to the detenu but it makes a specific reference to the orders for the temporary custody of the detenu to be made by the Provincial Government subject to proviso (ii) to sub-r. (2), viz., that no person shall be detained in custody under this sub-rule for a period exceeding two months. Reading proviso (i) to sub-r. (2) and this provision made in sub-r. (4) of R. 129 I have come to the conclusion that by necessary implication the Provincial Government has been invested therein with the power of making such orders as to the temporary detention of the detenu as may be necessary in the opinion of the Provincial Government not exceeding a period of two months from the date of the arrest of the detenu pending the final orders

to be made by the Government for the detention, release, or residence or any other matter concerning him as might appear to the Government in the circumstances of the case to be reasonable or necessary. There is, therefore, no force in this contention of Mr. D. B. Desai.

Having regard, however, to the observations made by me in the earlier portion of my judgment and the conclusion which I have come to that the orders for the arrest and detention of the detenu made by the Commissioner of Police on 10th April 1945 and the further detention of the detenu under the order of the Government of Bombay dated 18th April 1945, are illegal, I do order that the detenu should be immediately set at liberty. As regards the costs of this rule and the petition, it has been conceded by both the parties that having regard to the fact that the point which was argued before the Court was not covered by any authoritative pronouncement of this Court, the costs of each party to this petition and rule should be borne by the respective parties. I, therefore, order that each party do bear and pay their own costs of this petition and the rule. The detenu Dhruvaraj-sing Vishwanathsingh shall therefore be immediately set at liberty. There will be no order as to the costs of the petition and the rule.

R.K.

*Release ordered.*

[Case No. 17.]

**A. I. R. (33) 1946 Bombay 86**

**DIVATIA AND BAVDEKAR JJ.**

*Emperor*

v.

*A. G. K. Pathan — Accused.*

Criminal Revn. Appln. No. 100 of 1945, Decided on 2nd April 1945, from conviction and sentence passed by Resident First Class Magistrate, Camp Deolali.

Criminal P. C. (1898), S. 197 (1) — Sanction under S. 197 not required for prosecution of public servants removable by delegated authority without sanction of Provincial Government.

Section 197 applies only to public servants who are not removable except with the sanction of the Provincial Government. Where the Provincial Government under S. 2 (5), Defence of India Act, grants to the District Magistrate, who is an authority subordinate to itself, power to appoint and remove Assistant Price Inspectors, which power can be exercised independently of the Provincial Government, it is not necessary for the District Magistrate to take the sanction of the Provincial Government for the removal of such officer under him. It, therefore, follows that sanction of the delegating authority (Provincial Government) under



S. 197, Criminal P. C., is not necessary before the Assistant Price Inspector can be prosecuted for any offence committed by him in the discharge of his duty : ('17) 4 A.I.R. 1917 Mad. 344, *Dissent.* ; ('34) 21 A.I.R. 1934 Rang. 238, *Disting.* ; ('35) 22 A.I.R. 1935 Rang. 263 (F.B.) ; ('35) 22 A.I.R. 1935 Mad. 442 and ('26) 13 A.I.R. 1926 All. 271, *Rel. on.* [P 87 C 2 ; P 88 C 1]

**Cr. P. C.—**

('41) Chitale, S. 197, N. 4 Pts. (9) to (9c).

('41) Mitra, Page 686, N. 643.

V. R. Desai, *Additional Assistant Government Pleader* — for the Crown.

E. B. Ghaswala and R. D. Andhyarujina and C. S. Trivedi — for Accused.

**Divatia J.**—Mr. Ghaswala has addressed us on a point of law, that the prosecution of accused 1, in absence of sanction under S. 197, Criminal P. C., is illegal. That section lays down that, when any public servant who is not removable from his office save by or with the sanction of a Provincial Government or some higher authority is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction of the Governor of that Province. Now in the present case, as I said before, accused 1 was appointed an Assistant Price Inspector by the District Magistrate of Nasik in his capacity as Price Controller under the Defence of India Rules. Under S. 2, sub-s. (5), Defence of India Act, a Provincial Government may delegate any of the powers conferred on it to any officer or authority. By virtue of that section the power to make appointment of Assistant Price Inspector was delegated to the District Magistrate. That fact is conceded. It is, however, contended that, when the District Magistrate acts under such delegated authority, the appointment as well as removal of any person appointed under such delegated authority must be deemed to have been made by the original authority, viz., the Local Government, and reliance was placed for that contention on the decision of the Rangoon High Court in 12 Rang. 530.<sup>1</sup> In that case the Sub-Inspector of Excise in Burma was appointed by the Local Government under the rules framed by the Secretary of State for India in Council. One of the rules empowered the Local Government to remove or dismiss the officer. It was held that, if it was sought to prosecute the officer appointed by the Commissioner for an offence alleged to have been committed by him in the discharge of

his duty, he was entitled to the protection of S. 197 (1), namely, the sanction of the Provincial Government for such prosecution. The decision in that case proceeded under the special provisions of the Burma Excise Act, and it was, on that ground, distinguished in a later Full Bench decision of the same High Court in 13 Rang. 540.<sup>2</sup> The facts of that case resemble those of the present case. It was there held that, where the Local Government had delegated power to make appointment and removal to a subordinate authority, the sanction of the Local Government was not necessary under S. 197, Criminal P. C. It was observed [by Dunkley J.] (page 551):

"If the Local Government under statutory powers granted to an authority subordinate to itself power to appoint and remove, which power can be exercised independently of the Local Government, then obviously the appointment is made, not by the Local Government, but by the subordinate authority."

It may be noted that the learned Judge, who decided the previous case in 12 Rang. 530<sup>1</sup> relied upon a decision of the Madras High Court in 17 Cr. L. J. 168<sup>3</sup> where it was held that where a servant has been appointed under a delegated authority, the sanction of the original authority, which delegated power, was required under S. 197. But that case has been dissented from by the Madras High Court itself in 58 Mad. 787.<sup>4</sup> There it was held that S. 197 clearly draws a line between public servants, and provides that only in the case of the higher ranks the sanction of the Provincial Government is necessary, and that sub-s. (1) did not include public servants whom some lower authority has by law or rule or order been empowered to remove. The learned Judges expressly dissented from the previous decision in 17 Cr. L. J. 168<sup>3</sup> and held that even though the power of authority may be delegated, it does not necessarily follow that the sanction of the delegating power was required. To the same effect is also the decision of the Allahabad High Court in 48 ALL. 264.<sup>5</sup> In our opinion, these later decisions are correct on the wording of sub-s. (1) of S. 197. The section applies only to public servants who are not removable except with the sanction

2. ('35) 22 A.I.R. 1935 Rang. 263 : 13 Rang. 540 : 157 I. C. 1034 (F.B.), *Emperor v. Maung Bo Maung.*

3. ('17) 4 A.I.R. 1917 Mad. 344 : 33 I. C. 648 : 17 Cr. L. J. 168, *In re Abdul Khadir Saheb.*

4. ('35) 22 A.I.R. 1935 Mad. 442 : 58 Mad. 787 : 157 I.C. 24, *Pichai Pillai v. Balasundara Mudaly.*

5. ('26) 13 A.I.R. 1926 All. 271 : 48 All. 264 : 92 I. C. 857, *Emperor v. Jalal-Ud-Din.*

1. ('34) 21 A.I.R. 1934 Rang. 238 : 12 Rang. 530 : 152 I. C. 366, *Kyaw Htin v. Ah Yoo.*



of the Provincial Government. In the present case, even though the District Magistrate had a delegated authority to appoint as well as remove the Assistant Price Inspector, it was not necessary for him to take the sanction of the Provincial Government for the appointment or for the removal of such officers under him. It must, therefore, follow that, if it is within the competence of the officer, even though the authority to him is delegated, to remove a subordinate officer appointed by him, it is not necessary that the sanction of the delegating authority must be obtained before the subordinate officer can be prosecuted for any offence committed in the discharge of his duty. We think, therefore, that no sanction was necessary in the present case. The order of the lower Court is confirmed, and the rule is discharged.

N.R./V.B.

*Rule discharged.*

[Case No. 18.]

**A. I. R. (33) 1946 Bombay 88****BLAGDEN J.***George Bell — Plaintiff*

v.

*Royal Western India Turf Club, Ltd.  
— Defendants.*

O. C. J. Suit No. 308 of 1941, Decided on 8th December 1944.

(a) Corporate body — Meeting — Quorum necessary — For getting quorum all members must have notice of meeting.

In the absence of any rule to the contrary, where a committee or other body is empowered to act by a certain number of its members as a quorum, it is well established that there is no quorum, and the proceedings of the meeting are invalid, unless notice of the meeting is given to all the members of that committee or other body. A "quorum" in fact means a given number of individuals out of the whole body, all of whom have had notice of the meeting, who have attended the meeting.

[P 89 C 1]

(b) Club—Incorporated—Tribunal set up by club taking disciplinary action against member of club — Suit for damages by such member lies against club and not against tribunal.

Where a tribunal set up by a larger association of persons, such as a racing club, acts judicially or quasi-judicially in the case of a member by expelling him or in that of a licensee by taking away the licence, the tribunal acts as the agent of the association and not as an independent tribunal. Consequently, if the association is an incorporated one, a suit for damages by such member or licensee lies against the association and not against the individuals who composed the tribunal alleged to have acted wrongly: (1932) 2 K. B. 431; (1932) 2 K. B. 478n and (1920) 2 K. B. 523, *Rel. on.* [P 89 C 2; P 90 C 1]

(c) Racing Club—Royal Western India Turf Club Rules, Rr. 103, 180 — "Misconduct" in R. 103 is not restricted to offences under

R. 180—Misconduct sufficient for withdrawing licence of trainer explained.

There is nothing which restricts the word "misconduct" in R. 103 to the specific offences defined in R. 180; the word is very general, and has purposely been left very general. Hence the stewards are within their right in withdrawing the licence of a trainer charged with any conduct which reasonable men might regard as misconduct in a trainer, provided they honestly entertain the opinion, and arrive at it in a proper way, that he was guilty of that conduct and that it is "misconduct" in connection with racing. [P 92 C 1, 2]

(d) Malice — Consideration of, necessary—Conduct of defendant even at trial is material.

In considering a question of malice the subsequent conduct of those concerned or any of them may be most material and the Court is entitled in such cases to take into account the whole subsequent behaviour of the defendant down to and even at the trial: *Ley v. Hamilton, Foll.* [P 93 C 1]

(e) Domestic tribunal — Notice — No particular notice prescribed—Shortness of notice of hearing or absence of notice of charge cannot be pleaded after conclusion of enquiry.

In the absence of any provision for any particular length of period of notice before disciplinary action is taken before a domestic tribunal, the mere shortness of notice is not itself a matter which makes the proceedings before the tribunal contrary to natural justice. Similarly, where there is no rule expressly requiring any particular notice of charge to be given to a person against whom disciplinary action is started, that person cannot be allowed to conduct his case, before a tribunal properly constituted, to its conclusion, and then, when he has been unsuccessful, to say that as there was no notice of charge served on him the proceeding before the tribunal was vitiated as being opposed to natural justice: (1878) 11 Ch. D. 353 and (1879) 13 Ch. D. 346, *Ref.* [P 94 C 2; P 97 C 2]

(f) Domestic tribunal — "Bias" — What amounts to, explained.

"Bias" in order to disqualify a tribunal must be something tending to make the mind to go one way rather than another, and improperly tending to do so. In a social club, those of the committee who know the offending member cannot help having an opinion of him whose conduct they are asked to investigate. And, every member of the club has some pecuniary interest in the question whether a member shall or shall not be expelled. But this does not in itself amount to bias.

[P 97 C 2; P 98 C 1]

(g) Domestic tribunal — Rules in enquiry against member, explained.

A domestic tribunal is not bound by the ordinary rules of evidence, with which its members may well be unacquainted; nor is it bound to follow the procedure of the Courts of law or anything like it. It is not even bound to hear the parties, but may reach its decision even by correspondence. It is not bound to act in a way that "the man in the street" would necessarily regard as just. [P 98 C 2; P 99 C 1]

(h) Domestic tribunal — Natural justice — Rule of—How applied, explained.

When a tribunal has got to act "according to natural justice," it has merely to act impartially and honestly. It must make up its own mind and not, for example, substitute for it the opinion of some one else, or decide the question by spinning a coin, thereby leaving it to the arbitrament of



choice. It must do so without any improper or collateral motive, and in doing so it must treat the contending parties equally, giving to neither an advantage not enjoyed by the other. If in fact it does that, it is acting according to natural justice, whether or not it not only does that but also appears to do that: ('44) 31 A.I.R. 1944 Cal. 127, *Foll.*; (1919) 2 Ch. 276, *Rel. on.* [P 101 C 2; P 102 C 2]

*E. B. Ghaswalla, S. D. Vimadalal and C. N. Daji* — for Plaintiff.

*Sir Jamshedji Kanga and K. A. Somjee* — for Defendants.

**Judgment.**—[His Lordship summarised the pleadings and proceeded]: It is to be observed that the plaintiff does not allege that the tribunal was improperly constituted by reason of no adequate or proper notice having been given to those who were entitled to attend and take part in its decision. Where a committee or other body is empowered to act by a certain number of its members as a quorum, it is well established that there is no quorum, and the proceedings of the meeting are invalid, unless notice of the meeting is given to all the members of that committee or other body—a "quorum" in fact means a given number of individuals out of the whole body, all of whom have had notice of the meeting, who have attended the meeting. This at least is the case in the absence of any rule to the contrary, and it is customary for social clubs and similar bodies to provide in their rules that the accidental omission to give notice of any particular meeting shall not of itself invalidate its proceedings. Nothing being alleged against the notice given to the stewards and no application having been made to amend the pleadings until after the evidence was closed and at a late stage in the arguments of learned counsel I thought it right to refuse such application and consequently no issue about that has been framed or arises.

I should, however, say this in passing. The one person, if there now is any person in the world, who could have proved what notice was given to the stewards and what its terms were is a gentleman who is and at all material times was the Secretary of the defendant Club, a Major Gulliland. He was not called. If this issue had arisen I should, therefore, have been entitled and in the circumstances bound to presume that his evidence on this point would not have assisted the defendants. But I could not have gone further and assumed that it would have assisted the plaintiff. I should have had to assume that Major Gulliland would have said something of this sort, "I am not now in a position to say what notice I gave,

or in what terms that notice was couched." If the evidence had rested there, the proper inference for me to draw would have been that Major Gulliland has done his job properly. I ought not to presume, merely because he cannot after the lapse of five years remember how he did his job, that he did it wrongly. The correct inference, therefore, would have been that proper notice was given to the stewards and that they were told the purpose for which their meeting was convened.

The plaintiff also alleges as a grievance the publication by the stewards of a notice of their decision in the *Racing Calendar*. This publication took place on 16th March 1939 and the plaintiff, as I say, was admitted on 6th March 1941. Trying to construe the plaintiff as benevolently as I could, I first thought that it included a claim for damages for libel. Considered as a claim in libel the plaintiff is extremely defective because, amongst other things, it does not set out the precise words complained of. But there is a more serious defect about it than that; it is obviously time-barred, the period of limitation being one year from the date of publication. Accordingly, the plaintiff by his learned counsel has very wisely not pressed the point that it is capable of being construed as a plaintiff for libel, and no issue has been framed about the publication in the *Racing Calendar*. Even if it had been, it would not have assisted the plaintiff because it is clear from the terms of his licence that he consented to this particular publication being made if and when his licence should be withdrawn, and in these circumstances he would have had no cause of action for defamation: *see* (1932) 2 K. B. 431.<sup>1</sup>

The following issues were framed: (1) Does the plaintiff disclose a cause of action against the defendants? (2) Did the defendants' stewards in revoking the plaintiff's licence act (a) in contravention of the Rules of Racing, or (b) in a manner contrary to natural justice? (3) To what, if any, relief is the plaintiff entitled?

The first issue may be briefly disposed of. It was not strenuously argued by the defendants who, very naturally, desire a decision on the merits rather than on any technicality. The contention of the defendants was, originally, that where a committee or a board of stewards or similar body, set up by a larger association of persons, acts judicially or quasi-judicially in

<sup>1</sup>. (1932) 2 K. B. 431 : 101 L. J. K. B. 376 : 146 L. T. 538, *Chapman v. Ellesmere*.



the case of a member by expelling him or in that of a licensee by taking away the licence, they are not acting as the agents of the body which set them up, but as an independent tribunal, and that consequently, any suit lies, if it lies at all, not against the main association but against the individuals who composed the tribunal alleged to have acted wrongly. It is quite true that there are numerous cases in which those individuals have been sued, but in most if not all of them it will be found that the Club or other body which they represented was an unincorporated body; there are obvious difficulties in bringing a suit for damages against an unincorporated and fluctuating body of persons. I think I am right in saying, e. g., that the English Jockey Club as well as the Pony Turf Club are both unincorporated bodies of persons which no doubt is the reason why in (1932) 2 K. B. 431<sup>1</sup>—already cited—the defendants were the distinguished individuals who dealt with the plaintiff's case and not the Jockey Club itself: the same applies to (1932) 2 K. B. 478<sup>2</sup> reported in a note to (1932) 2 K. B. 431.<sup>1</sup> There are, however, other cases, both of clubs and professional tribunals, in which the body itself has been made a defendant, e. g., in (1920) 2 K. B. 523<sup>3</sup>—a suit for damages by a member against the club itself, being an incorporated body of persons, was brought and succeeded, though it is true that the damages, which were assessed at the sum of one farthing, were probably not an undue strain on the resources of the Ladies' Imperial Club. The General Medical Council has also more than once figured as defendant to a suit of this nature. In my opinion it follows that, as the defendants are incorporated, a suit will lie against them in respect of the alleged wrong doing of their stewards who for this purpose must be regarded as their agents. The answer to issue 1 is therefore "Yes."

As regards issue 2, the facts, as I find them, are as follows: The defendants are a company limited by guarantee, which is the controlling authority for the sport of horse racing in Western India, corresponding to the Jockey Club in England. They have what is called a "reciprocal arrangement for the enforcement of sentences" made with the Jockey Club and numerous other similar bodies in different countries; according

to the witness Mr. Reid, whose evidence I accept on this point, the reciprocal arrangements are very nearly world-wide. The result is that a disqualified person—to the exact meaning of which term I shall be referring a little later,—who becomes a disqualified person by reason of the decision of the defendants' stewards is a disqualified person in most parts of the world where horse racing is carried on, and if he makes his livelihood out of horse racing, he is practically—by which I mean "in practice"—debarred from earning his livelihood in this way almost anywhere on the face of the globe. In effect, the defendants' stewards have in their hands a giant's strength and like all persons in that position it is their moral duty to remember that "it is tyrannous to use it like a giant." I am not for a moment suggesting that on any occasion they have forgotten that duty. In the course of their operations the defendants for many years have been in the habit of issuing licences to trainers, which they are empowered to do by their memorandum and articles of association. As will be seen later from the rules of racing, it would not be practically possible for a person to train horses for reward in Western India if he did not hold a licence for that purpose from the defendants. The plaintiff has for substantially the whole of his working life been concerned in one way or other with horses. He has for a time been foreman of a distinguished firm (in its day) of horse dealers. Apart from that he has ridden and trained race horses for the rest of his working life. For many years prior to the matter now complained of he held a licence as a trainer from the defendants. That state of affairs was once or twice, I think, interrupted of the plaintiff's own volition and on one occasion it was interrupted otherwise. That occasion has now become ancient history, and I am satisfied that it has absolutely nothing to do with the present case; therefore the less I say about it the better, and I am not going to say anything more. Over 20 years ago the plaintiff, for a time, trained horses for a Mr. Geddis, who was the Chairman of the board of stewards at the time of their decision now in question. Curiously enough, the plaintiff said nothing about this in his own evidence, but some questions were put to Mr. Geddis in cross-examination in which it was suggested that there was some sort of a row between these two gentlemen at the time the plaintiff's employment ceased and that their relations

2. (1932) 2 K. B. 478n : 101 L. J. K. B. 394n, *Cookson v. Harewood*.

3. (1920) 2 K. B. 523 : 89 L. J. K. B. 563 : 123 L. T. 191, *Young v. Ladies Imperial Club, Ltd.*



have since been strained. The evidence I have about it is entirely one sided because, as I say, the plaintiff said nothing about this. But I have no hesitation in accepting the evidence of Mr. Geddis, whose honesty as a witness is not disputed, when he says that they had not been at any time anything but perfectly friendly acquaintances during the intervening period.

The licence which the plaintiff held was expressed to be issued subject to the Rules of Racing of the Royal Western India Turf Club, Ltd. It was an annual licence, but in the ordinary course if the stewards had nothing against Mr. Bell, or any other trainer, it would be renewed from year to year almost as a matter of course. It was expressed to be issued under certain conditions, one of which read as follows :

"A trainer's licence may be withdrawn or suspended by the Stewards of the Royal Western India Turf Club, Ltd., in their absolute discretion ; such withdrawal or suspension, or any other sentence may be published in the Racing Calendar of the Royal Western India Turf Club, Ltd., for any reason which may seem proper to the said Stewards and they shall not be bound to state their reasons."

The plaintiff does not dispute that he accepted the licence subject to that condition amongst others and that is the reason I said earlier he could not have complained of the publication in the Racing Calendar even if he had commenced his suit in time to do so, which he did not. The Rules of Racing issued by the defendants are on the whole similar to the rules of racing issued by the English Jockey Club. A good many of them have been cited, and the more material of them appear to be these. First of all R. 22, which defines the powers of the stewards of the Club and which reads as follows :

"In addition to any other powers conferred upon them by these Rules the Stewards of the Turf Club have power at their discretion :

To grant and to withdraw licences to officials, trainers, jockeys and others, and to refuse or cancel entries."

I am omitting several powers which are not necessary for this purpose.

"To make enquiry into, finally decide and deal with any matters relating to racing, whether or not referred to them by the Stewards of a Meeting or not."

I may say in passing that "the stewards of a meeting" means stewards of the Club and such persons as may be invited to act with them.

Next,

"To warn any person off the Bombay and Poona Race Course or other courses where these Rules are in force, and to authorise the publication in the

Racing Calendar of their decisions respecting any of the above matters,"

and the rule concludes :

"And they may at any time remove or modify any disqualification, or remit any penalty."

Rule 23 reads as follows :

"In exercising any of the powers conferred upon the Stewards of the Club by these Rules, three shall be a quorum and in the event of a difference of opinion the decision of the majority shall prevail. They may enlist the assistance of any other Club member of the Club and if they think the importance or difficulty of the case requires, may refer it to the Committee, who may, if necessary, call a General Meeting of the Club Members of the Club."

Rule 103 deals with trainers and provides first that

"Every trainer for fee or reward of a horse running under these Rules, shall obtain an annual licence from the Stewards of the Club, and on application shall pay a fee of Rs. 50, which shall be credited to the Benevolent Fund."

The rest of the clause does not, I think, matter. Clause 2 reads :

"No person shall train a horse on the Bombay or Poona Race Courses or other Race Courses controlled by the Stewards of the Club, without their written permission. Such permission may be revoked at any time."

That means that a person to train horses for reward must have a licence, and if he wants to train horses as an amateur he must get the permission of the stewards. The rule concludes :

"A person whose licence to train has been withdrawn on the ground of misconduct is a disqualified person."

I now turn to R. 180, which as far as material reads as follows : It is divided into several clauses—Clauses (i) to (vii) conclude with the words :

"Every person so offending shall be warned off the Bombay and Poona Race Course and other places where these Rules are in force."

Amongst the offences specified are these :

"(iv) If any person be guilty of any other corrupt or fraudulent practice in relation to racing in this or any other country;

(vii) Any person who shall at any time administer or cause to be administered for the purpose of affecting the speed, stamina, courage, or conduct of a horse any drug or stimulant whatever, or use any electric or galvanic apparatus for any of the purposes aforesaid."

Rule 181 provides,

"The decision of the Stewards of the Club, on the report of the Stewards or otherwise, that the person has been guilty of any of the offences specified in R. 180, shall be conclusive evidence of his guilt."

And R. 183 reads :

"When a person is a disqualified person under recognised Rules of Racing" (which, I think, means 'any recognised Rules' of Racing) "or is warned off the Bombay and Poona Race Courses or any Course under the Jurisdiction of any Recognised Turf Authorities who have a reciprocal agreement with the English Jockey Club for the mutual enforce-



ment of sentences and so long as his exclusion continues he is a disqualified person."

"A disqualified person, so long as his disqualification lasts shall not" (amongst other things) "enter, run, train, or ride a horse in any race at any recognised meeting" or

"Except with the permission of the Stewards of the Club enter any Race Course, stand or Enclosure, ride, work or be employed in any Racing Stable."

There is obviously a certain amount of overlapping between R. 183 and the last clause of R. 103. But the combined effect of these rules seems to be this — A trainer's licence might be withdrawn for misconduct or otherwise. If it is withdrawn otherwise than for misconduct, or if it is not renewed at the end of the year and no reason is assigned, that trainer is perfectly at liberty to work in connection with racing in Western India otherwise than as a trainer, provided he is qualified to work in any other capacity, and at liberty to apply for a trainer's licence anywhere else in the world. If, however, his licence is revoked on the ground of misconduct, he *ipso facto* becomes a disqualified person under R. 103. Whether or not he is also warned off the Turf in Western India, the effect is very much the same. He cannot be employed in a racing stable, he cannot enter any recognised race course, and in fact is completely debarred from earning his living in connection with racing in Western India or anywhere else where there exists the reciprocal arrangement to which I have already referred. I also observe with regard to these rules that there is in my opinion nothing which restricts the word "misconduct" in R. 103 to the specific offences defined in R. 180; the word is very general, and in my opinion has purposely been left very general. There is no particular hardship in this. The word is no more vague and no more wide than the expression "infamous conduct in a professional respect" used in relation to the medical profession, or "conduct unbecoming of an officer and a gentleman" used in relation to a Commissioned Officer in one of His Majesty's services. No doubt the import of such phrases changes and has changed with the changes in the behaviour of society; for example, a degree of drunkenness in private life which would have been, as far as one can judge from the literature of the period, almost a social duty during the Regency might well be considered unbecoming of an officer and a gentleman at the present day. But there is no hardship in a person's submitting himself to so indefinite a code or rules; he will be judged, if he is accused of an offence, by

persons well conversant with the conduct of people in his own walk of life and with what it ought to be; for example, a court-martial in the case of an officer in the fighting services, the General Medical Council in the case of a doctor, and the stewards of the controlling authority of racing in the case of a race horse trainer. I think the stewards are within their right in withdrawing the licence of a trainer charged with any conduct which reasonable men might regard as misconduct in a trainer, provided they honestly entertain the opinion, and arrive at it in a proper way, that he was guilty of that conduct and that it is "misconduct" in connection with racing.

The defendant club in addition to appointing five stewards, which is the number prescribed by its articles, has been in the habit, and it is within its powers, of appointing two "stipendiary stewards". As far as the rules of racing go, one might imagine that the position of these gentlemen was simply that they were stewards but, unlike other stewards, were paid for their services; a position similar to that of the Lords of Appeal in Ordinary in the House of Lords; i. e., life peers paid for discharging the high judicial office which they do discharge but having the same rights of voting and so on in the House of Lords in its legislative capacity as ordinary, unpaid, peers of the realm. Such, however, is not the case. If one looks at the memorandum and articles of association of the club, it is clear that the stewards of the club are limited to five in number and that the words "stipendiary stewards" do not, as one might expect, connote a species of the genus "stewards". They are servants or officers of the club, and a word must be said about the nature of their duties. Naturally, they are racing experts, and I accept the evidence which I have, that the stewards rely on them for advice on technical matters connected with racing of which they, the honorary stewards, very likely do not possess the necessary knowledge. One of them who gave evidence before me, Mr. Reid, agreed with the suggestion put to him by Mr. Vimadlal in cross-examination that it is a part of their duty "to ferret out malpractices", and he agreed that the stipendiary stewards were "in a sense, the eyes and ears of the stewards." It appears that they are expected to bring to the attention of the stewards anything that may come to their knowledge or notice in connection with racing in the area controlled by the defendant club which might



call for an enquiry and punitive action by the stewards. In the course of their duties it seems that they sometimes hold a more or less informal enquiry themselves, take and record statements from any persons who can give, or say that they could give, useful information, and report the result of their enquiry to the stewards. It is in this sort of sense that the expression "they are the eyes and ears of the stewards" has to be interpreted. It seems also that it is their part of the duty to attend at any enquiry conducted by the stewards and, at all events in serious matters, one or other of them acts at such enquiries a part not dissimilar to that of the prosecutor in a criminal Court. It has been said very many times that counsel prosecuting in a criminal case is in a different position from counsel appearing for a party in a civil case and should regard himself rather as a minister of justice than the advocate of a cause; it is not his duty to obtain a conviction by any means, but merely to see that the whole of the evidence is placed fairly before the tribunal which has to decide the case. *Mutatis mutandis*, the same thing no doubt applies, possibly to a lesser extent, to a person who has to discharge functions corresponding to those of a prosecutor before a domestic tribunal. There may be degrees of divergence from the model course which would vitiate the decision of such a body. [His Lordship then discussed the details of the enquiry against the plaintiff and other matters called "the who's who enquiry" and "the search," and proceeded.]

Sir Jamshedji Kanga for the defendants objected in law to my taking into consideration anything that happened after the conclusion of the enquiry. I ruled against him, and I must now explain why. One of the factors to be considered under the head whether natural justice has been observed or not is whether the body which decided the question were actuated by malice or some improper motive. In considering such a question the subsequent conduct of those concerned or any of them may be most material. The question of malice or no malice arises perhaps most frequently in suits for libel or slander whether the defence set up is qualified privilege, and I have always understood that the jury is entitled in such cases to take into account the whole subsequent behaviour of the defendant down to and even at the trial. I know of no better authority for this than the case of *Ley v. Hamilton*, which though it went

to the House of Lords is, I believe, nowhere reported. The material facts of that case, which I came to know of because of some subsequent proceedings in which I was concerned as counsel, were as follows:

Ley (the plaintiff), Hamilton (the defendant), and two friends of the defendant had been in partnership. The firm was dissolved by the retirement of the defendant and its business was continued by the other partners as, of course, a new firm. A few days after his retirement the defendant received information about the plaintiff which (if it were true) meant that no sensible person would trust him. The defendant apparently thought it is his moral duty — and many people would agree with him — to pass on his information to his two friends, and this he did by letter. One of them left the letter lying about in the premises of the new firm and so it came to the eyes of the plaintiff, who with commendable promptitude commenced a suit for libel.

The defendant pleaded, and pleaded only, that the publication was made without malice on a privileged occasion. At the trial before the late Lord Hewart C. J. and a special jury the plaintiff gave evidence mainly confined to his own good character and the learned Chief Justice ruled that there was some evidence of malice to go to the jury. The defendant then gave evidence and the first question he was asked in cross-examination was:

"Would you like to make any apology for the untrue statements you have made about the plaintiff?"

The deadly nature of this question is obvious. If the answer is "Yes" it can be followed up with the question "Why have you never done so before?" and whatever the answer to that it provides useful evidence of malice. If the answer is "No", again that can be pointed to as evidence of malice. It is not surprising that the question was objected to as one which assumed the falsity of the publication, and put that assumption into the mouth of the witness, when its truth or falsity was not even in issue. The objection was somewhat brusquely overruled, and the witness's answer must have exceeded the cross-examiner's wildest hopes. It was:

"If they are untrue — yes."

This, of course, was followed by the question "But you do not say they are true, do you?" to which the luckless defendant replied somewhat as follows:

"Certainly I do, now you ask me. I have received a lot more information since this suit started."



This provided admirable material for the plaintiff's counsel to make a final speech stressing the defendant's malice and inviting the jury to award vindictive damages, which they did. I forget the figure, but it was astonishingly large. Judgment going for the plaintiff, the defendant appealed. The Court of Appeal held that there was no evidence of malice apart from the defendant's evidence, that the first question in his cross-examination was unfair and should not have been allowed, and that anyhow the damages were excessive. I cannot remember if they ordered judgment to be entered for the defendant or a new trial—presumably the former. From that decision the plaintiff appealed to the House of Lords, who decided in the contrary sense to the Court of Appeal on the question whether there was a case for the defendant to answer, and — somewhat surprisingly — that the plaintiff's line of cross-examination was perfectly fair and proper, and that the damages were not, in the circumstances, a penny too large. The long battle thus ended in a great victory for the plaintiff. The case does most clearly show that when there is a question of malice, everything relative to matters in question even down to the very conduct of the defendant at the trial, may be material, and it is in that spirit that I approach the subsequent events in this case. Evidence of events subsequent to the stewards' decision was, I note, also considered in (1932) 2 K.B. 431.<sup>1</sup> (After stating the material subsequent events, the judgment continued.) The defendants, I think rightly, have accepted the position that there was an implied contract between the plaintiff and the defendants that the licence which the defendants had granted the plaintiff should not be revoked for misconduct except after an investigation which should be conducted according to the rules of racing and which should be in accordance with natural justice. I have already held that the investigation was in accordance with the rules of racing. Now, I have to ask myself why, if at all, the proceedings against the plaintiff were not in accordance with natural justice, and the first ground advanced for saying that is that the plaintiff was given inadequate notice of the hearing of the charge against him. He received the notice, according to himself, and there is nothing to contradict him, somewhere about 6 or 7 P.M., and he was required to attend a stewards' meeting at 8 A.M., the next morning, and (as I indicated in going through the evidence) that notice which he

received did not tell him for what purpose he was required to attend the meeting. The shortness of the notice that was given to him might have been highly material if in fact he had not been able to attend. Supposing that he did not turn up at the stewards' meeting the next morning at 8 A.M., and that the stewards had proceeded against him in his absence, I think it might well have been that their proceedings were not in accordance with natural justice. But does mere shortness of the notice, in itself, vitiate those proceedings, regard being had to the fact that he did turn up? I do not think it does. The rules of racing do not prescribe any particular length of notice and the mere shortness of notice is not, I think, itself fatal. It is true that (regard being had to the fact that the intervening hours between the receipt of the notice and the hearing were not the usual business hours) it might be that he was unable to arrange to see his legal advisers, had he desired to obtain legal advice, but then what legal advice could he have usefully obtained? All that the notice told him was that he was required to attend a meeting of the stewards. He would be a wise solicitor or counsel who on that could give him advice as to the best way he should conduct himself irrespective of whether it turned out that he was to be a witness or an accused, and irrespective of what the charge against him was. The most that any one could have advised him was this, "if you are charged with anything, ask for particulars and ask for time." And even then that advice might have been useless because the charge might have been one of so trivial a character that the plaintiff would have been prepared there and then to admit it, or it might have been one which he was in a position there and then, at an inquiry, to refute utterly and entirely, in which case, naturally, he would desire to get the matter disposed of at once. I do not think therefore that the mere shortness of the notice is itself a matter which makes the proceedings contrary to natural justice.

A more formidable point is made by Mr. Vimadalal in that the plaintiff had no notice at all of the charge before the hearing and indeed it was only after Major Nabi Khan had opened his case—if I may so term it—that he was given any particulars of the charge against him—for example, as to the time and place where he was supposed to have committed the alleged offence. Without looking at authorities for the moment, I should have thought that the mere absence



of notice of the charge before the hearing was not, in itself, incompatible with natural justice in a domestic tribunal. After all, what is the first domestic tribunal that most educated people come up against in their lives? It is the headmaster of their preparatory school. Well, it is a long time ago now, but it is my recollection that when one was told to visit that gentleman in his study one did not know the nature or particulars of the charge against one. Whether one suspected what it was depended on the innocence or otherwise of one's conscience. The mischievous boy might guess which of the possible six or more charges against him had been found out. An abnormally well behaved boy might be perfectly certain that there was nothing against him. But, in any case, I venture to think that very few schoolboys after they have grown up look back on their school days as a time when natural justice was not administered. The usual criticism by a former schoolboy of his school master, as far as my experience goes, is "he was a beast, but a just beast." However, it must be admitted, of course, that proceedings which are intended to take away for a substantial time a man's livelihood are rather — indeed a great deal — more serious than those directed to temporarily taking away a schoolboy's comfort, and what is natural justice in one case is not necessarily the same in the other. However, if one examines the authorities (and there are quite a number of them) on the question of notice to a person accused before a domestic tribunal, or its absence, I think it will generally if not always be found that the point arises either where the rules of the club or other institution expressly require a special length or a particular form of notice, or where a domestic tribunal has in fact proceeded in the absence of the accused. In cases where the rules expressly require some particular form of notice, the question is one of construing the rules. Where there is no particular provision and the accused — if I may use that expression for want of a better — has not turned up at the hearing, and the committee or other tribunal has proceeded in his absence, then, of course, natural justice, apart from express rules, requires that he should have been told why he was required to attend. If he is merely told "you have got to come to a certain place at a certain time" he may not bother to come, whereas had he been told that he must attend at such and such a time at such and such a place on which the committee would consider whether it should

expel him or not, he might have made it convenient to come. Unless the seriousness of the proceedings have been brought home to him by the notice, the proceedings in his absence would, generally, be contrary to natural justice.

It must be borne in mind that in several cases such as for example (1920) 2 K. B. 523<sup>3</sup> the decision was made with reference to a rule which expressly required the meeting to be a meeting "specially summoned for that purpose," and it was held on the construction of those rules that a statement of the object of the meeting as "to report on and discuss the matter concerning Mrs." or "Miss" (whichever the plaintiff was) "Young and Mrs. L" was not a sufficient statement of its object to make the meeting one "specially summoned for that purpose." Several of the leading cases on this particular point were decisions of that very great lawyer Sir George (afterwards Lord) Jessel M. R. and it is quite true that in some of them such as (1879) 13 Ch. D. 346,<sup>4</sup> he has used expressions which taken by themselves suggest that in all cases it is essential that the person charged before the tribunal should be informed, beforehand, that he is being charged and what the charge against him is. Perhaps, for this purpose, a better example of that is the same learned Judge's decision in (1878) 11 Ch. D. 353.<sup>5</sup> At p. 362 quoting Lord Hatherley in a previous case, which I will refer in a moment, he said that a committee, acting under such a rule as this, are bound to act, as Lord Hatherley said, according to the ordinary principles of justice, and "are not to convict a man of a grave offence which shall warrant his expulsion from the club, without fair, adequate, and sufficient notice, and an opportunity of meeting the accusations brought against him." Reading those words as Mr. Vimadala contends they should be read, two distinct things are necessary, (first) that in all cases notice not merely of the meeting where it is proposed to try him but of the charge against him must be given to the person accused and that he should be given an opportunity of answering the charge, and it was, if I may say so, forcibly and ably argued, that a reasonable and sufficient interval of time must elapse between those two things. It is, however, a method of using authority which is very apt to mislead to take a particular sentence from a judgment of however eminent

4. (1879) 13 Ch. D. 346 : 41 L. T. 638 : 28 W. R. 367, *Labouchere v. Earl of Wharnccliffe*.

5. (1878) 11 Ch. D. 353 : 49 L.J.Ch. 11 : 41 L. T. 335, *Fisher v. Keane*.



a judge and, without regard to the facts before him, to seek to apply it rigidly to other facts which may not have been present to his mind at the time he made that pronouncement. Especially is this so in the case of an unconsidered judgment, which the judgment in (1878) 11 Ch. D. 353<sup>5</sup> was. It is, therefore, necessary to notice what the facts in that case were. It is a fairly well-known case, being that of the Army and Navy Club, Pall Mall; the plaintiff brought a suit claiming a declaration and an injunction against the defendants (members of the committee) from interfering with his enjoyment by him, as a member of the club, of the use and benefit of the club and the buildings and property thereof. It appears that the plaintiff, a member of that club, dined there (rather too well), and after dinner adjourned to the billiard room where he engaged in a game of pool, one of the players being a guest of another member of the club, and also a friend of the plaintiff. The guest, finding that the game did not proceed as rapidly as he desired, said to the plaintiff, "Get on, I want to get home : you are drunk." Whereupon the plaintiff answered, "I don't think I would say such a thing to you at your club" which seems not an unreasonable reply. The guest replied, "You are drunk," whereupon the plaintiff retorted, "You are a damned liar," or "It is a damned lie." The game was stopped, there was a row, and the conduct of the plaintiff was reported by a member of the club to the general committee, which held its weekly meeting on the afternoon of the following day for the transaction of the ordinary business of the club. Thereupon, though no notice of what was intended to be done whatsoever was given to the plaintiff, nor was he asked, nor was any opportunity offered him, to explain or palliate his conduct, the committee passed a resolution purporting to suspend the plaintiff. In fact, on the morning immediately after the occurrence he had written a letter of apology to the guest, couched in the fullest terms of regret, a step which, it seems to me, was extremely generous on his part. The letter itself was not received by the guest until the following day, but immediately on its receipt he wrote to the committee stating that he was perfectly satisfied with the plaintiff's apology, and hoped they would not take serious notice of the matter. The plaintiff, moreover, sent a letter of apology to the member whose guest he had insulted. The following resolution was communicated to the

plaintiff by a letter dated 15th March and signed by the Chairman of the Committee :

"Sir, — It having been brought to the notice of the committee that you last night, being in a state of intoxication, made use of insulting language to the guest of a member of the club, which fact has been substantiated by the evidence of two gentlemen who were present, and by your own confession in a letter addressed to Captain B . . . , they feel compelled to put in force Rule (vii), and suspend you from the use of the Army and Navy Club from this day."

Of course, it was an outrageous case of acting against natural justice, nor had the committee observed the provisions of the rule under which the Chairman claimed it was acting, and I am not surprised that Lord Jessel expressed his astonishment that English gentlemen should behave in such a way. It was in reference to those facts that these words were used and I am not at all sure that Lord Jessel meant that in each and every case the notice of the charge must precede the hearing by an appreciable time. If he did, and if that is a correct statement of the law, it appears to me that it would be impossible legally to run a race meeting in the manner in which such meetings in fact are run : which ordinarily involves deciding any objection to the riding of a horse in any one race before the start of the next one. The case referred to in which Lord Hatherley made his pronouncement is (1871) 6 Ch. A. 489.<sup>6</sup> There again it is perfectly true that there are dicta which support Mr. Vimadalal's proposition. Vice Chancellor James, from whom an appeal was taken to the Lord Chancellor, is reported at p. 492 as having said :

"It appears to me that, if a meeting was summoned for the purpose of bringing charges, those charges ought to have been communicated to Mr. Bennett before the meeting was called, so that he might have an opportunity of knowing what he was to meet."

and later on he says (p. 493) :

"Now I hold that that second notice was perfectly insufficient and invalid in point of law, because, it being a notice to confirm resolutions, there was no way in which the congregation could be informed of the resolutions, and the only mode by which that notice could have been properly given was a notice stating the resolutions which had been passed, and convening a meeting for the purpose of considering those resolutions."

These words were spoken in reference to the deed of settlement of a Baptist Church which expressly provided a particular procedure for getting rid of the minister, and I think that what Vice Chancellor James had in mind was the construction of that deed rather than laying down a general proposi-

6. (1871) 6 Ch. A. 489 : 40 L. J. Ch. 452 : 24 L. T. 169 : 19 W. R. 363, *Dean v. Bennett*.



tion applicable to each and every domestic tribunal; Lord Hatherley agreed with the Vice Chancellor and again his judgment is largely founded on the express provision of that particular deed. I do not think they lay down any general proposition applicable to any and every case. Again, my predecessor the late Sir Patrick Blackwell, in a case in this Court, 37 Bom. L. R. 261,<sup>7</sup> suggested that previous notice to the accused not only of the fact that he will be tried but of the charge on which he will be tried is necessary. That was a caste case, but the principles of law which apply to clubs are applicable. Again, however, his views are obiter, and I hold, with the utmost respect, that the cases he relied on, such as *Young's case*<sup>8</sup> (already cited), do not bear out that extreme proposition. Most of them will be found either to turn on a particular rule, or to be cases in which the tribunal has proceeded in the absence of the accused, or both. In any event there is, to say the least, considerable force in the argument for the defendants here that by not asking for any adjournment, but proceeding with his evidence, the plaintiff must be held, if not to have waived his right to notice—that is not, perhaps, the right word to use for it—at any rate to have acquiesced in the tribunal's proceeding to hear his case then and there, for better for worse. As to that, there are some defects in the procedure of domestic as of public tribunals which are incurable by submission or waiver or otherwise.

In (1879) 13 Ch. D. 346<sup>4</sup> the rules relating to expulsion of a member of the Beefsteak Club required three weeks notice to the member charged and to the members of the tribunal. The plaintiff, the famous editor of "Truth" and one of the greatest litigants of his day was declared to be expelled by a meeting summoned for that purpose by a notice which was one day short of three weeks. He had attended the meeting and, after making some protest, (it does not clearly appear what the protest was), defended himself on the merits. His suit claiming substantially the relief usually claimed in such cases, came up before Lord Jessel and succeeded. Nor does that seem to me surprising—the body assembled on a short notice was not the proper body to try the plaintiff. It should have been a body summoned by proper notice. There may have been members who were unable to come but who would have attended if given good

notice. In fact, the whole proceedings were "coram non iudice," and were aptly compared in the argument before me to a "no ball" at cricket, which the batsman is entitled to hit as hard as he can and knock as many runs off as possible: but if he misses it, and it hits his middle stump, he is still entitled to insist that it is a "no ball" and that he is not out. But where, as here, there is no rule expressly requiring any particular notice to be given to him or to the tribunal, I cannot think that a party can be allowed to conduct his case, before a tribunal properly constituted, to its conclusion, and then, when he has been unsuccessful, to say "I ought to have had notice of the charge before the hearing began, and particulars of the charge." That seems to me very like sitting on the fence, or blowing hot and cold at the same time. (After dealing with the contention that the plaintiff did not get a fair hearing before the tribunal his Lordship proceeded.)

Then the next count of indictment is that the stewards were biased. I am asked to consider in that connexion the cumulative effect of the "Who's Who" enquiry, the search, and the events alleged to have happened over twenty years ago between the plaintiff and Mr. Geddis about Mr. Geddis's horses. I think the way it is put is that it was a tribunal more prone to believe evidence against the plaintiff than it would otherwise have been.

Well, now, as far as the facts go, I do not think that that was the case at all. I have already indicated that individual stewards were the more careful to try Mr. Bell fairly and to form their opinion properly because of the previous incidents. But apart from that, what is the "bias" in this connexion? Lord Maugham in (1929) 1 Ch. 602<sup>8</sup> says in effect that it must be something tending to make the mind to go one way rather than another, and improperly tending to do so. If a member of a club should quarrel with every single member of the committee, he has no right, when the question of his expulsion arises, to insist that an entirely new committee should be elected to try his case, and it must be borne in mind that in every club, and even in every profession, the tribunal is to a certain extent interested in the result of such proceedings. That is not, in itself, "bias" for this purpose. It may be possible—one hopes that it will always be possible—that every litigant in a Court of

7. (1935) 22 A.I.R. 1935 Bom. 268 : 157 I. C. 127 : 37 Bom. L. R. 261, *Ramji v. Naranji*.

8. (1929) 1 Ch. 602 : 98 L. J. Ch. 293 : 141 L.T. 83, *Maclean v. The Workers' Union*.



law will have his case heard before somebody who is in every possible sense impartial when he begins to hear it. In relation to a domestic tribunal that is not always possible and never will be. In a social club, for example, those of the committee who know him cannot help having an opinion of the member whose conduct they are asked to investigate, and, as just pointed out, every member of the club (including the committee) has some pecuniary interest in the question whether a member shall or shall not be expelled. Does that in itself amount to bias? No. The most that is proved against the stewards here is that they were aware of the previous incidents and I am satisfied that that did not influence them improperly against the plaintiff.

Now the stipendiary stewards were not exactly in the position of prosecuting counsel: perhaps they were more nearly in the position of a police-officer who has investigated a case, and is himself prosecuting, than anything else. They were, as I have explained in my judgment, not really stewards at all. They were servants, albeit senior and responsible servants, of the club. Apart from authority, I think that is a very important point. It might lead to a reasonable suspicion of improper influence if an independent person or a person not subordinate in service remains in the room; but would it necessarily lead to a reasonable suspicion of improper influence where the person who remains in the room is, if I may use the expression without offence, in an inferior position to the members of the tribunal—where he is a servant of the club and the gentlemen deliberating were honorary stewards? The question presents itself in this form. As a matter of fact, I am satisfied that the presence of these gentlemen in the room did not influence the stewards in the slightest degree; but it might have done so. Does the mere fact that it might have done so, and therefore might lead to a reasonable suspicion that justice was not being done, vitiate the decision of a domestic as opposed to a public tribunal? I may note here in passing that it is not a matter to which the plaintiff himself attached very much importance. When asked what his grievances were, this was the one he mentioned last. He only mentioned that in answer to a question put by me, which reminded him directly that he had that grievance. However, there it is. If as a matter of law the mere presence of a person in a position somewhat analogous to that of a prosecutor

in the room with a domestic tribunal during its private deliberations vitiates its decision, the plaintiff is entitled to the benefit of it. It is perfectly clear that in the case of a Court of law that which happened in this case would undoubtedly have vitiated the result, if unfavourable to the plaintiff. On that the English authorities are perfectly clear and I do not wish to say anything which in any way diminishes their authority in this country. I need only perhaps refer to the well-known statement of Lord Hewart C. J. in (1924) 1 K. B. 256<sup>9</sup> (p. 259):

"But while that is so, a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."

Probably as Avory J., was right when he pointed out in the subsequent and similar decisions in (1927) 2 K. B. 475<sup>10</sup> (page 488): "I think that in that sentence the words 'be seen' must be a misprint for the word 'seem'." Justice would not "seem" to be done when a person who has acted as a prosecutor retires with the jury or retires with the Magistrates when they go out before their decision, or in the case of a tribunal which does not retire for that purpose, if he is not turned out with the others who ought not to be present at its deliberations. Once again, however, one comes back to Lord Shaw's statement that the assumption that the methods of natural justice are *ex necessitate* those of Courts of Justice is wholly unfounded. There is some reason to differentiate between private and public tribunals. One of the reasons why justice should seem to be done by Courts of Justice is in order that the public may have confidence in those institutions which, after all, do their job in the public light of day. A domestic tribunal does not do its job in public, and it matters to only a small section of the public whether it appears to do justice. The important thing is that it should do justice. Again, in the case of a club committee the members can usually elect a new committee if its methods do not inspire their confidence. But the good people of Sussex or Essex cannot appoint for themselves new Justices of the Peace however much they may desire to do so. It is perfectly clear from all the cases cited that a domestic tribunal is not bound

9. (1924) 1 K. B. 256 : 93 L. J. K. B. 129 : 130 L. T. 510, *Rex v. Sussex Justices; Ex parte McCarthy*.

10 (1927) 2 K. B. 475 : 96 L. J. K. B. 530 : 137 L. T. 455, *Rex v. Essex Justices; Perkins, Ex parte*.



by the ordinary rules of evidence, with which its members may well be unacquainted; nor is it bound to follow the procedure of the Courts of law or anything like it; and since the two House of Lords cases, viz., (1911) A. C. 179<sup>11</sup> and *Arlidge's case*<sup>12</sup> already referred to, it has now become law that it is not even bound to hear the parties, but may reach its decision even by correspondence. At first view, at all events, it is clear from the later decision that it is not bound to act in a way that "the man in the street" or as Lord Bowen called him "the man on the Clapham omnibus" would necessarily regard as just.

In (1915) A. C. 120<sup>13</sup> the Local Government Board proceeded to dismiss Mr. Arlidge's appeal on the strength of a report of their own local Inspector which they would not allow Mr. Arlidge to see. That strikes any one, especially a lawyer, at first view, as most unfair. I think, however, Sir Jamshedji Kanga's argument about this is well founded. It appears from passages in Lord Shaw's and Lord Haldane's speeches and a passage towards the end of Lord Moulton's speech that, in making that decision about the Local Government Inspector's report, the House was not really making a pronouncement on the subject of natural justice but was making a pronouncement on the construction of the Housing and Town Planning Act of 1909 and the rules made thereunder. Though it requires a bit of close reading to see it, that is the real truth about the matter, as appears very clearly from the dissenting judgment of Hamilton L. J. in the Court of Appeal with which their Lordships agreed.

It has been suggested by no less an authority than Lord Atkin in the recent case in (1943) A. C. 627<sup>13</sup> at p. 638, that the procedure which might be very just in deciding whether to close a school or an insanitary house is not necessarily right in deciding a charge of infamous conduct against a professional man, which suggests as Mr. Vimadalal would have me decide that domestic tribunals can be divided into three classes:— first, those which are administrative, secondly, those which are professional (like the stewards in this case), and, thirdly those,

which are purely social. I dare say there may be more categories and should myself have thought that they might more usefully be divided, first, into statutory and contractual tribunals. In the absence of express rules, one would expect to find that the former should conform more closely to legal procedure than the latter and how very far even they may deviate therefrom is clearly shown by (1915) A. C. 120<sup>12</sup> in that Mr. Arlidge was never heard in person or by his advocate. However that may be, the suggestion that a different standard may have to be applied to professional as opposed to other tribunals does not seem to have received acceptance from the other noble and learned Lords, particularly Lord Wright and the Lord Chancellor. They appear to me to regard the principles laid down in (1911) A. C. 179<sup>11</sup> and (1915) A. C. 120<sup>13</sup> as still applicable, *mutatis mutandis*, to all domestic tribunals.

Really the most important authority cited for the plaintiff is the opinion of two members of the Court of Appeal in (1937) 2 K. B. 309.<sup>14</sup> In that case a police constable whom his chief constable had purported to dismiss appealed to the Watch Committee. The procedure in such cases is very similar to an appeal on facts to Quarter Sessions in England, in which, once the notice of appeal is admitted or proved, the burden is on the respondents to prove their case all over again. It is really in the nature of a rehearing. In this particular case, therefore, the chief constable, who attended the meeting of the Watch Committee, did so in two capacities—as respondent to the appeal and as the prosecutor of Cooper. He occupied — it is difficult to know from the report whether the Watch Committee sat on a bench like the one we have in this Court, or were seated at a table — at all events the chief constable sat at the table or on the bench (whichever it was) and continued to sit there even after Cooper was turned out of the room, as Mr. Bell was in this case. There were other reasons — and excellent reasons — that the appeal should succeed and it did, and therefore the observations which I must deal with were obiter. They, however, form part of considered — and extremely well considered — judgments and, though dicta, are entitled to the very highest respect. Both Greer L. J. and Scott L. J. were emphatically of the opinion that the doctrine that justice must seem to be done is applicable

11. (1911) 1911 A. C. 179 : 80 L. J. K. B. 796 104 L. T. 689, *Board of Education v. Rice*.

12. (1915) 1915 A. C. 120 : 84 L. J. K. B. 72 : 111 L. T. 905, *Local Government Board v. Arlidge*.

13. (1943) 1943 A. C. 627 : 112 L. J. K. B. 529 : 169 L. T. 226 : 1943-2 All E. R. 337, *General Medical Council v. Spackman*.

14. (1937) 2 K. B. 309 : 106 L. J. K. B. 728 : 157 L. T. 290 : 1937-2 All. E. R. 726, *Cooper v. Wilson*.



to tribunals such as Watch Committees, and consequently that the mere presence of the chief constable while the members of the committee were deliberating vitiated the decision of that committee. The remaining member of the Court of Appeal (Mc Naghten J.) did not share this opinion and it is evident that the learned trial Judge (Singleton J.) did not share it either. In a subsequent case indirectly connected with (1937) 2 K. B. 309<sup>14</sup> Tucker J. expressed the view that he must follow the guidance this case gives him and did not express the slightest doubt or hesitation about these dicta. In the Court of Appeal one member was common to the Court which decided (1937) 2 K. B. 309<sup>14</sup> that was Scott L. J. and the others were Mackinnon and du Parc L. JJ. Neither of them expressed their dissent from these dicta and it must be assumed that they were inclined to agree with them. They, being dicta, are not strictly binding on the puisne Judges in England, still less on me, although they are entitled to, and I do hold them in, the highest respect.

If, however, one scans the judicial field still further it is material to look at (1889) 43 Ch. D. 366.<sup>15</sup> The only facts I need go into are these: A medical practitioner was arraigned before the General Medical Council for acting as "cover" for an unqualified person called Cornelius Bennett Harness, who subsequently figured in the case of *Alabaster v. Harness*. The prosecutors were the Medical Defence Union. Of a body of 27 members who sat to hear the case two were members, though not active members, of that Union. It is quite clear that if the General Medical Council had been in a strict legal sense a Court of Justice, even that amount of possible bias in its constitution would have vitiated the proceedings. The extraordinary lengths to which the Courts have, very rightly, gone in guarding themselves against not merely bias but against any suspicion of bias are well illustrated by cases such as (1852) 3 H. L. C. 759<sup>16</sup> where a decision of Lord Cottenham was set aside by his successor on its being discovered that Lord Cottenham (unknown to the appellant) held a few shares in the defendant company which fact he had no doubt completely forgotten, and which as his successor said could not conceivably have influenced his decision in any way; and a quite recent decision in our

own Court in 40 Bom. L. R. 904<sup>17</sup> where the late Chief Justice quashed a taxation by an officer of the Court who when he conducted the taxation was indebted to the Central Bank of India, a fact which was unknown to the people who were actually concerned in the taxation, though it must have been known to some officials of the Bank.

Applying those principles, if the General Medical Council had been a Court of law, the presence of two persons who were parties, albeit technically parties, amongst its members would have necessarily vitiated its proceedings; but North J. and the majority of the Court of Appeal, consisting of Cotton and Bowen L. JJ., reached the opposite conclusion as regards the General Medical Council. A passage from Bowen L. J.'s judgment is, I think, well worth reading (page 384):

"As the Lord Justice has said, nothing can be clearer than the principle of law that a person who has a judicial duty to perform disqualifies himself for performing it if he has a pecuniary interest in the decision which he is about to give, or a bias which renders him otherwise than an impartial Judge. If he is an accuser he must not be a Judge." Pausing there for a moment I have already found as a fact that Major Nabi Khan, who may be regarded as the accuser in this case, was not one of the Judges. To proceed with the judgment (p. 384):

"Where such a pecuniary interest exists, the law does not allow any further inquiry as to whether or not the mind was actually biased by the pecuniary interest. The fact is established from which the inference is drawn that he is interested in the decision, and he cannot act as a Judge. But it must be in all cases a question of substance and of fact whether one of the Judges has in truth also been an accuser."

Here the question would be, as regards Major Nabi Khan, whether an accuser ever became a Judge. The judgment proceeds (page 384):

"The question which has to be answered by the tribunal which has to decide — the legal tribunal before which the controversy is waged — must be: Has the Judge whose impartiality is impugned taken any part whatever in the prosecution, either by himself or by his agents? I think it is to be regretted that these two gentlemen, as soon as they found that the person who was accused was a person against whom a complaint to the Council was made by the society to which they subscribed, and to which they in law belonged as members, did not at once retire from the Council."

I cordially endorse that expression of regret as applied to the present case. It is most regrettable that Major Nabi Khan and Mr. Reid did not retire from the room when Mr. Bell went out. But nothing is easier, or less

15. (1889) 43 Ch. D. 366, *Leeson v. General Council of Medical Education and Registration*.

16. (1852) 3 H. L. C. 759, *Dimes v. Grand Junction Canal (Proprietors of)*.

17. ('38) 25 A.I.R. 1935 Bom. 431 : I.L.R. (1938) Bom. 829 : 177 I. O. 934 : 40 Bom. L. R. 904, *Shamdasani v. Central Bank of India, Ltd.*



helpful, than being wise after the event. The judgment proceeds (p. 385) :

"I think it is to be regretted, because Judges, like Caesar's wife, should be above suspicion, and in the minds of strangers the position which they occupied upon the Council was one which required explanation. Whatever may be the result of this litigation, I trust that in future the General Medical Council will think it reasonable advice that those who sit on these enquiries should cease to occupy a position of subscribers to a society which brings them before the Council. But having said that, I come back to the point which we have to decide, whether these two gentlemen took any part whatever in the prosecution either by themselves or by their agents."

And he came to the conclusion that they did not, that is that the Judges in question were not prosecutors. Conversely, my finding of fact is that the prosecutors here were not Judges. It is quite evident that Bowen L. J., Cotton L. J. and North J. would not, had they been alive and sitting in the Court of Appeal which decided (1937) 2 K. B. 309,<sup>14</sup> have gone to the length of the *dicta* of Greer and Scott L. JJ. but would have contented themselves with answering the question whether the presence of the chief constable at the committee's deliberations had in fact had any influence on its decision. It seems, as far as one can judge, reasonably clear from the judgment of Maugham J. (afterwards Lord Maugham, Lord Chancellor) in (1929) 1 Ch. 602<sup>8</sup> which I have already referred that he also would not have entirely agreed with those *dicta*. As far as I can tell from his judgment he is definitely of the opinion that not everything which applies to Courts of law in this connexion should be applied with absolute strictness to domestic tribunals, and a very recent authority is a case the only report of which that is available is in Mews Digest (1943) 207/8 (1943) 107 J.P. 101<sup>18</sup> from which it does seem that another extremely eminent and careful English Judge, Lewis J. has not followed those *dicta* to the full length. He seems to have entertained the question whether a person who improperly remained in the room had influenced the committee or not. He came to the conclusion that the decision of the tribunal in question was not so influenced and decided against the party impugning it. His judgment, if correctly summarized in the Digest, seems to me flatly inconsistent with the *dicta* in question.

Well, that means that there are ranged on one side, for one view of the law, Greer, Scott, Pry, Mackinnon, du Parc L. JJ. and Tucker J. On the other side Cotton,

18. (1943) 107 J. P. 101, Noakes v. Smith.

L. J. Bowen L. J. Maugham J. (who afterwards became Chancellor), McNaghten, North, Singleton and Lewis JJ. Well, I have to decide one way or the other, and I have the satisfaction of knowing that if I do go wrong, I shall be erring in very distinguished company. The question must largely depend on the opinion of the ordinary man in the street. Is there something in the mere fact of the stipendiary stewards remaining in the room during the deliberations whether or not they influenced the decision, after the other side has gone out, which is so repugnant to ordinary ideas of fair play that, whatever happens, what is done is unfair? According to two very eminent and extraordinary fair minded Englishmen (Greer and Scott L. JJ.) the answer is "Yes." On the other hand (apart from Cotton and Bowen L. JJ. and Maugham, Lewis and North JJ. and looking only at (1937) 2 K. B. 309<sup>14</sup> for the moment) there never was a fairer minded Englishman than Singleton J. or for that matter a fairer minded Irishman than McNaghten J. and they both took the opposite view. Perhaps it is not a bad test to come down to what happened in this case : it appears that the plaintiff did not think it was one of his grievances until I reminded him of it; the point has been well described as, in this case, a lawyer's point, but it is not, for that reason only, a bad point.

On the whole I am of opinion that the *dicta* in (1937) 2 K. B. 309<sup>14</sup> should not be followed, still less extended; as already indicated, the position of a stipendiary steward as against the steward was not identical with that of a chief constable as against the Watch Committee. It is true that they receive some support from Eve J. in (1919) 2 Ch. 276.<sup>19</sup> But I have not included him in the list because the facts are so different from those in (1937) 2 K. B. 309<sup>14</sup> and that it is difficult to say with certainty in which camp Eve J. would have been on this particular point. The exact meaning of the expression "natural justice" is fully discussed in Maugham J.'s judgment in (1929) 1 Ch. 602.<sup>8</sup> I certainly cannot attempt to rival his brilliant exposition of the law, but I still do not think that I was very far wrong when I decided in Calcutta in I. L. R. (1943) 1 Cal. 156<sup>20</sup> that when a tribunal has got to

19. (1919) 2 Ch. 276 : 88 L. J. Ch. 319 : 121 L. T. 50, Law v. Chartered Institute of Patent Agents.

20. ('44) 31 A.I.R. 1944 Cal. 127 : I.L.R. (1943) 1 Cal. 156 : 213 I. C. 63, Chandra Bhan Bilotia v. Ganapatrai & Sons.



act "according to natural justice," it has merely to act impartially and honestly. It must make up its own mind and not, for example, substitute for it the opinion of some one else, or decide the question by spinning a coin, thereby leaving it to the arbitrament of chance. It must do so without any improper or collateral motive, and in doing so it must treat the contending parties equally, giving to neither an advantage not enjoyed by the other. If in fact it does that, it is acting according to natural justice, whether or not (in my opinion) it not only does that but also appears to do that. The result, therefore, is that the answer to this particular issue, whether the stewards acted in accordance with natural justice, is "Yes."

Just for the moment let me assume that I am wrong and that I ought to have followed the opinion of the other school of judicial thought. Suppose I am right in thinking that in fact the presence in the room of the stipendiary stewards did not in the slightest degree influence the decision of the stewards, but that owing to the suspicion that it might have created of something unfair being done it vitiates the decision of the tribunal. In that view of the matter, the plaintiff would be entitled to a declaration somewhat in the form he has claimed, and a further order (if he thought it worth while to ask for it) the restitution of the actual licence he formerly held, a piece of paste board now quite valueless. But what of the issue as to his claim for two lakhs? Admittedly there was an implied contract between him and the defendants that his licence should not be withdrawn for misconduct except in accordance with natural justice, and the decision to withdraw it would have been arrived at technically, in a manner not according to natural justice. Therefore, he would be entitled to some damages for breach of contract. But if, in fact, the presence of the stipendiary stewards did not really affect the position at all, then he would not have been one whit worse off than he would have been if they had gone out of the room when they should; the decision of the stewards would still have been the same, with the result that he has not actually suffered any damage at all, if I am right as to the facts. The result, therefore, would be, on the assumption that I am wrong as to the law but right as to the facts, that the plaintiff would be entitled to a declaration that his licence was illegally withdrawn by the club,

to the restitution of his 1938/9 licence if he asks for it, and nominal damages which I should assess at Re. 1. If I had reached this conclusion, I should have given the plaintiff his costs. But as it is, the suit fails and the last issue must be answered "None." I am not in a position to assess the damages on the assumption that I am wrong both on the facts and the law, because the question of amount of damages was held over by consent until the question of liability had been determined.

I desire, without wishing to assume to dictate to the defendants how their stewards should conduct their affairs, to repeat one thing I have already said. That is, that I do think the stewards would be well advised if in future, to avoid this sort of trouble, they request the stipendiary stewards to leave the room during their deliberations. One other thing; I do not know at all whether, now that the suit is over, the present stewards would consider restoring the plaintiff's licence if he applies to them in a proper manner. It is a question entirely for them. It is not their fault that his earlier requests were turned down; I feel sure that it is largely due to the unfortunate manner in which he couched his letters. I do not say that they should do so, but they may well think, now that the club has fought and won, that it would be a graceful act again to allow Mr. Bell to earn his livelihood on the turf, having regard to the length of time during which he has been unable to do so. The suit is dismissed with costs.

R.K./V.S.

*Suit dismissed.*

[ *Case No. 19.* ]

**A. I. R. (33) 1946 Bombay 102**

**LOKUR AND WESTON JJ.**

*Manilal Bhaichand — Appellant*

**v.**

*Mohanlal Maganlal — Respondent.*

Second Appeal No. 382 of 1944, Decided on 19th January 1945, against decision of Dist. Judge, Ahmedabad, in Appeal No. 261 of 1943.

(a) Civil P. C. (1908), S. 60 (1) (i) — Notification No. 1489-D/43 dated 29-4-1943—Dearness allowance of private employee is not exempt.

Clause (i) of the proviso to S. 60 (1) refers to an allowance forming part of the emoluments of any public officer or of any servant of a railway company or local authority. Hence the dearness allowance received by a private employee from his employer is not exempt from attachment by reason of the Notification No. 1489-D/43 dated 29-4-1943 of the Government of India. [P 103 C 2; P 104 C 1]

(b) Civil P. C. (1908), S. 60 (1) (i) — Private employee—No part of pay is exempt.



The benefit of cl. (i) was not available to a private employee. Before the amendment of 1937, no part of the pay of such an employee, who was not a labourer or a domestic servant, was exempt from attachment. [P 104 C 1]

(c) Civil P. C. (1908), S. 60 (1) (h) — Clerk in mill doing no manual labour is not labourer or domestic servant.

A clerk in one of the departments of a mill doing no manual labour cannot be regarded as a labourer or a domestic servant: (1942) 29 A. I. R. 1942 Bom. 191, *Rel. on.* [P 104 C 1]

(d) Civil P. C. (1908), S. 60 — Amendments made by Act 9 [IX] of 1937 and Act 5 [V] of 1943—Effect of amendments explained.

The amendment in S. 60, Civil P. C., effected by Act 9 [IX] of 1937 having been incorporated in the Code itself, there was no necessity of burdening the statute book with Act 9 [IX] of 1937, and it was repealed by the Repealing and Amending Act, 1942; but the repeal did not affect the existing rights and liabilities created by that Act. That Act preserved for the holder of a decree passed in a suit filed before 1st June 1937, the right to attach the salary of the judgment-debtor in accordance with S. 60 as it stood before the amendment, and in spite of the amendment he could attach the whole of the salary of a private employee. Act 5 [V] of 1943 is not intended to take away pre-existing rights that were preserved by S. 3 of Act 9 [IX] of 1937, since the amendments made by it were only verbal. All that it did was to transfer the second part of cl. (h) to cl. (i) and make some other nominal changes. Hence in proceedings arising out of any suit instituted before 1st June 1937, the liability of a judgment-debtor's salary to attachment is governed by S. 60 as it stood before it was amended by Act 9 [IX] of 1937. [P 104 C 2]

*R. M. Shah* — for Appellant.

*B. G. Thakor* — for Respondent.

**Lokur J.**—This second appeal raises an important question regarding the exemption of salaries from attachment in execution of a decree under S. 60 (1), Civil P. C. The appellant filed suit No. 1063 of 1936 against the respondent on 5th October 1936, and obtained a money decree on 31st August 1937. The respondent is a clerk in a mill, and the appellant filed darkhast No. 1 of 1943, on 4th January 1943, to execute his decree and recover the decretal amount by attachment of the respondent's salary, which, according to the darkhast application, was Rs. 105 per month. The respondent contended that his salary was only Rs. 62, and not Rs. 105, that it was not liable to attachment under S. 60 (1), Civil P. C., and that in any case all that could be attached was half of the excess of the salary over Rs. 100. The executing Court found that Rs. 105, which the respondent received from the Mill, consisted of Rs. 62 as his pay, and Rs. 43 or so as dearness allowance. It held that dearness allowance was not liable to attachment under the Government of India Notification

No. 1489-D/43, Home Department, dated 29th April 1943, and that, in spite of the amendment of S. 60 (1), proviso, cl. (h), Civil P. C., by Act 9 [IX] of 1937, under S. 3 of the latter Act the amendment was not applicable to the present case as the darkhast proceedings arose out of a suit instituted before 1st June 1937. The respondent was found to have worked at night in the months of February, March and April, and received an extra salary of Rs. 15 per month. The executing Court further held that under S. 60 (1), proviso, cl. (i), Civil P. C., before its amendment by Act 9 [IX] of 1937, the first 40 rupees out of the pay were exempt from attachment. Thus deducting Rs. 40 from the salary of Rs. 62, it ordered the attachment of the remaining Rs. 22 every month and Rs. 37 for those months during which he worked at night. The total amount thus attached came to Rs. 243 only, and a prohibitory order was accordingly issued to the mill company in respect of that amount. The learned District Judge, however, thought that by the amendment made in S. 60, Civil P. C. by Act 5 [V] of 1943, the whole amount of the respondent's salary was exempt from attachment. He, therefore, dismissed the darkhast with costs.

Both the Courts below have committed serious errors in reading the Notification of the Government of India and the wording of the amending Acts. It is not disputed here that out of the salary of Rs. 105 received by the respondent his pay was only Rs. 62 and the remainder was paid to him by the mill company by way of dearness allowance. The Notification of the Government of India, which is quoted in the order of the executing Court, exempts from attachment dearness allowance under cl. (l) of the proviso to sub-s. (1) of S. 60, Civil P. C. That clause purports to exempt from attachment any allowance forming part of the emoluments of any public officer or of any servant of a railway company or local authority which the appropriate Government may by notification in the Official Gazette declare to be exempt from attachment, and it does not apply to any allowance received by private employees. The executing Court thought that the Government of India could issue a notification even in respect of the dearness allowance paid by mill companies to their employees. But cl. (l) of the proviso to S. 60 (1) clearly refers to an allowance forming part of the emoluments of any public officer or of any servant of a railway company or local authority. It must, therefore, be held



that dearness allowance received by a private employee from his employer is not exempt from attachment by reason of the said Notification of the Government of India.

The executing Court has fallen into another error of a similar kind in thinking that out of the pay of Rs. 62, only Rs. 22 can be attached. Prior to the amendment of 1937, cl. (i) of the proviso to S. 60 (1) exempted from attachment the salary of a public officer or a servant of a railway company or local authority to the extent of 40 rupees monthly where the salary exceeded 40 rupees, and did not exceed 80 rupees monthly. The benefit of the clause was not available to a private employee. In fact before the amendment of 1937, no part of the pay of such an employee, who was not a labourer or a domestic servant, was exempt from attachment. The learned District Judge has committed an error in regarding the salary of the respondent as the wages of a labourer or domestic servant wholly exempt from attachment under cl. (h) of the proviso to S. 60 (1), Civil P. C. The evidence shows that the respondent is a clerk in one of the departments of the mill, and does no manual labour. According to the ruling in *I. L. R. (1942) Bom. 287*,<sup>1</sup> a clerk like the judgment-debtor cannot be regarded as a labourer or a domestic servant. The view taken by the learned District Judge is obviously incorrect, and is not pressed in this Court. Before S. 60 (1), Civil P. C., was amended by Act 9 [IX] of 1937, cl. (h) of the proviso exempted only the wages of labourers and domestic servants, and there was no provision to exempt the salary of any other person in private employment. By S. 2 of Act 9 [IX] of 1937, in the proviso to sub-s. (1) of S. 60, the following clauses were substituted for cls. (h) and (i), namely :

"(h) the wages of labourers and domestic servants, whether payable in money or in kind; and salary, to the extent of the first hundred rupees and one-half the remainder of such salary ;

(i) the salary of any public officer or of any servant of a railway company or local authority to the extent of the first hundred rupees and one-half the remainder of such salary."

Section 3 of Act 9 [IX] of 1937, provided that the amendment made by S. 2 was not to have effect in respect of any proceedings arising out of any suit instituted before the first day of June 1937. Admittedly the present execution proceedings have arisen out of a suit filed before 1st June 1937, and, therefore, the judgment-debtor cannot claim exemp-

1. (42) 29 A. I. R. 1942 Bom. 191 : *I. L. R. (1942) Bom. 287* : 202 I. C. 157, *Kulkarni v. Ganpat Hiraji*.

tion of any part of his salary from attachment under the amended cl. (h) of the proviso to sub-s. (1) of S. 60. But it is pointed out that Act 9 [IX] of 1937 has been repealed by Act 25 [XXV] of 1942, and, therefore, the decree-holder can no longer get the benefit of S. 3 of Act 9 [IX] of 1937. Act 25 [XXV] of 1942 is the Repealing and Amending Act, by which various previous amending Acts were either wholly or partially repealed. Section 6A, General Clauses Act, (10 [X] of 1897) provides that where any Central Act repeals any enactment by which the text of any Central Act was amended by the express omission, insertion or substitution of any matter, then, unless a different intention appears, the repeal shall not affect the continuance of any such amendment made by the enactment so repealed and in operation at the time of such repeal. So too S. 4, Repealing and Amending Act, 1942, says that the repeal by that Act of any enactment shall not affect any Act or Regulation in which such enactment has been applied, incorporated or referred to, nor shall it affect any right, title, obligation or liability already acquired, secured or incurred, or any remedy or proceeding in respect thereof. The amendment in S. 60, Civil P. C., effected by Act 9 [IX] of 1937 having been incorporated in the Code itself, there was no necessity of burdening the statute book with Act 9 [IX] of 1937, and it was repealed by the Repealing and Amending Act, 1942; but the repeal did not affect the existing rights and liabilities created by that Act. That Act preserved for the holder of a decree passed in a suit filed before 1st June 1937, the right to attach the salary of the judgment-debtor in accordance with S. 60 as it stood before the amendment and in spite of the amendment he could attach the whole of the salary of a private employee. That right was not taken away by the repeal of Act 9 [IX] of 1937. But it is urged that a further amendment was made in cls. (h) and (i) of the proviso to S. 60 (1), Civil P. C., by Act 5 [V] of 1943 which contains no provision corresponding to S. 3 of Act 9 [IX] of 1937 exempting from its application any proceedings arising out of suits instituted before a certain day. We do not think that Act 5 [V] of 1943 was intended to take away pre-existing rights that were preserved by S. 3 of Act 9 [IX] of 1937, since the amendments made by it were only verbal. All that it did was to transfer the second part of cl. (h) to cl. (i) and make some other nominal changes. We, therefore, hold that in proceedings arising out of any suit insti-



tuted before 1st June 1937, the liability of a judgment-debtor's salary to attachment is governed by S. 60, Civil P. C., as it stood before it was amended by Act 9 [IX] of 1937. Hence the whole of the respondent's salary, including the dearness allowance, is liable to attachment.

The learned District Judge further misread Act 5 [V] of 1943 in thinking that it was by the amendment introduced by it that the whole of the amount of the wages of labourers and domestic servants was exempted from attachment. Such wages were already exempt under the old cl. (1) as it stood before the amendment of S. 60 by Act 9 [IX] of 1937. Moreover, as already pointed out, the respondent is not a labourer or a domestic servant. It is singular that the plain meaning of the section was misunderstood by both the Courts below in more different ways than one. We set aside the order of the lower appellate Court and remand the darkhast to the executing Court for being proceeded with according to law in the light of the finding recorded in this judgment. The respondent shall pay the costs of the appellant throughout.

R.K.

*Case remanded.*

[Case No. 20.]

**A. I. R. (33) 1946 Bombay 105**

SEN J.

*Tammanji Govind Kulkarni and others — Appellants*

v.

*Abdul Rahim — Respondent.*

Second Appeal No. 907 of 1942, Decided on 2nd February 1945, from decision of District Judge, Belgaum, in Appeal No. 68 of 1942.

(a) Civil P. C. (1908), O. 21, R. 14 — Decree on mortgage — Applicability of R. 14.

The Court may, under O. 21, R. 14, require from the decree-holder the production of certain extracts of Record of Rights where an application is made for the attachment of any land which is registered in the office of the Collector. But in the case of an execution of a mortgage decree, the property being already secured for payment of the debt, such an application need not be made. And therefore it cannot be said that the requirement of R. 14 was not complied with by the decree-holder.

[P 106 C 2]

(b) Hindu Law — Debts—Father—Mortgage by, of joint family property — Decree against father — Sons must pay decree out of their share in spite of subsequent partition.

In a joint Hindu family governed by the Mitakshara and consisting of a father and sons the whole of the joint family property is liable for the father's debts if they are not tainted by illegality or immorality. The obligation continues even after a partition, but is limited in the case of each of the

sons to the extent of his share in the family property. [P 106 C 2]

Once a liability is a family liability e. g., a mortgage by the father, when joint every item of the joint family property is bound to satisfy that liability, and the question whether the family continues to remain joint or became divided becomes immaterial : ('37) 24 A.I.R. 1937 Mad. 610 (F.B.), 13 Cal. 21 (P. C.); ('24) 11 A. I. R. 1924 P. C. 50; ('36) 23 A.I.R. 1936 P. C. 277 and ('28) 15 A.I.R. 1928 Bom. 232, *Rel. on*; ('40) 27 A.I.R. 1940 Bom. 22 and ('28) 15 A. I. R. 1928 Mad. 657 (F. B.), *Commented on*. [P 107 C 2]

(c) Civil P. C. (1908), S. 11 — Execution proceedings.

The principle of *res judicata* applies to execution proceedings and would apply after the death of a party bound by it to his legal representatives : 6 All. 269 (P.C.), *Ref.* [P 108 C 1]

*R. A. Jahagirdar* — for Appellants.

*P. B. Gajendragadkar* — for Respondent.

**Judgment.** — This appeal arises out of execution proceedings. The father of appellants 1 and 2 executed three mortgages in favour of the respondent. There was an arbitration in respect of them followed by an award and by a decree on 29th October 1929. The decree was for Rs. 3000 to be paid in yearly instalments of Rs. 400, and it was directed that in default of payment of any two instalments the defendant would be entitled to recover the entire amount due by sale of the mortgaged property. The first instalment fell due in 1930, but it was not paid. The decree-holder filed a darkhast in 1931. During the pendency of the darkhast, Suit No. 485 of 1939, was filed by the judgment-debtor Govind's son Tammaji (appellant 1) against Govind, his second son Appaji (appellant 2), his wife Akkubai (appellant 3), the decree-holder and Govind's other creditors, including one Mallaya, for partition and a declaration that Govind's debts and his liabilities under the award decree were not binding on his share in the joint family property. On 14th April 1937, a decree was made directing partition to be made and giving a declaration that the award decree passed in favour of the present respondent was binding on the present appellants as well as on Govind. The first darkhast filed in 1931 under the award decree was disposed of in 1933 on the ground that Suit No. 485 of 1932 had not yet been disposed of. The second darkhast No. 530 was filed in 1936. The Court ordered the decree-holder to produce certified extracts from the Record of Rights, but as they were not produced the darkhast was struck off on 29th August 1937. Thereafter the present darkhast No. 1011 of 1937, was filed on 1st November 1937, that is, after the date of the decree in Suit No. 485 of 1932, against Govind



only. The decree-holder prayed that the amount due be recovered by sale of the mortgaged property. The notice to the judgment-debtor under O. 21, Rule 22, was duly served, but he remained absent. The Court ordered on 14th March 1938: 'Sale of sufficient portion of mortgaged property through Collector is ordered. Send papers to Collector.' Govind the judgment-debtor died on 18th January 1941. An application was made to bring the present appellants on record as his heirs and they were brought on the record on 18th February 1941. They filed their written statement (Ex. 37) on 27th October 1941. Therein they contended that the decree-holder being aware of the decree in Suit No. 485 of 1932, for partition and the applicants not having been made parties to the darkhast, he could not proceed against them or their separate shares in the family property. At the hearing they raised three contentions: (1) that one Mallaya had a half share in the decree under execution and, therefore, he was a necessary party; (2) that the decree-holder's previous darkhast No. 530 of 1936, having been disposed of for non-production of the certified extracts of the Record of Rights, that is, for non-compliance with the requirements of O. 21, R. 14, under O. 21, R. 17 (1), the darkhast application was not an application in accordance with law and that, therefore, the present darkhast was not in time under Art. 182 (5) of the schedule to the Limitation Act; and (3) that as the darkhast had not been filed against them with respect to their own rights which were now separate from those of Govind, the decree-holder also having been aware of the partition, their shares in the mortgaged property were not liable to be sold. The Court negatived all these contentions and ordered the papers to be sent to the Collector for sale of the mortgaged property. There was an appeal to the District Court which summarily dismissed it. The appellants have now raised the same contentions as urged before the trial Court in this appeal.

As to the question whether Mallaya is a necessary party to this darkhast, it is true that in suit No. 485 of 1932, Mallaya was one of the defendants and there he was described as a decree-holder under another award decree against Govind. But the decree I am concerned with makes no mention of Mallaya. In the present darkhast the decree holder made an application asking that Mallaya should be made a party on the ground that he had a half share in the decretal amount, but the application was

not pressed and it was filed by the Court. There seems, therefore, to be no substance in this contention. Darkhast No. 530 of 1936 was struck off because the decree-holder failed to produce certain extracts of Record of Rights as ordered by the Court. The Court may, under O. 21, R. 14, require the production of such documents "where an application is made for the attachment of any land which is registered in the office of the Collector." Here no such application was made, the property being already secured for payment of the debt, and, therefore, it cannot be said that the requirement of O. 21, R. 14, was not complied with. Sub-rules (1) and (2) of O. 21, Rule 17, are as follows:

"(1) On receiving an application for the execution of a decree as provided by R. 11, sub-r. (2), the Court shall ascertain whether such of the requirements of Rr. 11 to 14 as may be applicable to the case have been complied with, and, if they have not been complied with, the Court may reject the application, or may allow the defect to be remedied then and there or within a time to be fixed by it.

(2) Where an application is amended under the provision of sub-r. (1), it shall be deemed to have been an application in accordance with law and presented on the date when it was first presented."

As it cannot be said that the requirement of R. 14 was not in this case complied with, it must be held that darkhast No. 530 of 1936 was an application in accordance with law. The finding of the trial Court, therefore, on this point is correct. The third point urged is the most important one in this appeal. Mr. Jahagirdar does not deny that the appellants' shares are liable under the decree. But his contention is that as they were not parties to the darkhast but have been brought on the record merely as Govind's legal representatives, their shares cannot be proceeded against. It is now settled law that in a joint Hindu family governed by the Mitakshara and consisting of a father and sons the whole of the joint family property is liable for the father's debts if they are not tainted by illegality or immorality: (13 Cal. 21,<sup>1</sup> 51 I. A. 129<sup>2</sup> and 63 I. A. 384<sup>3</sup>) and that the obligation continues even after a partition, but is limited in the case of each of the sons to the extent of his share in the family property: 52 Bom.

1. ('86) 13 Cal. 21; 13 I. A. 1; 4 Sar. 682 (P.C.), Nanomi Babuasin v. Modhun Mohun.

2. ('24) 11 A. I. R. 1924 P. C. 50; 46 All. 95; 51 I. A. 129; 77 I. C. 689 (P.C.), Brij Narain v. Mangla Prasad.

3. ('36) 23 A.I.R. 1936 P. C. 277; 17 Lah. 644; 63 I. A. 384; 164 I. C. 6 (P.C.), Sat Narain v. Sri Kishen Das.



376.<sup>4</sup> It is not alleged that in this case the mortgage-debt was illegal or immoral. Mr. Jahagidar has relied on 41 Bom. L. R. 1177,<sup>5</sup> where Lokur J. sitting singly, was concerned with a case in which the decree-holder had obtained a money decree and had brought to sale the judgment-debtor's property and purchased it himself, and where the judgment-debtor's minor son, born after the decree and not a party to the execution proceedings, brought a suit for a declaration that the decree-holder got no interest in the property purchased by him on the ground *inter alia* that there had been a partition between him and his father before the date of the execution, the property sold having come to his own share. After saying that it was well-settled in this province that even after partition a separated son is liable for his father's pre-partition debts which are not illegal or immoral, Lokur J. remarked (p. 1181) :

" But if the son is not a party to the creditor's suit, different considerations arise according as the partition takes place before the institution of the suit, or during the pendency of the suit, or after the decree is passed against the father. It is obvious that if the creditor files his suit after the partition between the father and the son, he must implead the son also as a party to the suit if he wants to proceed against his share since the father ceases to represent the son after the partition. On the same reasoning, if a partition takes place during the pendency of the suit the father will not represent the son after the partition and the son ought to be impleaded if the decree is to be executed against his separated share. If the son is not a party to the decree, not represented by his father at the date of the decree, as he would not be after the partition, the decree would not be binding on him, though he might be liable for the debt."

The conclusions he arrived at are stated towards the end of the judgment in six paragraphs, the fifth of which is relevant (p. 1189) :

" If such decree is to be executed after the son has separated from his father, the son must be made a party to the execution proceedings, if his separated share is to be proceeded against. Otherwise its sale will not be binding on the son."

One of the grounds on which this proposition is based is that the Court should take as strict a view as possible of the effect of the son's pious obligation to pay his father's debts, the doctrine about which (which is to be applied even to cases in which the son may have derived no benefit from the father's debts) is seemingly so unjust that in

51 Mad. 361,<sup>6</sup> Coutts-Trotter C. J. condemned it as (p. 367) "an illogical relic of antiquity unsuited to any but a primitive and patriarchal society" and that we should apply the doctrine of the son's pious obligation "within the limits made binding upon us by the decisions and should refuse to go a step further."

In I.L.R. (1937) Mad. 880<sup>7</sup> a Full Bench of the Madras High Court held that a Hindu father by virtue of his position as manager of the undivided Hindu family has the power to represent the entire family in all transactions relating to the family, that when the suit relates to joint family property it must be presumed that he was sued as representing his family, and the decree need not be specifically passed against him as such, and that, once a liability is declared to be a family liability, every item of the joint family property is bound to satisfy that liability, and the question whether the family continues to remain joint or became divided becomes immaterial. Venkatasubba Rao J. observed (p. 894) :

" The reason for holding that the members not joined should be held liable is, that they are substantially parties to the suit through the manager, in other words, they are sufficiently represented, though not *eo nomine* parties on the record. It follows from this that the decree can be executed not only against the parties whose names appear but also against those who must be deemed to be constructive parties. In this view it is immaterial whether the family continues to remain joint or became divided."

The above line of reasoning, however, did not commend itself to Lokur J. and the ground of his decision to the contrary effect is that after a partition the father could not represent his separated son and that therefore though the son was constructively a judgment-debtor [see 51 All. 932<sup>8</sup> at p. 964 and Mayne's Treatise on Hindu Law and Usage, 10th Edn., p. 440], he should be joined as a party to the execution proceedings if his separated share was to be attached and sold, for the separated son might be ignorant of the decree against his father and must be afforded an opportunity to save his separated share by paying the decretal amount.

Besides relying on the ground that after the partition the father ceases to represent

4. ('28) 15 A.I.R. 1928 Bom. 232 : 52 Bom. 376 : 110 I. C. 269, Annabhat Shankarhat v. Shivappa Dundappa.

5. ('40) 27 A. I. R. 1940 Bom. 22 : I.L.R. (1939) Bom. 658 : 186 I. C. 695 : 41 Bom. L. R. 1177, Surajmal Deoram v. Motiram Kalu.

6. ('28) 15 A.I.R. 1928 Mad. 657 : 51 Mad. 361 : 110 I. C. 141 (F.B.), Subramania Ayyar v. Saba-pathy Aiyar.

7. ('37) 24 A.I.R. 1937 Mad. 610 : I.L.R. (1937) Mad. 880 : 171 I. C. 101 (F.B.), Venkatanarayana v. Venkata Somaraju.

8. ('29) 16 A.I.R. 1929 All. 726 : 51 All. 932 : 121 I. C. 257, Kishan Sarup v. Brijraj Singh.



the sons, Mr. Jahagirdar has pointed out that the appellants have been brought on the record not in their capacity as members of the family, but as legal representatives of Govind, and he has contended that their liability would be to the extent of Govind's share, that is, a one-fourth share, in the family property. Mr. Gajendragadkar on behalf of the respondent decree-holder has contended that this case can be distinguished from 41 Bom. L. R. 1177<sup>5</sup> on the following grounds : (1) that whereas the decree in that case was a money decree, the decree in the present suit is a mortgage decree which authorises the decree-holder to bring the whole of the mortgaged property to sale; (2) that the partition decree expressly declares the award decree to be binding on the appellants; (3) that the appellants have appeared in these proceedings only as legal representatives of Govind and as such they are not entitled to rely on their alleged rights in their individual capacity; and (4) that the order of the Court dated 14th March 1938, for sale of the property is binding on them as such representatives as *res judicata*. To take the last point first, there is no doubt that the principle of *res judicata* applies to execution proceedings (11 I. A. 37<sup>9</sup>) and would apply after the death of a party bound by it to his legal representatives, and it is obvious that Govind, if he had been alive at the date of the appellants' application, could not have been allowed to say that the order of sale of the mortgaged property was bad or not binding on the whole of the mortgaged property. The line of argument appears to me to be not without considerable force, though it may be a somewhat technical way of shutting out the main contention on which Mr. Jahagirdar has relied. It may also be that strictly speaking all that the appellants can urge is what they as representatives of Govind are entitled to urge. But they have brought to the notice of the Court that they became divided from Govind after the date of decree, and it does not now appear possible for the Court to shut its eyes to the legal consequences of such partition. In I. L. R. (1937) Mad. 880<sup>7</sup> as in the present case, there had been a mortgage decree against the father in an undivided Hindu family whereas the decree with which Lokur J. was concerned in 41 Bom. L. R. 1177<sup>5</sup> was a money decree. In I. L. R. (1937) Mad. 880<sup>7</sup> the mortgagee decree-holder brought the mortgaged

9. ('84) 6 All. 269 : 11 I.A. 37 (P.C.), *Ram Kirpal Shukul v. Mt. Rup Kuari*.

property to sale and purchased it and then filed a suit against the father and his two major sons to recover possession of the property and mesne profits. At a partition subsequent to the decree the suit property fell to the share of the father and the minor son who continued to remain joint. The trial Court dismissed the suit. But the High Court on appeal made a decree for possession and mesne profits in favour of the plaintiff. Thereafter the father died and an application was made to recover the decretal amount by sale of other properties in the minor son's hands. That son pleaded a partition between him and his father during the pendency of the appeal in the High Court alleging that the properties which fell to his share could not be rendered liable under the decree. Venkatasubba Rao and Venkataramana Rao JJ. took the view that where it can be held that the members of the joint family not joined in the suit should be held liable on the ground that they were sufficiently represented though not *eo nomine* parties on the record, it is immaterial whether the family continues to remain joint or became divided. The following passage from Mayne was relied on (p. 894) :

"All the members of the family, and therefore all their property, *divided or undivided*, will be liable for the debts which have been contracted on behalf of the family by one who was authorised to contract them : " (Mayne's Hindu Law, 9th Edn., S. 333).

Venkataramana Rao J. observed (p. 904) :

"The principle of Hindu law is that members, who are united at the time a joint family liability is incurred, are not absolved from their liability by the fact that they become subsequently divided : *vide* 22 Mad. 166.<sup>10</sup> So far as a creditor is concerned, he is entitled to have recourse to every item of the joint family property so long as it is in the hands of the persons who are under the law liable for his debt. When they must be held to be parties to the suit, it is immaterial what the character of the property in their hands is, whether it is still undivided property or has become separate property by division."

With respect I agree with this view. Mr. Jahagirdar did not seek to repudiate the liability of his clients under the decree sought to be executed, but he contended that if the decree-holder did not take care to implead them in his darkhast, he could not avail himself of such liability. Such a view would necessitate the decree-holder's impleading in execution all coparceners of a joint Hindu family against whose *karta* he has obtained a decree which is binding on such coparceners for they may plead a partition of which he may not even be aware.

10. ('99) 22 Mad. 166, *Chalamayya v. Varadayya*



Why he should not proceed against the judgment-debtor on the record, especially when, as in this case, the decree enables him to bring the property mortgaged to sale, is somewhat difficult to understand, for a technical objection like the one Mr. Jahagirdar has pressed amounts, in a case like the present, virtually to a repudiation of the other coparceners' liability so far as the darkhast in question is concerned. In a case like the present, a partition in such circumstances appears to me to be a fortuitous event of which such coparceners should not be allowed to take advantage, and the representative character of the father or manager in the suit cannot in my judgment be made to disappear in the execution proceedings at the mere will of those bound by the decree by effecting a partition. In *I.L.R. (1937) Mad. 880*<sup>7</sup> Venkatasubba Rao J. remarked (p. 889) :

"Is it to be imagined that the respondent could at his will abruptly put an end to the representation which had gone on for about 12 years, producing by his act the strange legal result of his not being bound by the decree to be passed shortly thereafter? I think the answer to this question must be in the negative."

In the present case the decree rendered the mortgaged property liable to sale and the partition decree has expressly declared therein that the award decree is binding on the plaintiff and defendants 1, 2 and 3, the present appellants and Govind. In these circumstances the omission of the decree-holder to implead the appellants separately from Govind in execution is, in my judgment, immaterial. The other line of reasoning would appear to involve the exemption of the unimpleaded coparceners from their liability even if the partition takes place during the execution proceedings, for instance, on the date next preceding the sale, so that the sale may be said to affect the interest of the only judgment-debtor on record. With respect, therefore, the reasoning adopted in the Madras case appears to me to apply to the facts of this case rather than that adopted in 41 Bom. L. R. 1177.<sup>6</sup> In the result I hold that the view taken by both the Courts below was correct, and the appeal is, therefore, dismissed with costs.

R.K./V.S.

*Appeal dismissed.*

[Case No. 21.]

**A. I. R. (33) 1946 Bombay 109**

KANIA AG. C. J. AND

GAJENDRAGADKAR J.

*Sumitrabai N. Nadkarni — Appellant*  
v.

*Vishweshwar — Respondent.*

First Appeal No. 240 of 1942, Decided on 26th July 1945, from decision of Dist. Judge, Kanara at Karwar, in Misc. Appln. No. 18 of 1941.

Succession Act (1925), S. 214—Probate limited to collection of debts cannot be made.

It is not open to a party to apply for probate of a will, limited to the collection of debts nor to the Court to issue such a grant : 6 Bom. 452, *Expl.*

[P 109 C 2; P 110 C 1]

*D. R. Manerikar* — for Appellant.

*G. P. Murdeshwar* — for Respondent.

**Kania Ag. C. J.**—This is a first appeal from the judgment of the District Judge at Karwar in miscellaneous application No. 18 of 1941. The short point argued before us is whether under the Succession Act of 1925 it is open to a party to obtain probate of a will, limited to the collection of certain debts. It was argued by Mr. Manerikar that in 6 Bom. 452<sup>1</sup> a limited probate of that kind was granted to a Cutchi Memon under S. 18 of Act 27 [XXVII] of 1860. He argued that Act 7 [VII] of 1889 (the Succession Certificate Act) was enacted thereafter, and it contained a provision similar to what is now found in S. 214, Succession Act. Following that line of reasoning, it was contended that, as the present Act is an Act to consolidate the law applicable to intestate and testamentary succession in British India, decisions which were based on the construction of the previous section, although found in another Act of the Legislature, were equally binding. He argued, therefore, that as probate was granted in 6 Bom. 452,<sup>1</sup> it is still open to a party to apply for probate for the limited purpose of collection of debts.

In our view, this argument is unsound. A careful reading of the case relied upon shows the following : In 1878, when the succession in that case opened and shortly after which the application was made, the Court was governed in the matter of granting general representation by the Charter constituting the High Court. That Charter was construed to empower the Court to grant representation only in respect of the estates of British subjects. In order to enable Hindus to obtain such representation, the Hindu Wills Act was passed. There was no law permitting such general grant in the case of Muhammadans. In order, however, to enable debtors

1. ('82) 6 Bom. 452, In re Haji Ismail Haji Abdulla.



to get effective discharge in the case of other communities, whom the existing statute did not cover, the Legislature had enacted Act 20 [XX] of 1841. Section 14 of that Act enabled the grant of probate and letters of administration, but for the purpose of recovery of debts only and the security of debtor paying the same, except in so far as the Act provided. The section was repeated as S. 18 in Act 27 [XXVII] of 1860. In 6 Bom. 452<sup>1</sup> the parties were Cutchi Memons and it was held that the provisions of the Hindu Wills Act did not apply to Cutchi Memons. The Court, therefore, had no option but to act under S. 18 of Act 27 [XXVII] of 1860. That section in terms mentioned that all probates or letters of administration granted by the Supreme Court of Judicature under that section were limited to the purpose of recovery of debts only, etc. Therefore, the decision came to be given on the existing law at the time. In our opinion, the law as it now stands has completely changed. The present Succession Act permits members of all communities to apply for a complete representation, and the effect of the grant of probate or letters of administration is that the executor or administrator, as the case may be, completely represents the estate of the deceased. Where limited grants are permitted specific provision is found in the Succession Act. It is not open to the Court or any party to add to that list of limited grants. The Succession Act is a consolidating Act in respect of all matters of succession and inheritance and the procedure in respect of the grant of representation. The contention of the appellant, therefore, that under S. 214, Succession Act, as it now stands, it is open to a party to apply for probate limited to the collection of debts or to the Court to issue such a grant, is untenable. The appeal therefore, fails and is dismissed with costs.

V.B.

*Appeal dismissed.*

[Case No. 22.]

**A. I. R. (33) 1946 Bombay 110**

STONE C. J. AND DIVARIA J.

G. R. Sane — Appellant

v.

D. S. Sonavane & Co. and others —  
*Respondents.*

First Appeal No. 39 of 1943, Decided on 18th January 1945, against decision of First Class Sub-Judge, Dharwar, in Case No. 2 of 1939.

(a) Evidence Act (1872), S. 112—Non-access—Merely living with paramour is no evidence of non-access.

The presumption of legitimacy can only be rebutted by evidence of non-access. Proof *per se* that the woman was living with the paramour is not evidence of non-access by her husband : ('34) 21 A. I. R. 1934 P. C. 49 and ('26) 13 A. I. R. 1926 Bom. 348, *Ref.* [P 111 C 1]

(b) Workmen's Compensation Act (1923), S. 30—Object of S. 30 stated.

The object of the proviso to S. 30 of the Act, is clearly that in the cases involving relief to the dependants of persons in a humble station of life there should be a quick and final decision and that the compensation arising under the Act from the death of the supporter of poor dependants should be quickly available to supply such dependants with the necessities of daily life. [P 112 C 1]

(c) Workmen's Compensation Act (1923), S. 30A—Stay ordered by Commissioner pending appeal — Procedure to be followed by appellant stated.

When an order of direction is made by a Commissioner for a stay or for the retaining of the money in Court pending an appeal, an application shall be made by the appellant to the High Court within one month, asking for expedition of the appeal and also for the giving of any directions which the High Court may seem fit to give with regard to the maintenance of the dependants in the meantime. [P 112 C 2]

(d) Workmen's Compensation Act (1923), S. 2 — Dependant — Illegitimate child of adulterous intercourse supported by deceased is dependant.

An illegitimate child even though born of adulterous intercourse is a dependant of the deceased if it was supported by him : ('26) 13 A. I. R. 1926 Bom. 301 and ('31) 18 A. I. R. 1931 Bom. 221, *Ref.* [P 113 C 1]

(e) Workmen's Compensation Act (1923), S. 30 — Substantial question of law.

The quantum of evidence necessary to discharge the onus of proof is not a substantial question of law. [P 112 C 2]

D. A. Tulzapurkar and D. M. Athavale —  
for Appellant.

S. H. Belavadi — for Respondents (2 to 4).

**Stone C. J.**—This is an appeal from the First Class Subordinate Judge at Dharwar sitting as Commissioner for Workmen's Compensation under the Act of 1923. Under S. 30 of that Act, an appeal only lies to this Court on a substantial question of law. That section is as follows :

"(1) An appeal shall lie to the High Court from the following orders of a Commissioner, namely—"  
Then there are set out in sub paragraphs various types of orders from which an appeal lies, followed by this proviso :

"Provided that no appeal shall lie against any order unless a substantial question of law is involved in the appeal and, in the case of an order other than an order such as is referred to in cl. (b), unless the amount in dispute in the appeal is not less than three hundred rupees."

On 21st March 1939, a workman of the name of Fatechand was killed, and it seems that he was leaving in adulterous intercourse with opponent 1, who was the wife of another



man, and who had two young children whom admittedly Fatechand maintained as though they were his own children. The two children are opponents 2 and 3 in this Court, whilst the appellant is one of the alleged employers of Fatechand. The other alleged employer has not appealed, and whatever the result of this appeal may be, the order of the lower Court remains binding on him. By sub-s. 2 (1) (d), Workmen's Compensation Act, 1923, "dependant" is defined, amongst other definitions, as follows:

"(ii) If wholly or in part dependant on the earnings of the workman at the time of his death, a widower, a parent other than a widowed mother, a minor illegitimate son, an unmarried illegitimate daughter . . . ."

It is essential in making any examination of the evidence in this case to bear in mind the language of S. 112, Evidence Act:

"The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten."

Therefore, the presumption of legitimacy can only be rebutted by evidence of non-access. Proof *per se* that the woman was living with Fatechand is not evidence of non-access by her husband. Sir George Lowndes in delivering the judgment of the Board in 12 Rang. 243<sup>1</sup> said at page 251:

"It was suggested by counsel for the appellants that 'access' in the section" (that is, S. 112) "implied cohabitation, and a case from the Madras reports was cited in support of this contention. Nothing seems to turn upon the nature of the access in the present case, but their Lordships are satisfied that the word means no more than opportunity of intercourse."

Before turning to the evidence, a difference between the law of England and the law of India should be observed. Under English law, the declaration of a father or mother cannot be admitted to bastardise the issue born after the marriage; but this rule does not apply in India: see 28 Bom. L. R. 607.<sup>2</sup>

The only two witnesses of non-access are the mother herself and a witness named Radhabai, who was a neighbour. The mother's evidence is this: "He" (that is her husband) "has deserted me since five to six years ago." The word "deserted" in the vernacular may equally be translated as "abandoned." In cross-examination she said:

1. ('34) 21 A. I. R. 1934 P. C. 49 : 12 Rang. 243 : 147 I. C. 891 (P. C.), Karapaya Servai v. Mayandi.  
2. ('26) 13 A. I. R. 1926 Bom. 348 : 95 I. C. 834 : 28 Bom. L. R. 607, Bai Kamala v. Babubhai.

"Mahadev Bhoite" (that is, her husband) "was living at Satara till his death. He was not living near my house but a furlong away from it." The evidence of the other witness, Radhabai, is this: "She" (that is, the mother) "had quarrelled with her husband. Opponent 1's husband was not going to her." In cross-examination she said: "Opponent 1's husband was living half a mile away from her." No one, it seems, drew the learned Judge's attention to S. 112, Evidence Act, since that section is nowhere referred to either in the judgment or in the record of this case. Dealing with the question of the paternity of the children, the learned Judge says this:

"The most important question, therefore, is whether opponents 2 and 3 (that is, the children) "were born of Fatechand and if so, whether they are dependants and if so, whether their right to claim compensation is barred by the fact that they were born of adulterous intercourse."

Opponent 1, who is the mother of opponents 2 and 3, has stated on oath that though she was married many years ago, she was deserted by her husband who was one Mahadev Bhoite. She added that she began to live with the deceased Fatechand as his wife though no marriage was formally solemnized. She denied that she was in the keeping of any one else. She added that her two children, opponents 2 and 3, were born of him and that he was maintaining them all. She admitted in the course of her cross-examination that Mahadev Bhoite who was her married husband was living at Satara till his death which took place about 1941. It is true that she has not produced certified copies from the register of births. She also admitted that there was no divorce between her and Mahadev Bhoite. It is important to note that it was not suggested in the course of her cross-examination that Mahadev Bhoite was visiting her in her mother's home or that she was living with him during the period when her children were born to her. There was nothing to prevent the employer from asking her these questions or to prove that Mahadev Bhoite was cohabiting with her or used to go to her."

Dealing with the evidence of the other witness Radhabai, the learned Judge says this:

"The fourth witness, exhibit 74, has stated on oath that Radhabai's husband was never going to her and that opponents 2 and 3, were born to Radhabai of Fatechand. I see no reason why her testimony should be disbelieved."

The learned Judge gives his conclusions in the following passage:

"Giving the matter my most anxious consideration I am satisfied that the deceased Fatechand was the putative father of opponents 2 and 3 whose mother Radhabai was living with him as his own wife."

It does not appear to have been suggested in the Court below that the onus of proof of non-access lies on those who seek to bastardize the children by proving them to be Fatechand's children. But the fact that on this evidence we might well come to the



conclusion that the initial onus of proof of non-access had not been discharged, is not, in my judgment, the point to which attention should be focussed. Mr. Belavadi on behalf of the children raises by way of a preliminary point the submission that no appeal lies since no substantial question of law is involved. The memorandum of appeal is wholly devoid of any assertion of there being a substantial question of law upon which an appeal to this Court could be grounded. I invited Mr. Tulzapurkar to state what he now contended the substantial question of law to be. He answered that: "the substantial point of law is that the finding arrived at by the learned Judge on issue 4, which is: 'Whether opponents 2 and 3, (the children) were born of the deceased Fatechand,' is arrived at on no evidence in the case which would be sufficient to discharge the burden which lay upon them under S. 112, Evidence Act." That answer proceeds from the difficulty in which the appellant is, namely, that no issue with regard to non-access by the father was framed and that no cross-examination took place upon such evidence of non-access as was led. The object of the proviso to S. 30 of the Act is clearly that in these cases involving relief to the dependants of persons in a humble station of life there should be a quick and final decision and that the compensation arising under the Act from the death of the supporter of poor dependants should be quickly available to supply such dependants with the necessities of daily life. Only if a substantial question of law is involved, does an appeal lie. No better illustration could be given than this case of the mischief which flows from appeals in these cases, particularly in a case such as this one in which the memorandum of appeal does not even suggest a substantial question of law.

The workman was killed on 21st March 1939, and now on this 18th January 1945, nearly six years afterwards, the compensation moneys are still held up in the Court at Dharwar, and the children have not received a single pie for their maintenance. Judgment was delivered on 5th November 1942. Rs. 1,898 were ordered to be paid into Court within one month. On 11th January 1943, the Rs. 1,898 were deposited in the Dharwar Court. On the same day it appears that the appellant applied that the money should be retained in Court till the decision of the High Court in appeal was known. The pleader on behalf of the children left the matter in the hands of the Court,

and the Court on 11th February 1943, ordered that the sum of Rs. 98 in respect of costs be paid out; but no order was made with regard to the Rs. 1800 compensation moneys or any part thereof. This procedure is very unsatisfactory, and appears to proceed without any attention having been drawn to S. 30A of the Act, which was introduced by amendment in 1933. That new section is as follows:

"Where an employer makes an appeal under clause (a) of sub-s. (1) of S. 30, the Commissioner may, and if so directed by the High Court shall, pending the decision of the appeal, withhold payment of any sum in deposit with him."

This discretion vested in the Commissioner ought to be properly exercised having regard to all the circumstances of the case. In particular a matter of primary importance is for the Commissioner to be satisfied that there is some substantial question of law involved on which alone the right to appeal is given. Justice delayed is justice denied; and in order that these cases may be expeditiously and properly dealt with in the future, and that the object of the Act may not be frustrated, we direct that in any case in which an order or direction is made by a Commissioner for a stay or for the retaining of the money in Court pending an appeal, an application shall be made by the appellant to this Court within one month, asking for expedition of the appeal and also for the giving of any directions which this Court may seem fit to give with regard to the maintenance of the dependants in the meantime. In my judgment, no appeal lies on the first point taken by the appellant. There was some evidence of non-access, shadowy though it may be, but the quantum of evidence necessary to discharge the onus of proof is not a substantial question of law.

[The rest of the judgment is not material to this report.]

**Divatia J.**—[The material portion of his Lordship's judgment is as follows.]

The second point urged by Mr. Tulzapurkar on behalf of the appellant is that even taking opponents Nos. 2 and 3 to be the children of Fatechand, they are not illegitimate children within the meaning of Hindu law which governs them, and that therefore, they would not be entitled to any share in the compensation. He relies upon two decisions of our Court. One of them is 28 Bom L. R. 595<sup>3</sup> according to which under Hindu law, the connection between a man and the married wife of another does not cease to be

3. ('26) 13 A.I.R. 1926 Bom. 301 : 96 I.C. 358 : 28 Bom. L. R. 595, *Vithabai v. Pandu*.



adulterous, simply because the husband of the woman connives at the adultery. A son born of such union is not a *dasiputra*. The other decision in 33 Bom. L. R. 289<sup>4</sup> says that under Hindu law, where a woman is in the sole keeping of a shudra and the relation lasts till the death of the paramour, a son born of the connection is the illegitimate son of the deceased, provided the son is not the fruit of adulterous connection. It is no doubt true that the relationship between the parties is to be ascertained on the personal law governing them, and according to that law as interpreted in these two authorities an illegitimate child of a person would not be entitled to any share in the inheritance of the deceased if the child is born of adulterous or incestuous intercourse. The question, however, so far as we are concerned in this appeal, is not whether the child is the heir of the deceased but whether it is a dependant of the deceased. Under S. 8, Workmen's Compensation Act, the compensation is to be paid to each of the dependants of the deceased workman, and "dependant" is defined in S. 2, as, among other persons, a minor illegitimate son and an unmarried illegitimate daughter. It may be noted that a mistress is not included in the class of dependants, but an illegitimate son and an illegitimate daughter are so included. In view of this definition it cannot be said that an illegitimate child even though born of adulterous intercourse is not a dependant of the deceased if it appears from the evidence that it was supported by him. Even under these two authorities, it cannot be said that the child born of adulterous intercourse ceases to be an illegitimate child of the father even though it cannot inherit his property. It does not follow that the child should not get any share in the compensation if it is found to be a dependant even though an illegitimate child. In my opinion, therefore, these two authorities do not assist the appellant's case, and as it has been proved that they were dependant upon the deceased because their mother was in the permanent keeping of the deceased, they do fall within the definition of "dependant", and therefore, they are entitled to the compensation awarded by the lower Court. [After dealing briefly with other points his Lordship proceeded:]

The last point is with regard to the deposit made by the appellant in the lower Court and the amount to be paid to the two opponents Nos. 2 and 3. Section 30A of

4. (31) 18 A.I.R. 1931 Bom. 221 : 131 I.C. 883 : 33 Bom. L. R. 289, *Tukaram v. Dinkar*.

the Act no doubt gives a discretion to the Commissioner under this Act to withhold payment of any sum in deposit in case the employer makes an appeal against the decision of the Commissioner. The section says that "the Commissioner may, and if so directed by the High Court shall, pending the decision of the appeal, withhold payment of any sum in deposit with him." It follows that even before an appeal is filed to this Court against the decision of the Commissioner, the latter has the discretion to direct the withholding of payment. Still, however, that discretion is finally subject to the order of this Court if an appeal is filed, and it is, therefore, desirable in all such cases where an employer wishes to appeal against the decision of the Commissioner and makes a deposit for that purpose, that the Commissioner should direct the employer to obtain an order of stay as expeditiously as possible; otherwise payment would be made to the persons who were found entitled to the same. It is when the appeal comes for admission to this Court and after it is admitted that this Court may, in the exercise of its discretion, grant an order of stay on such terms as it considers fit. In all such cases the appeal, after it is admitted, should be brought on for hearing as expeditiously as possible so that the dependants, who have been awarded compensation, may not have to suffer delay in receiving the amount due to them if the appeal fails. For these reasons I agree with the order proposed by the learned Chief Justice that this appeal should be dismissed with costs.

R.K.

*Appeal dismissed.*

[Case No. 23.]

**A. I. R. (33) 1946 Bombay 113**

LOKUR AND GAJENDRAGADKAR JJ.

*Jadavbai Narayandas — Applicant*

v.

*Shrikisan — Opponent.*

Civil Revn. Appln. No. 593 of 1941, Decided on 27th June 1945, from order of joint Civil Judge, Sholapur, in suit No. 343 of 1939.

Civil P. C. (1908), O. 17, R. 1—Adjournment of hearing of suit — Costs of adjournment — Nature and extent of — Principle underlying O. 17, R. 1 (2) indicated.

In granting an adjournment of the hearing of the suit the Court is empowered by O. 17, R. 1 (2), "to make such orders as it thinks fit with respect to the costs occasioned by the adjournment." The expression "occasioned by the adjournment" is deliberately used in order that the discretion of the Court should not be restricted to the taxable costs of the day. The principle underlying O. 17, R. 1 (2)



is that the party who is ready to proceed with the suit should be awarded such costs as can reasonably be held to be "occasioned by the adjournment," and as might reasonably compensate him for the expense incurred by reason of the adjournment. Of course the condition imposed should not be in the nature of a penalty or punishment to the party asking for adjournment, and hence the costs awarded should in no case exceed a sum commensurate with the expense, which, in the opinion of the Court, the party ready to proceed reasonably incurs as a result of the adjournment. [P 114 C 2]

**C. P. C. —**

(44) Chitale, O. 17. R. 1, N. 5, Pts. 2, 4.

*P. V. Kane, S. G. Patwardhan and S. S. Kavalekar* — for Applicant.

*Y. V. Dixit* — for Opponent.

**Lokur J.** — This is an application in revision against an order passed by the joint First Class Subordinate Judge at Sholapur in suit No. 343 of 1939 granting the plaintiff's application for adjournment of the hearing on condition that she should pay Rs. 600 to the defendant for his costs of the day. The plaintiff's family is one of the richest in Sholapur and she filed this suit against her adopted son for recovering past and future maintenance at the rate of Rs. 600 per month, a portion of the family *wada* for her residence and Rs. 10,000 for visiting holy places. The subject-matter of the suit was valued at Rs. 86,400. The defendant was prepared to give her maintenance at the rate of Rs. 250 per month but nothing for her pilgrimage. The suit was filed on 8th February 1939, and was adjourned from time to time at the request of one party or the other. It was fixed for final hearing on 22nd February 1941, but on that day one of the witnesses for the plaintiff was not present. She asked for an arrest warrant against that witness and got the suit adjourned to 5th March 1941. On that day the defendant was ready with his witnesses. The claim being hotly contested, the defendant had engaged, in addition to his local pleaders (Messrs. Mule and Paranjpe), an advocate (Mr. Dixit) and a counsel (Mr. Daphtary) from Bombay. Both of them were present in Court on that day and the defendant was prepared to go on with the suit. But the plaintiff was not present and her pleader made an application that as she was not well she was not able to attend the Court and that the hearing of the suit should be adjourned. In its order below the application the lower Court expressed the view that the plaintiff's sickness was exaggerated and that her aim was to get an adjournment of the hearing as the defendant had engaged a counsel from Bombay. The application was opposed but

the Court was inclined to allow a short time to the plaintiff. The lower Court then ascertained from Mr. Daphtary that he was paid Rs. 600 per day and adjourned the hearing of the suit on condition that the plaintiff should pay Rs. 600 to the defendant. It does not appear from the record that the plaintiff's pleader objected to that condition. But now it is contended on her behalf that the Court had no jurisdiction to impose such an onerous condition and that at the most it could have ordered her to pay the defendant's costs of the day, that is to say, his pleader's fees for a day (Rs. 15) and whatever the defendant had to spend in getting orders for re-attendance served on his witnesses.

In granting an adjournment under O. 17, R. 1, sub-r. (1), Civil P. C., the Court is empowered by sub-r. (2) "to make such orders as it thinks fit with respect to the costs occasioned by the adjournment." The expression "occasioned by the adjournment" is deliberately used in order that the discretion of the Court should not be restricted to the taxable costs of the day. The principle underlying the sub-rule is that the party who is ready to proceed with the suit should be awarded such costs as can reasonably be held to be "occasioned by the adjournment," and as might reasonably compensate him for the expense incurred by reason of the adjournment. Of course the condition imposed should not be in the nature of a penalty or punishment to the party asking for adjournment, and hence the costs awarded should in no case exceed a sum commensurate with the expense, which, in the opinion of the Court, the party ready to proceed reasonably incurs as a result of the adjournment. On this principle the defendant who had not anticipated an adjournment on 5th March 1941, and had expected the suit to be heard on that day, had brought a counsel from Bombay at a cost of Rs. 600. That expense was wasted by the adjournment. In addition to Rs. 600 the defendant might have been awarded also the fees of the local pleaders and the advocate from Bombay, as well as the amount which he had to spend to secure the re-attendance of his witnesses on the next date of hearing. Looking to the stake involved in the suit, we think that the defendant was not unreasonable in incurring the expense of a counsel from Bombay, and the lower Court was right in requiring the plaintiff to pay his costs as a condition of the adjournment. We see no reason to interfere with



the order of the lower Court. The rule is discharged with costs.

G.N.

*Rule discharged.*

[Case No. 24.]

**A. I. R. (33) 1946 Bombay 115**

DIVATIA AND BAVDEKAR JJ.

*Emperor*

v.

*Rustam Karanjia — Accused.*

Criminal Appeal No. 153 of 1945, Decided on 10th August 1945, from order of acquittal by Chief Presidency Magistrate, Bombay.

Bombay Children Act (13 [XIII] of 1924), S. 27B, (as amended in 1935)—Report likely to lead to child's identification at least by relations and friends of child—Report comes under S. 27B—Previous publication of report is mitigating factor in awarding sentence.

The intention of the Legislature in inserting the words 'calculated to lead to the identification' in S. 27B in the year 1935 is that the future of a child should not be marred by any report which is likely to lead to the child's identification. Thus a newspaper report does come within the wording of this section if it is likely to lead to the child's identification only by the friends and relations of the child's family, though not by a large section of public. The motive behind publishing the report, however laudable, is immaterial for the applicability of the section. The fact that the report had already been published in some other newspapers and the identity of the child concerned was thereby known by a wide section of public, though affords no justification for the offence itself, yet is a mitigating factor in the matter of sentence.

[P 116 C 1; P 117 C 1]

An amendment of S. 27B restricting the scope of offences included in it suggested.

*S. G. Patwardhan, Asst. Government Pleader*  
— for the Government of Bombay.

*S. D. Vimadlal and Pochaji Jamshedji* —  
for Accused.

**Divatia J.**— This is an appeal by Government against the order of the Chief Presidency Magistrate of Bombay acquitting the editor and publisher of a weekly newspaper in Bombay called "*Blitz*" of the offence under S. 27B, Bombay Children Act (Bom. 13 [XIII] of 1924). One Dr. Talati was arrested on 31st March 1944 for ill-treating his daughter named Zarine, and charged for causing hurt to her, under S. 324, Penal Code, read with S. 9, Bombay Children Act. He was, therefore, placed before the Magistrate for remand on 15th April 1944. But before that date, a report was published in the newspaper "*Blitz*" on 8th April, purporting to be from the woman editor of that paper. In that report certain facts were stated, the substance of which was that one girl named Zarine, exactly five years of age, winsome, frail and sickly, the daughter of a

Parsi medical practitioner, whose age was somewhere in the forties, was cruelly ill-treated by her father, and was lying in the ward of the Jerbai Wadia Hospital. Thereafter, the father, Dr. Talati, gave a notice to the editor of "*Blitz*" through his advocate that he contemplated taking proceedings against the paper for publishing the report. On 29th April the notice given by the advocate was published verbatim in the paper with a note from the editor to the effect that the notice was the outcome of a report published in "*Blitz*" about the charge against Dr. Talati, a medical practitioner, for mercilessly beating his five years old daughter, that the editor knew his business, and was perfectly aware of the legal implications of the case, and refused to be intimidated by such gratuitous warnings. In June 1944 the Public Prosecutor filed a complaint against the editor of the "*Blitz*" under S. 27B, Bombay Children Act, which runs thus :

"No report in any newspapers or news-sheet of any offence by or against a child or of any proceedings in any Court relating to such offence shall disclose the name, address or school, or include any particulars calculated to lead to the identification of any such child nor shall any picture be published as being or including a picture of any such child."

The case came up for trial before the learned Chief Presidency Magistrate. He was of the opinion that prima facie the case came within the provisions of S. 27B, which was applicable to the facts of the case. He further observed that the contents of the report were dangerously near the border line; but, in his opinion, the name of the child as well as the particulars given in the report were not calculated to lead to the identification of the child. According to the learned Magistrate, "calculated to deceive," as observed in the Stroud's Judicial Dictionary, implied something inherent in the deception and on the same reasoning 'calculated to lead to the identification' would not be just a mere clue that would [*sic. not*] without other extraneous assistance, lead to the identification of the child, but something which inherently without such assistance would lead to such identification. Applying that test, the learned Magistrate was of the opinion that there were a number of Parsi medical practitioners in Bombay, and he was not prepared to say that the particulars disclosed in that report would lead to the identification of child. On that ground he acquitted the respondent.

The words 'calculated to lead to the identification' in S. 27B, which were inserted in the Bombay Children Act in 1935, seem to



have been borrowed from S. 39 of the English Act known as Children and Young Persons Act of 1933, where the words are that the Court may direct that no newspaper report of the proceedings shall reveal the name, address or school, or include any particulars calculated to lead to the identification, of any child or young person concerned in the proceedings. There is no legal definition of the words 'calculated to lead to the identification' and we have, therefore, to go to the dictionary meaning of the word 'calculated.' In Oxford English Dictionary the word 'calculated' is stated to mean two things: firstly, reckoned, estimated, or thought out; secondly, fitted, suited, apt, that is, proper or likely to lead. The instance of the first kind is given as speaking with a calculated caution, and that of the second kind is given as disguises not calculated to deceive. In our opinion, the second meaning is more appropriate here, where 'calculated' is followed by the word 'to,' and that also seems to us to be the intention of the Legislature. The intention is that the future of a child should not be marred by any report which is likely to lead to its identification. Applying that test, it seems to us that the material words in the report were likely to lead to the child's identification, though not by a large section of the public, at least by the relations and friends of Dr. Talati's family. We think, therefore, that the first report of 9th April comes within the wording of the section. In any case, there is no doubt that the second report of 29th April does come within the section, because the name of the father, Dr. Minocher M. Talati, which is given in the notice given by his lawyer is published, and it is also published in the editor's note that the previous report had reference to the accused, Dr. Talati, mercilessly beating his five years old daughter with a sharp instrument. We may take it that the editor honestly thought that he was fulfilling his duties as a journalist in bringing to the notice of the public a very heinous crime committed by a medical practitioner against his own daughter. We are not, however, concerned with his motive, however laudable it may be, but with the object of the section, which aims at protecting the child against whom the offence is committed. Mr. Vimadlal, who appeared for the respondent in this case, has urged that the section must be construed strictly in favour of the subject. But, in the present case, the subject is not merely the editor of the paper, who published the report, but also the child

against whom an offence is committed, and this Court has to look to the effect of the report, not only with reference to the editor, but also to the child about whom the report is made; and judging in that manner, we think the second report certainly comes within the prohibition.

As regards sentence we were told at the last hearing that this report was published in some newspapers in Bombay, before it appeared in "*Blitz*" on 8th April. We, therefore, adjourned the hearing of this case, in order to enable the respondent to file an affidavit, to prove that one or more reports of this incident were published. We now find from the facts deposed to in the affidavit, which has been filed before us on behalf of the respondent, that four days before the first report was published in "*Blitz*," that is to say, on 4th April a report of these criminal proceedings being initiated in the police Courts was published in the *Bombay Sentinel*. There the name of the father, Dr. Minocher Manekji Talati, was given, and it was stated that he was charged with the offence of mercilessly beating his four years old daughter. There is no doubt, in our opinion, that this report was certainly calculated to lead to the identification of the girl. On 3rd April there appeared in the *Times of India* a report, which, however, is quite general in its nature, relating to a medical practitioner giving a severe beating to his five year old daughter. That report seems to be entirely innocuous, but on 18th April when the hearing of the case against Dr. Talati was pending, there appeared in the *Times of India* a further report of this case in which it was stated that:

"A charge sheet had been filed in the Police Court against Dr. Minocher Manekji Talati aged 40, a medical practitioner of Khetwadi, who was arrested on the allegation that he had caused injuries to his five year old daughter, and he was subsequently released on bail."

That report certainly comes within the words of the section. We do not know what considerations prompted the Government to launch these proceedings against the newspaper "*Blitz*" for an offence for which the *Bombay Sentinel* as well as the *Times of India* could have been also prosecuted; but it does appear to us from the publication of the reports in these two papers that the identification of the girl who was involved in this case, must have been known to a wide section of the public, when the first report was published by the *Bombay Sentinel* on 4th April 1944, and to a still wider section of the public, when the *Times of India*



published the report on 18th April. The publication of these reports no doubt does not afford any justification for the offence itself. But, in our opinion, it does affect the question of punishment to be awarded to the present respondent, because, at the time when the first report was published the public was already aware of the incident by its publication in the *Sentinel*; and at the time of the second publication of the report, the *Times of India's* report of 18th April had also been published. We think, therefore, that this is a mitigating factor in the matter of sentence.

There is another reason also, which must be taken into consideration in awarding the sentence. This S. 27B appears in the Children Act, and it is not unnatural that, in the mind of the public, which also includes the class of the journalists, it is thought, though erroneously, that what was prohibited was only a report connected with any proceedings pending in a Children's Court and not in any other Court. In this connexion, we might take an opportunity to note that the provisions of this section seem to be too wide and drastic as compared with those of the corresponding S. 39 in the English Act. In the latter section it is provided that, in relation to any proceedings in any Court, which arise out of any offence against, or any conduct contrary to, decency or morality, the Court may direct that no newspaper report of the proceedings shall reveal the name, address or school, or include any particulars calculated to lead to the identification of the child. It would thus appear that the discretion is left to the Court to prohibit the publication of any newspaper report. In our Act there is no such discretion left to the Court, and it applies to all reports connected with any offence, either by or against a child, and of any proceedings in any Court. It may be that the Legislature, in making this departure from the provision of the English law, might have thought that under the prevalent sentimental notions of Indian society with regard to children, it is better that such reports should be absolutely prohibited. Whatever that may be, we cannot help thinking that the section is expressed in too wide and general terms, and that the intention of protecting the interest of the child can well be achieved by restricting the scope of the offences included in this section to particular offences, which might have the effect of ruining the future welfare of the child, and leaving a discretion to the Court to allow the publica-

tion of reports of other than those specified offences. In our opinion, an amendment to that effect would sufficiently protect the interest of children. These circumstances lead us to take a lenient view of the offence with which the respondent is charged, and although, therefore, we set aside the order of acquittal made by the learned Chief Presidency Magistrate, and convict the editor of the offence under S. 27B, Children Act, we think that the ends of justice will be met by imposing on him a fine of Re. 1 only. Accordingly, the respondent is convicted of the offence under S. 27B, Bombay Children Act, and sentenced to a fine of Re. 1.

V.B.

*Appeal allowed.*

[Case No. 25.]

**A. I. R. (33) 1946 Bombay 117**

STONE C. J. AND DIVATIA J.

*District Local Board, Ratnagiri—**Appellant*

v.

*Shantaram Rajaram and others—**Opponents.*

Second Appeal No. 973 of 1942, with S. A. Nos. 974 and 975 of 1942 and Civil Revns. Applns. Nos. 208 to 213 and 626 to 645 of 1942, Decided on 13th April 1945, from decision of Dist. Judge, Ratnagiri, in Appeal No. 55 of 1942.

(a) Bombay Local Boards Act (6 [VI] of 1923 as amended by Act 23 [XXIII] of 1938), Ss. 72, 104 — Levy of Octroi — Suit for recovery of Octroi held not maintainable.

Before the 1938 amendments became operative, no written demands or notices or bills which could ratify sub-s. (2) of S. 104 were served, and hence the amount of octroi could not be recovered by distress under the subsequent sections of Ch. 8, because there was no demand and no delivery of a bill under S. 104. Accordingly the alternative procedure of suing the importer in a civil Court by virtue of S. 72 for recovery of octroi duty by obtaining a personal decree against him could not arise unless the machinery of S. 104 with regard to the giving of a bill, which is mandatory had been complied with. Even after the amendments of 1938, the alternative procedure laid down in S. 72 of suing the importer in a civil Court has no application to the case of an octroi. [P 120 C 2; P 122 C 1]

(b) Legislature — Amendments.

Method of making legislative amendments by correction slips intended to be stuck into unamended copies is deprecated. [P 121 C 1]

(c) Taxation — Octroi duty — Difference between duty and tax stated.

A tax can be and is usually imposed without difficulty on a person because he is the owner of some species of property such as income, a house or a motor car; whereas an octroi and customs duty though a tax, are limited in scope to a levy or duty on the import of goods or animals into some town, place or country or a levy or duty on the goods or animals. As such the collection of the duty is effected at the point of entry either by refusing



entry or by seizure, or by penalties imposed on any person attempting to introduce the animals or goods and at the same time evading payment of the duty. There are obvious difficulties in imposing personal liability for such a duty, since it is the animals or goods in relation to location which causes the duty to arise and not property in relation to ownership. [P 118 C 1, 2]

*S. S. Kavalekar* — for Appellant.

*A. G. Desai and P. S. Malwankar* — for Opponent 1 and other opponents respectively.

**Stone C. J.**—These appeals and petitions concern an octroi imposed by the Local Board of Ratnagiri under the Bombay Local Boards Act, 1923. For convenience there has been called on together, Second Appeals Nos. 973, 974 and 975 of 1942 and Civil Revisions Applications Nos. 208 to 213 both inclusive and 626 to 645 both inclusive, all of 1942. One of the twenty-nine cases so-called on comes from Devgad and the remainder from Malvan. Except in Civil Revision Applications Nos. 208 to 213, the Local Board failed in the immediate Courts below.

The right to impose an octroi was not seriously disputed in the Courts below, but in this Court the arguments have ranged over a more extensive field and it became clear at an early stage that there is a sharp distinction between octroi alleged to be payable before 22nd December 1938, and that alleged to be payable after that date. In the Courts below it was the method of collection of the octroi and in particular whether an action was maintainable for its recovery in the civil Courts which were principally in dispute. However, on the pleadings and the evidence the larger question, which has been argued before us, is clearly open. Therefore, before turning to the relevant statutory provisions and rules, it is necessary to say something about the nature of an octroi which, like a customs duty, has certain features which differentiates its nature from a tax. A tax can be and is usually imposed without difficulty on a person because he is the owner of some species of property such as income, a house or a motor car; whereas an octroi and customs duty though a tax, are limited in scope to a levy or duty on the import of goods or animals into some town, place or country or a levy or duty on the goods or animals. As such the collection of the duty is effected at the point of entry either by refusing entry or by seizure, or by penalties imposed on any person attempting to introduce the animals or goods and at the same time evading payment of the duty. There are obvious difficulties in imposing personal liability for such a duty, since it is

the animals or goods in relation to location which causes the duty to arise and not property in relation to ownership. The "octroi" is of French origin, and literally means "to authorise." In the Oxford Dictionary it is defined as: "A tax levied on certain articles on their admission into a town (especially in France)." No such levy is known in England, though it is not uncommon in certain other countries. In Belgium and Egypt it was formerly in force but its abolition was effected in 1870 and 1903 respectively. No one has been able to suggest how the word came to be applied in India, except that it may have been used as appropriately descriptive of certain forms of levy anciently asserted. Whether an octroi can be correctly applied to a levy on goods or animals coming into a rural as opposed to an urban area seems to be in some doubt. In the article on octroi in the Encyclopædia Britannica it seems to be suggested that it might be. No mention of the word is to be found in either Stroud's Judicial Dictionary or in Wharton's Law Lexicon, and it is not without significance to observe that in S. 192, City of Bombay Municipal Act, 1888, levies on goods coming into the City of Bombay are called 'town-duties'. To impose such a levy on goods or animals entering a country district obviously presents great difficulties in its collection, unless, either personal liability can be validly and effectually attached to some person in relation to the goods and animals imported, or unless a very extensive army of officials is to be maintained to guard many miles of marine and rural boundary.

If the right to impose an octroi exists in a Local Board, its origin must be the creature of statute as also must be, if it exists, the right to enforce personal liability on some person not in physical possession or control of the goods or animals at the time when they attract the duty by an attempt being made to introduce them across the frontier or boundary. By S. 80A, Government of India Act, 1919, and the sanction given thereunder by R. 3 of the Scheduled Taxes Rules, a Provincial Legislature is empowered to make and take into consideration any law imposing, or authorising any local authority to impose, for the purposes of such local authority, any tax included in Sch. II to those rules. This schedule is as follows:

**"SCHEDULE II.**

(In this Schedule the word 'tax' includes a cess rate duty or fee).

- (1) A toll. (2) A tax on land or land values. (3) A tax on buildings. (4) A tax on vehicles or boats. (5)



A tax on animals. (6) A tax on menials and domestic servants. (7) An octroi. (8) A terminal tax on goods imported into, or exported from, a local area, save where such tax is first imposed in a local area in which an octroi was not levied on or before the 6th July 1917. (9) A tax on trades, professions and callings. (10) A tax on private markets. (11) A tax imposed in return for services rendered, such as— (a) a water rate, (b) a lighting rate, (c) a scavenging, sanitary or sewage rate, (d) a drainage tax, (e) fees for the use of markets and other public conveniences."

The Bombay District Local Boards Act, 1923, is the enabling Act of the Provincial Legislature and this Act is in effect saved from repeal on the coming into operation of the Government of India Act, 1935, by S. 143 of the Act. Section 99, Bombay Local Boards Act, empowers District Local Boards subject to the preliminaries and sanctions therein mentioned to impose for the purposes of that Act a tax other than a toll which the Provincial Government could impose. Sub-sections (1) and (2) of S. 100 are as follows :

"(1) Every district local board shall, before imposing a tax, by resolution passed at a meeting of the board—(a) select a tax which may under S. 99 be imposed; and (b) approve rules describing the tax selected ; and shall in such resolution and in such rules specify ; (c) the class or classes of persons or of property, or of both, which the district local board desires to make liable, and any exemptions which it desires to make; (d) the amount for which, or the rate at which it is desired to make such classes liable ; and (e) all other matters which the Provincial Government may require to be so specified.

(2) When such resolution has been passed, the District Local Board shall publish the rules with a notice in the form of Schedule B prefixed thereto."

Sub-section (3) of S. 100 provides for objection being taken by an inhabitant of the district. Section 101 is as follows :

"The Commissioner may either refuse to sanction the rules submitted, or may return them to the District Local Board for further consideration, or if no objection, or no objection which is in his opinion sufficient, was made to the proposed tax within one month from the publication of the said notice, may sanction the said rules either —

(a) without modification, or

(b) subject, as he deems fit,

(i) to such modifications not involving an increase of the amount to be imposed, or (ii) to such conditions as to the application within the district to any purpose or purposes of this Act specified in such conditions of the whole or any part of the proceeds of such tax."

As appears from the judgment of the learned District Judge in the appellate Court below, the Ratnagiri District Local Board considered that the natural boundaries of their district placed them in a peculiarly favourable position for the levy of an octroi, provided they could enlist the assistance of the customs authorities, who already had in operation customs control of

the District's principal boundary which lies on the sea. That assistance was offered and accordingly in 1927 the Ratnagiri District Local Board took up the matter of the imposition of an octroi; but Government were doubtful of the wisdom of such a step and it was not until 1929 that the Local Board obtained sanction for its proposed octroi rules. The sanction of Government to the imposition of the tax was, however, expressed to be as an experimental measure and was given for three years only. By the 1929 rules no attempt was made to impose personal liability for the octroi, the duty being in effect collected by *nakedars* at the supposed points of entry. In effect the 1929 octroi rules set up a machinery similar to that laid down for the collection of customs duty under the Sea Customs Act of 1878. The 1929 rules make it clear that the octroi was on animals and goods brought within the octroi limits for consumption, use or trade therein and that the duty only arose on import, that is to say on crossing the octroi limits and, except under special arrangement under the provisions in connection with goods exported after import, the duty was to be paid to the *nakedar* "at the time of import on his tendering the import bill for the same." The effective deterrent by which the octroi was collected was provided by sub-r. 8 (3) which is as follows :

"Every Nakedar appointed under these rules and bye-laws shall require every person, importing goods, to comply with the provisions of these rules and bye-laws, and if on demand, the said person refuses to permit an inspection of goods or to pay the amount leviable thereon, the Nakedar shall, unless there be any special reason to the contrary, seize any part of the goods to be imported of sufficient value to defray the amount of octroi, and if the amount of tax remains undischarged for twenty-four hours, with the cost arising from such seizure, the case shall be referred to the President of the Taluka Local Board within whose jurisdiction the Naka is situate. The said President should then take action as laid down in S. 116 (3) (4) (5) Bombay Local Boards Act. When, however, any article seized is subject to speedy and natural decay or when the expense of keeping it, together with the amount of octroi chargeable, is likely to exceed its value the Nakedar shall proceed according to S. 116 (2) (3) (4) (5)."

Section 116, Bombay Local Boards Act, 1923, and indeed the whole of Chap. 8 which is headed "Collection of Taxes" was, before the 1938 amendments, completely silent as to an octroi. Section 116 provided for the collection of tolls by seizure and sale of the goods or animals imported without payment of the toll, it does not aim at imposing any personal liability for which action could be



taken in a civil Court. The sanction for the imposition of the octroi, originally limited to three years, was extended by the Provincial Government from time to time. However, it was not long before trouble arose in the collection of the octroi duty which appears to have raised opposition often of a violent character. The learned Judge in the Court below has set out in paras. 31 to 39 (both inclusive) of his judgment an account of some of the disputes and the civil and criminal proceedings by which they were followed. The practical difficulty in enforcing the levy of the octroi was made abundantly clear by these disputes and proceedings and an attempt was made to stop the gap by changing the octroi rules. Accordingly there were sanctioned by the Commissioner under S. 100 of the Act what have been referred to in this Court as "the 1936 Revised Octroi Rules." By them there was introduced a vital change, the object of which appears to have been to impose personal liability on the owner of the goods or animals irrespective of whether he was in charge of them when the octroi duty arose by virtue of their crossing the frontier. By Rule 2, which is a definition clause, "import" means the conveying into the octroi limits from any other area and includes such conveying through the agency of the Post; "importer" means the owner of, and includes any person in actual charge of, goods at the time of their import. Rule 4 which purports to impose the octroi in terms affixes liability on the importer which by the definition clause includes the owner and is as follows :

"4. Subject to the exemptions and provisions hereinafter expressly specified, an importer of the goods described in Sch. B shall on the import of any such goods pay to the Board on octroi at the rates specified in Sch. B."

Sub-section 10 (1) of the new rules in substance takes the place of sub-r. 8 (3) of the 1929 rules, but the expression "every person importing goods" in the 1929 Rules is now replaced by "every importer" which by virtue of the new definition clause now includes every owner. The persons in fact sued in the cases before us are the owners of the goods or animals and not the person in whose actual charge they were when the boundaries of the Ratnagiri district were crossed. It may be that in some cases the owners were the same persons as the men in charge, but there is no evidence about this at all, and the onus to show that they have sued the right persons is on the Board. As I have already pointed out, S. 116, Bombay Local Boards Act, 1923, before its amendment, was completely silent with regard to the imposition of an octroi.

In my judgment, assuming that the incorporation of the machinery for the enforcement by seizure and sale set up by S. 116 in the case of a toll was validly applied by the 1929 Octroi Rules and the 1936 Revised Octroi Rules to an octroi, new R. 4 in the 1936 Revised Octroi Rules, which sought to impose personal liability on persons not necessarily in charge of the goods or animals at the time when the liability for octroi arose, cannot be enforced. The fundamental statutory power and the consequential right to impose taxes expressly permits the levy of an octroi, a peculiar type of duty the nature of which I have already referred to, and which is one the very character of which cannot involve any one in personal liability who does not actually cause the duty to arise. It does not necessarily follow that either the consignor or the consignee is such a person. There can, I think, be little doubt that some such difficulty must have been realised by the Provincial Government, since by the Bombay Local Boards (Amendment) Act, being Act No. 23 [XXIII] of 1938, the 1923 Act was amended for the express purpose of including an octroi and by laying down the method of its collection. However, the short answer to all the cases before us in so far as they are concerned with the collection of octroi before 22nd December 1938, is that S. 104 which heads Chapter VIII of the 1923 Act before its amendment provided that when any amount, not being payable on demand on account of a toll, is claimable as an amount which is imposed in the district shall have become due,

"the district local board shall, with the least practicable delay, cause to be presented to the person liable for the payment thereof a bill for the sum claimed as due."

By sub-s. (2) it is provided that every such bill shall specify, and this includes *inter alia* 'the liability incurred in default of payment.' It is not disputed that before the 1938 amendments became operative, no written demands or notices or bills which could ratify this sub-section were served. Therefore, it is clear that the amount of this octroi, assuming the validity of its imposition, could not be recovered by distress under the subsequent sections of Chap. VIII, because there was no demand and no delivery of a bill under S. 104. Accordingly the alternative procedure of suing in a civil Court by virtue of S. 72 could not arise unless the machinery of S. 104 with regard to the giving of a bill, which is mandatory, had been complied with. The Local Board, therefore, fails in these appeals



and revision applications in so far as the amounts claimed arose before 22nd December 1938. I will now proceed to consider the position after the coming into operation of the 1938 amendments. In the first place S. 99 is amended by inserting after the word 'toll' where it occurs for the second time in that section the words 'or octroi.' This has the effect of putting into the proviso an octroi as a tax which shall not be levied for the passage of troops, the conveyance of Government stores or of any other Government property and makes it clear that the Provincial Government regarded an octroi for the purposes of the Bombay Local Boards Act, 1928, as amended in 1938, as a tax although it was not previously mentioned in the sections of that Act. Section 4 of the amending Act is as follows:

"4. In cl. (b) of sub-s. (1) of S. 104 of the said Act, after the words, 'on account of' the words 'an octroi or' shall be inserted."

But the words 'on account of' twice appear in cl. (b) of sub-s. (1) of S. 104, once in the exception and once in the substantive part of the section. Two copies of the amended statute were handed up to this bench. In one of them the words 'an octroi or' had been inserted after the words 'on account of' where they first appear and in the other copy after the words 'on account of' where they secondly appear in the section. In both cases the section as thus amended reads correctly in point of form and grammar, though the resultant sense is very different. Carelessness in legislative drafting of this character is liable to bring the law into great confusion, and this case clearly demonstrates how desirable it is, when sections of a Provincial Act are subsequently amended, for the whole amended section to be re-enacted in its amended form or for prints of the Act in its amended form to be speedily available. The great inconvenience attendant upon the present method of making legislative amendments by correction slips intended to be stuck into unamended copies is but too well-known in this Court. In this case in order to settle what was the intention of the Legislature we sent for the King's printer's copy of the Act as amended and from it, it appears, that the inserted words are to be placed after the words 'on account of' where they first occur in the old section. Accordingly the result is that S. 104 had no application at all to an octroi. So that the detailed bill as therein specified no longer has to be presented. The position is in fact now dealt with by certain new sections, viz., Ss. 102A,

102B, 115A, 115B and 115C and the amendments made to S. 116 and new 116A. New S. 102A provides for the collection of octroi by one public body on behalf of another. Section 102B is as follows:

"A district local board when submitting to the Commissioner for sanction a proposal for the imposition of octroi shall, after observing the requirements of sub-ss. (2) and (3) of S. 100, include in such rules provisions for fixing octroi limits and stations; providing for the exhibition of tables of octroi; regulating, subject to any general or special orders which the Provincial Government may make in this behalf, the system, under which refunds are to be made on account thereof when the animals or goods on which the octroi has been paid, or articles manufactured wholly or in part from such animals or goods, are again exported, and the custody or storage of animals or goods declared not to be intended for use or consumption within the area of the board; and prescribing a period of limitation after which no claim for refund of octroi shall be entertained and the minimum amount for which any claim to refund may be made."

Section 115A (1) provides that a person bringing into or receiving from beyond the octroi limits of a district local board any animal or goods on which octroi is payable shall permit inspection and examination and communicate information as therein mentioned, and sub-s. (2) provides a power of search. New S. 115B is as follows:

"An officer demanding octroi by the authority of the district local board shall tender to every person introducing or receiving anything on which the tax is claimed, a bill specifying the animal or goods taxable, the amount claimed, and the rate at which the tax is calculated."

Section 115C provides a penalty for the evasion of the payment of octroi of ten times the amount of the duty or Rs. 50 whichever is greater. Then comes old S. 116 (1) in its amended form:

"In the case of the non-payment on demand of any octroi or toll leviable by district local board the person appointed to collect such octroi or toll may seize any animal or goods on which octroi is leviable or vehicle or animal on which the toll is chargeable or any part of its burden, which is of sufficient value to satisfy the demand, and may detain the same. He shall thereupon give the person in possession of the property seized a list of the property together with a written notice in the form of Schedule E that the said property will be sold as shall be specified in such notice."

And the remaining sub-sections of this section provide the power to sell the property seized, for the release of property on payment and certain provisions with regard to the sale and how any surplus is to be dealt with. Section 116A is also new and that provides a special power for the Local Board to keep current accounts with any person, firm or public body instead of requiring payment



"at the time when the animals or goods in respect of which the octroi is leviable are introduced within the octroi limits."

It is submitted by Mr. A. G. Desai on behalf of the various owners that in order for the Local Board to sue in a civil Court in respect of an octroi, personal liability to pay must have been in some way imposed on the persons sued and that S. 72 of the Act is the only section which makes any provision that

"the district local board may sue in any Court of competent jurisdiction the person liable to pay the same."

This provision is alternative and only applies

"in lieu of proceeding by distress and sale, or in case of failure to realise by so proceeding the whole or any part of any amount recoverable under the provision of Chap. VIII or of any compensation, expenses, charges or damages awarded under this Act."

Now, except for S. 116A which has no application to any of the cases before us, none of the new sections or the amendments to the old ones introduced by the 1938 Amending Act provides for the levy of a distress. Section 116 as amended is in respect of seizure of the goods or animals in respect of which duty arises and is limited to those goods and animals, whereas the power to levy a distress and consequent thereon are contained in Ss. 105 to 111 of the Act and apply to any movable property of the person named in the warrant. Mr. Kavalkar on behalf of the District Local Board is unable to suggest that those sections or any other empower the Local Board to distrain any movable property generally of any person in respect of unpaid octroi. That being so, it is clear that the alternative procedure laid down in S. 72 of suing in a civil Court has no application to the case of an octroi. The result is that in all the cases arising after 22nd December 1938, the District Local Board also fails in these civil suits.

I desire to add that in deciding this case, we have not taken into consideration an argument that was adumbrated in this Court, viz., that as S. 143, Government of India Act, 1935, only protects taxes lawfully levied before 1st April 1937, under a law in force on 1st January 1935, the whole effect of the 1938 amendments are inoperative because that Act did not come into operation until 22nd December 1938, by which date it was too late for the Provincial Government to legislate otherwise than by virtue of List II and List III of the Seventh Schedule to the Government of India Act, 1935, in which there is no mention of an octroi,

though item 49 of List II is in respect of "cesses on the entry of goods into a local area for consumption, use or sale therein." We express no opinion on this question. The costs must follow event.

**Divatia J.**—The common question arising for decision in all these matters is whether the plaintiff Local Board is entitled to maintain the suits under S. 72, Bombay Local Boards Act, 1923, for recovery of octroi duty for personal decrees against the defendants. It may be assumed for the purpose of these suits that the Local Board is competent to recover octroi from persons who bring the goods or the animals within its jurisdiction. The only question is whether for the non-payment of the octroi at the *naka*, the power of the Board is merely to seize the goods or also to file a suit against their importers. In chapter VIII, Bombay Local Boards Act, relating to the collection of taxes as it stood before the amendment of 1938 the octroi duty was not mentioned as one of the taxes to be collected. Section 72 applies to amounts recoverable under chapter VIII, and it also appears that no written demand or bills were issued under S. 104, before the amendment. It follows, in my opinion, that S. 72 would not apply to the levy of octroi and no suit could be filed against the defaulters.

Even after the amendment of 1938 when the term "octroi" was introduced in several sections in chapter VIII, it appears from the authorised publication of the amended Act that in S. 104 (1) (b) octroi is included along with toll in the amount not being payable or demanded and is thus an exception to the provisions for presenting bills to the persons liable for the payment. The subsequent sections in the same chapter, with the exception of S. 116A, where the word octroi is added do not relate to personal liability. It is under S. 116A which provides that the Local Board may instead of requiring payment of octroi at the *naka* maintain current account with any person, mercantile firm or public body and such account may be settled and paid for at intervals. It is further provided in that section that any amount so due at the expiry of any such interval shall, for the purpose of chapter VIII, be deemed to be recoverable in the same manner as an amount claimed on account of any tax recoverable under that chapter. This shows the intention of the Legislature that it is only in a case where such current account is kept that the amount is recoverable under



chapter VIII and not otherwise, because octroi duty is excepted from the provisions of S. 104 imposing personal liability of importers to whom the bills are presented. As a result, S. 104 will apply only to cases where current account is maintained. Section 72 will, therefore, apply to cases falling under S. 116A but not to any other cases where octroi duty is payable. There is also some force in the contention of Mr. Desai for the respondent that in cases of octroi duty to be collected under chapter VIII the duty is not leviable by distress and sale but by seizure and sale. Section 72 applies to proceeding by distress and not by seizure. For these reasons, I am of the opinion that even after the amendment of the Act in 1938 the Local Board has no power to file the suits in all these matters under S. 72 of the Act. Rule 8 framed by the Board is thus *ultra vires*. I, therefore, concur in the order proposed by the learned Chief Justice.

R. K. *Order accordingly.*

[Case No. 26.]

### A. I. R. (33) 1946 Bombay 123

LOKUR AND GAJENDRAGADKAR JJ.

*Partab Bawaji Jivaji — Appellant*  
v.

*Bai Suraj and others — Respondents.*

First Appeal No. 62 of 1940, Decided on 23rd March 1945, from decision of Civil Judge (Sr. Division), Nadiad, in Special Suit No. 6 of 1936.

(a) Hindu law — Adoption — Adoption by regenerate unchaste widow, if effected formally, is valid.

The purpose of an adoption by a widow is the continuity of the family line and the spiritual benefit of her deceased husband who cannot be deprived of the benefit for the widow's unchastity. A widow, therefore, of the regenerate classes, though unchaste or otherwise impure, can make a valid adoption provided she performs the physical act of taking the boy in adoption and delegates the performance of the necessary religious ceremonies to some one and those ceremonies are duly performed by him, formally going through the ceremony: 5 Beng. L. R. 362, *Dissent.*; (21) 8 A. I. R. 1921 Bom. 301, *Discussed.* [P 125 C 1]

Hindu Law —

(40) Mulla, Page 531, S. 466.

(38) Mayne, Page 207, Note 144.

(b) Hindu law—Adoption—Widow can delegate performance of ceremonies — Presumption of delegation by woman, of ceremonies in adoption, which she herself cannot legally perform.

A widow can validly delegate the performance of religious ceremonies on her behalf to some one who can legally perform them. This delegation need not be express and when it is said that a woman performed all the necessary ceremonies at the time of an adoption, it is to be presumed that those which she could not personally perform were

duly performed by some one on her behalf: (42) 29 A.I.R. 1942 Bom. 12, *Foll.* [P 124 C 2; P 125 C 1, 2; P 126 C 1]

Hindu Law —

(40) Mulla, P. 545, S. 490 (1), P. 546, S. 490 (3).  
(38) Mayne, Page 253, S. 184.

*J. C. Shah and N. C. Shah* — for Appellant.

*B. G. Thakor* — for some of the Respondents.

**Lokur J.**—This appeal raises an important question as to the validity of an adoption by an unchaste widow among the three regenerate classes. The suit out of which this appeal arises was filed by the three minor daughters of one Bawaji Jiwaji through their next friend, Abhesing, for a declaration that the adoption of defendant 1 by defendant 2 is invalid and that the alienations of Bawaji's property by defendant 1 are ineffective. Bawaji died about the year 1928 leaving behind him his three minor daughters and his widow Baiji, defendant 2, and a minor son named Bhika who died in his infancy. Defendant 2 is said to have been living in illicit intimacy with defendant 3 and she claims to have taken his son, defendant 1, in adoption. After his alleged adoption defendant 1 alienated Bawaji's property to defendants 4 to 8. Hence the minor plaintiffs filed this suit through their next friend to have those alienations set aside alleging that defendant 1 was not the validly adopted son of Bawaji, that there was no adoption in fact, and that even if Baiji took him in adoption, it was invalid by reason of her unchastity. During the pendency of the suit, plaintiffs 1 and 2 attained majority and they elected not to proceed with the suit. Hence the suit was proceeded with only on behalf of minor plaintiff 3. Defendant 1 also died during the pendency of the suit and his widow Bai Suraj was brought on record as his legal representative. She contended that her husband had been taken in adoption by defendant 2 and that the adoption was valid. Defendants 2 and 3 remained absent and put in no written statement. The other defendants contended that Bai Baiji, defendant 2, had taken defendant 1, Sursing, in adoption with all religious ceremonies and that, therefore, the plaintiffs had no right to the declaration sought for. The lower Court held that the factum of the adoption of defendant 1 by defendant 2 was proved, and that although it might be held that defendant 2 was unchaste and was living with defendant 3 since 1931, yet the adoption was not invalid on that ground. The suit was, therefore, dismissed with costs and plaintiff 3 has presented this appeal through her next friend.



There is ample evidence to prove the factum of defendant 1's adoption. The adoption is alleged to have taken place on 1st May 1930, in the presence of three priests and several villagers. *Datta homa* was performed and the acts of giving and taking took place in front of the house of defendant 2. Dalsukhram who officiated as the priest on the occasion describes the details of the ceremony. He says that in his presence defendant 3 offered his son in adoption to defendant 2 and that she accepted the offer and took defendant 1 in adoption in the presence of several Brahmans and other villagers. Two other witnesses Someshwar and Manishankar have also deposed to the same effect. They assisted Dalsukhram in the performance of the ceremony and acted as Varuna-Brahmans. They too state that defendant 3 gave defendant 1 in adoption and defendant 2 took him in adoption in their presence. *Chorashi-dinner* was given on that day to all the Brahmans of the village. Somabhai and Shivabhai swear that such a dinner was given. They were not present at the time of the ceremony but they state that a dinner was given on account of the adoption of defendant 1 by defendant 2. At the time of adoption a group photograph was taken and the photographer has been examined to prove it. It shows defendant 3 giving his son, defendant 1, in adoption to defendant 2. In the photograph appear the three plaintiffs, the priest and defendants 1 to 3. The plaintiffs' next friend was asked to identify these persons in the photograph, but he evaded it by saying that he was unable to identify any person in the photograph. On 29th May 1930, a formal deed of adoption was executed by both defendants 2 and 3 and was registered. Thus every possible precaution was taken to see that the evidence regarding the factum of adoption was complete. When both the giver and the taker were ready to complete the adoption, there was no reason why any essential part of the ceremony should have been omitted. The learned Subordinate Judge who examined the witnesses was satisfied that they were stating the truth and held that defendant 1's adoption by defendant 2 was duly proved. We agree with that finding.

Although there is no clear evidence to prove the criminal intimacy between defendants 2 and 3, yet from the various circumstances brought on record, especially from the fact that defendants 2 and 3 were living together in a field near Pandoli, and that since they left the village in 1931 they are

living together to this day, the learned Subordinate Judge has come to the conclusion that they must have been living in criminal intimacy. It is true that they have not come forward to give evidence in this case. The obvious reason is that they are no longer interested in supporting the adoption as the adopted son has alienated all the property which had come to him as Bawaji's adopted son. Moreover they are said to be living in Cambay State and their presence could not be enforced. In these circumstances the fact that they have not come forward to give evidence in this case is of little consequence; but assuming that they are living in criminal intimacy and that at the time of the alleged adoption defendant 2 was unchaste, we still find that defendant 1's adoption by her cannot be held to be invalid on that ground.

The parties are Girasia Rajputs or Kshatriyas, belonging to one of the three regenerate classes. In 5 Beng. L. R. 362<sup>1</sup> it was held by Norman J. (sitting singly) that an unchaste widow could not make an adoption even though she might be acting under an express authority from her husband, but in 45 Bom. 459<sup>2</sup> this Court has held that a Sudra widow, though unchaste, can make a valid adoption. Mr. Shah, on behalf of the appellant, contends that in the case of Shudras no *datta-homa* is necessary, and therefore, even though the adopting widow is unchaste, she can make an adoption. It is only the religious ceremonies that an unchaste woman cannot perform, and as no such ceremonies are required among the Shudras, there is no bar to her making an adoption. But in the case of a widow belonging to one of the three regenerate classes, when the boy to be adopted is not of the same *gotra*, *datta-homa* is essential to complete his adoption, and as an unchaste widow cannot perform it, she is incapable of adopting such a boy. This contention, however, cannot be upheld, since a widow can delegate the performance of the ceremonies to another, and as held in 43 Bom. L. R. 920,<sup>3</sup> where the performance of the ceremonies of the adoption was delegated by the widow to somebody who could perform them, the circumstance that she was unchaste at the time of the adoption does not invalidate the adoption. In 22 Bom.

1. ('70) 5 Beng. L. R. 362, Sayamalal Dutt v. Saudamini. Dasi.

2. ('21) 8 A. I. R. 1921 Bom. 301 : 45 Bom. 459 : 59 I. C. 800, Basvant Mushappa v. Mallappa Kallappa.

3. ('42) 29 A. I. R. 1942 Bom. 12 : 198 I. C. 483 : 43 Bom. L. R. 920, Ramu Bala v. Jana Dala.



590,<sup>4</sup> an untensured Brahman widow had taken a boy in adoption and the *homa* had been performed by her relative at her instance. In upholding the adoption Ranade J. observed (page 593):

"there is nothing surprising . . . in her . . . asking her elderly relation to complete the *homa* and other religious portion of the celebration, which, indeed, as a woman, she could not directly take on herself to perform."

The purpose of an adoption by a widow is the continuation of the family line and the spiritual benefit of her deceased husband, and it would be hard that her impurity or want of chastity should deprive him of the benefits, which, according to Hindu ideas, accrue to him from the adoption. It may now be taken as well-settled that a widow of one of the three regenerate classes, though unchaste or otherwise impure, can make a valid adoption, provided she performs the physical act of taking the boy in adoption and delegates the performance of the necessary religious ceremonies to some one and those ceremonies are duly performed by him. Mr Shah, however, contends that there is no evidence in this case that defendant 2 thus delegated the performance of the religious ceremonies to any of the priests who were present there. He relies upon the assertion made by defendants 4 and 8 in their written statement that defendant 2 adopted defendant 1 after performing all the necessary ceremonies. It appears that this question was never raised during the trial. The case in 43 Bom. L. R. 920<sup>3</sup> had not then been reported and the question of delegation of the performance of the religious ceremonies was not mooted. The officiating priest, Dalsukhram, stated in his examination-in-chief that the *homa* was performed and the cocoanut was offered to the sacrificial fire, but no question was put to him in his cross-examination as to who offered the cocoanut or who performed the *homa*. The other priest, Manishankar, who acted as the Varuna-Brahman, described the ceremony as follows:

"Defendant 3 holding the hand of defendant 1 and placing it in that of defendant 2, said that defendant 1 was her son since then. Defendant 2 placed defendant 1 in her lap and said that defendant 1 was since then her son. Shastric ceremony was made. Cocoanut was offered in *homa*. Photos were taken."

The first two sentences are in the active voice showing who held the hand of defendant 1, who placed the hand of defendant 2 and who took the boy in adoption, whereas the other sentences regarding the ceremony, the offering of a cocoanut, etc., are in the

4. ('98) 22 Bom. 590, *Lakshmibai v. Ramchandra*.

passive voice. The witness was asked no questions on these points in the cross-examination. Thus there is nothing in the evidence to indicate that defendant 2 herself performed the religious ceremonies or offered oblations to the sacrificial fire. In fact women of even the regenerate classes are incompetent to perform personally such ceremonies or to offer oblations, whether they are chaste or unchaste. According to Manu (Chap. 9, verse 18) "नास्ति स्त्रीणां क्रिया मन्त्रैरिति धर्मे व्यवस्थितिः ।" that is to say, 'for women there can be no rite with sacred texts; so is the law settled.' In Vyavahara Mayukha also Nilkanth, dealing with adoption, says: स्त्रिया अपि शुद्रवदेवाधिकारः 'स्त्रीशूद्राश्च सधर्माण' इति वाक्यात्। वसिष्ठः (अ. १५ सू. २-९).

"Even a woman is entitled like the Sudra to adopt, since there is a text 'women and Sudras have the same rules of conduct' (prescribed for them). Vasistha (Dh. S. 15, 2-9)." S. IV. 5.15, MM. Kane's Translation, p. 115.

Golapchandra Sarkar says in his Hindu Law of Adoption, Tagore Law Lectures, 2nd Edn., page 381, as follows:

"Sudras and women labour under the same religious disability, and the necessary logical consequence of the ruling that *homa* is not essential to an adoption made by a Sudra, would be that it is not necessary also in an adoption by a widow of a Brahman or any other regenerate person, for she, like a Sudra, can neither recite the Vedic prayers nor personally perform the *homa*. And the religious ceremonies should, therefore, be dispensed with in her case for the same reasons as in the case of Sudras."

It is not necessary to go so far as to say that *datta-homa* is not at all necessary in the case of an adoption by a widow of one of the three regenerate classes, but as pointed out in 43 Bom. L. R. 920,<sup>3</sup> such *homa* can be performed by some one else by delegation. In Sarkar's Hindu Law, 8th Edn., page 195, the learned author says:

"Widows, like Sudras, can perform the *homa* rite vicariously through the sacerdotal priests. The sacred texts are omitted if women or Sudras perform any religious ceremony, (स्त्री शूद्राणाम-मन्त्रकम् ।)"

It is well-known that women, even of one of the three regenerate classes, never perform a sacramental rite or a *homa* personally at any religious function, and if it is to be performed, they merely pronounce the vow (संकल्प), and delegate its performance to a priest: "द्विजस्त्रियस्तु संकल्पमात्रं स्वयं कृत्वा वैदिक-मन्त्रयुक्तं सर्वं ब्राह्मणद्वारा कारयेयुरिति प्रयोगपारिजातः ।" निर्णयसिन्धुः, तृतीयः परिच्छेदः page 292. This delegation need not be express, and when it is said that a woman performed all



the necessary ceremonies at the time of an adoption, it is to be presumed that those which she could not personally perform were duly performed by some one on her behalf. The evidence in this case shows that *homa* was performed, and as no witness says that defendant 2 herself performed the *homa* or offered oblations to the sacrificial fire, it must be presumed that the *homa* was duly performed, that is to say, performed by some one at her instance. The plaintiff has nowhere alleged that the adoption is invalid as the *homa* was not properly performed. Even in the memorandum of appeal it is not stated specifically that defendant 2 herself performed the *homa* or other rituals essential to the adoption, and that on that ground the adoption is invalid. In these circumstances we must hold that the adoption and the necessary ceremonies were properly performed and that the adoption is valid. The appellant is, therefore, entitled to no relief in this case and the appeal is dismissed with costs.

V.B.

*Appeal dismissed.*[*Case No. 27.*]**A. I. R. (33) 1946 Bombay 126**

SEN J.

*Laxmappa Goneppa — Appellant*

v.

*Bhimappa Goneppa and others —**Respondents.*

Second Appeal No. 261 of 1942, Decided on 28th March 1944, from decision of Dist. Judge, Dharwar, in Appeal No. 43 of 1940.

Registration Act (1908), S. 17 (1) (b) — Document, if intended to be part of transaction of partition, requires registration.

The word "declare" being *ejusdem generis* with "create", etc., implies a definite change of legal relation to the property by an expression of will embodied in the document. [P 127 C 1]

If a document relating to partition is intended by the parties to be embodied in the transaction of partition, it is compulsorily registrable; but if it is intended to be used merely as a record of an already effected partition, it need not be registered. [P 127 C 2]

Where a document executed by the parties within one hour of an alleged completed oral partition, started with the recital of details in the past tense but concluded in the present tense and described itself as a deed of partition :

*Held* that the document was a part of the partition transaction and not a mere record or acknowledgment of a completed transaction. Hence it was compulsorily registrable under S. 17 (1) (b) : ('28) 15 A. I. R. 1928 All. 641 (F.B.) and ('41) 28 A. I. R. 1941 Nag. 209, *Foll.* ; 5 Bom. 232 ; 2 Bom. L. R. 800 ; ('20) 7 A. I. R. 1920 Bom. 46 and ('38) 25 A. I. R. 1938 Bom. 257, *Disting.*

[P 129 C 2]

Registration Act —

('45) Chitaley, S. 17, N. 15 ; N. 81, pts. 4, 9.

('39) Mulla, S. 17, Page 37; "Declare"; Pages 53, 54, pts. (p) and (q).

*A. G. Desai and S. R. Parulekar —*

for Appellant.

*G. R. Madbhavi —* for Respondent 1.

**Judgment.** — The appellant is defendant 1 against whom a suit in ejectment was brought by respondent 1, the suit also being against defendants 2 and 3, the sons of defendant 1. The plaintiff's case was that defendant 1 was his elder brother, that the property in suit, which is a house, was part of his ancestral property, that there was a partition between him and defendant 1 on 7th October 1925, when the house in suit and other properties were allotted to him, defendant 1 getting a smaller house to the south of his house, but that defendant 1 was allowed to remain in the house in suit because he wanted to celebrate the marriage of his sons and promised to give it up on constructing a new house. He brought the suit practically on the last date of the period of limitation from the date of the partition. Defendant 1 denied that there was a partition in 1925, but he alleged that there was a partition in 1926 in which the house in suit fell to his own share. He also denied the other allegations of the plaintiff.

The trial Court found that the plaintiff had proved his case and made a decree in his favour for possession and mesne profits. The lower appellate Court also held that the plaintiff's case was proved and that the defendants' case was not proved, and accordingly dismissed the appeal. The only point in the present appeal is whether an unregistered document, Ex. 91/1, which was the basis of the plaintiff's case, was rightly admitted in evidence. It is admitted that the value of the property in suit is over a hundred rupees. The said document is headed :

"Details of the partition got effected by Laxmappa Goneppa Sawkar and Bhimappa Goneppa Sawkar of Antarwalli in the presence of the below mentioned gentlemen on 7th October 1925. The below mentioned properties and survey numbers have fallen to the share of Bhimappa."

Then follows a list of certain survey numbers, and it is stated that the bigger house along with the cattle shed and a threshing floor had fallen to the share of the plaintiff, defendant 1 having got another house and a space lying to the east thereof. It next makes a provision regarding outstandings amounting to Rs. 13,000 and it is stated that,

"Laxmappa (defendant 1) is entrusted with the responsibility of Rs. 8,800 . . . but that Bhimappa



has to shoulder no responsibility of either to pay or to receive any amount;"

and the document ends thus :

"We have got divided the remaining movable property according to our shares. In this way the aforesaid lands, threshing floor and houses have been divided with our consent and the aforesaid property is given in Bhimappa's possession. Such is the deed of partition got effected. Signed and dated as above (7th October 1925)."

Then follows the endorsement of the writer and the signature of defendant 1. Thereafter four witnesses have affixed their signatures to the document. The plaintiff stated in his deposition that he himself executed a document (presumably similar to Ex 31/1) in favour of defendant 1 in respect of the property that fell to his share. He further stated that the lands were divided in the morning, that the houses were divided at 3 P. M. and Ex. 31/1 was executed by defendant 1 at 4 P. M. on 7th October 1925. The lower appellate Court came to the conclusion that Ex. 31/1 had been properly admitted in evidence, following the decision in 5 Bom. 232.<sup>1</sup> In its opinion defendant 1's signature to the said document was taken "by way of acknowledgment of the partition already effected and in order to put it out of his power to deny the fact of it." It came to the conclusion that it was not a document of the type referred to in 2 Bom. L. R. 800<sup>2</sup> and that though 44 Bom. 881<sup>3</sup> would at first sight seem to support the contention of the defendants, viz., that the document required registration, that decision did not really support their case.

Under S. 17 (1) (b), Registration Act, the following documents must be registered if the property to which they relate is situate in a district in which and if they have been executed on or after the date on which, Act 16 [XVI] of 1864, or the Registration Act of 1866, 1871 or 1877, or the present Act came or comes into force, viz.,

"non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property."

The word "declare" in this section was interpreted by West J. as being *ejusdem generis* with the words "create" "limit" or "extinguish" a "right, title or interest" and, therefore, implying a definite change of legal relation to the property by an expression of

will embodied in the document referred to. This interpretation was approved by the Privy Council in 59 I. A. 130.<sup>4</sup> In 5 Bom. 232<sup>1</sup> it was also held that the terms of cl. (b) of S. 17, Registration Act, do not include an acknowledgment of such a fact as that a partition had been effected (headnote):

"Had the terms of cl. (b) of that section been satisfied by a mere acknowledgment, cl. (c) would have been superfluous. Its operation is to require an acknowledgment in the form of a receipt to be registered, but not an acknowledgment in any other shape as distinguished from the instrument of the transaction."

Following this decision, the lower appellate Court held that in this case Ex. 31/1 constituted an acknowledgment of partition by defendant 1, and that, therefore, it did not require registration. Under S. 49, Registration Act, a document requiring registration under S. 17 of the said Act cannot, if unregistered, be received as evidence of any transaction affecting any immovable property comprised therein. Mr. Desai on behalf of the appellant has relied on the notes in Sir Dinshah Mulla's Indian Registration Act, 4th Edn. at pages 52 and 54, where *inter alia* the following cases have been cited : 14 Lah. 635,<sup>5</sup> 51 ALL. 79,<sup>6</sup> 44 Bom. 881<sup>3</sup> and 40 Bom. L. R. 202.<sup>7</sup> The question that arises in this case is, if a document is executed by the parties to a partition putting on record the details of the partition and the reasons therefor, the document itself being described in the end as a deed of partition, is such a document to be regarded as an instrument of partition or an instrument purporting or operating to create, declare, assign, limit or extinguish, whether in the present or future, any right, title or interest to or in immovable property? Prima facie, if the document is merely a record and is intended to be used as a record of a partition which has already been effected, there can thereby be no creation or assignment of right, title or interest in the present or in future. If the word "declare" is *ejusdem generis* with the words "create" and "assign" i. e., as involving a change in the legal status of the parties, the same consideration will apply to that word also. The question, therefore, arises, whether the document, Ex. 31/1, was intended to be merely a record of a past partition? On behalf of

4. ('32) 19 A. I. R. 1932 P. C. 55 : 59 I. A. 130 : 11 Pat. 272 : 136 I. C. 798 (P. C.), Bageshwari Charan Singh v. Jagarnath Kuari.

5. ('33) 20 A. I. R. 1933 Lah. 648 : 14 Lah. 635 : 144 I. C. 396, Ram Lal v. Mt. Sita Bai.

6. ('28) 15 A. I. R. 1928 All. 641 : 51 All. 79:116 I. C. 861 (F. B.), Ram Gopal v. Tulsi Ram.

7. ('38) 25 A. I. R. 1938 Bom. 257: 175 I. C. 361: 40 Bom. L. R. 202, Rudragouda v. Basangoudai.

1. ('81) 5 Bom. 232, Sakham Krishnaji v. Madan Krishnaji.

2. (1900) 2 Bom. L. R. 800, Ramchandra v. Dinkar.

3. ('20) 7 A. I. R. 1920 Bom. 46 : 44 Bom. 881 : 58 I. C. 450, Nilkanth Bhimaji v. Hanmant.



the appellant it is pointed out that only an interval of an hour elapsed, according to the evidence of the plaintiff himself, between the division of the house and the execution of Ex. 31/1 and that the said document is itself described as a deed of partition. His contention, therefore, is that the deed must be held to be an inseparable part of the transaction in which the partition was effected and must, therefore, be held to be an instrument of partition.

In 5 Bom. 232<sup>1</sup> the document which was held to embody merely an acknowledgment of the partition and therefore admissible in evidence without registration was executed in 1877, the defendants having pleaded a partition in 1870. In the circumstances of that case, therefore, it was not possible to hold that the document in question was an instrument of partition, as it was not a document which itself declared a right in immovable property in the sense intended by S. 17, Registration Act. It seems to me, therefore, that this decision does not apply to the facts of the present case, for there no question arose, such as arises in the present case, as to whether the execution of the document should be regarded as a part of the transaction in which the partition was effected. In 2 Bom. L. R. 800<sup>2</sup> there was a document which, after reciting the allotment of lands, contained an agreement to act accordingly; and it was held that such a document was compulsorily registrable under S. 17. The facts of that case, again, are different from those in the present case. In 44 Bom. 881<sup>3</sup> the plaintiff claimed to be entitled to certain property, alleging that the same was allotted to his share on a partition between himself and his brothers; and for the purpose of proving the alleged partition, he relied upon certain unregistered receipts signed by his brothers in which they acknowledged having accepted certain portions of the family property. It was held that the receipts required registration and were, therefore, inadmissible in evidence. In that case, however, there was practically no other evidence of partition except the receipts, and the learned Assistant Judge who tried the first appeal had held that those receipts required registration and were, therefore, inadmissible in evidence. That conclusion was concurred in by Macleod C. J., who appears to have regarded them as instruments of partition, there being no evidence that the partition had been effected prior to the execution. Heaton J., however, agreed that the appeal should be dismissed on somewhat different

grounds. He held that if the receipts were regarded as instruments of partition, they were clearly inadmissible, but if they were to be regarded as lists of property made after the partition, they would not themselves prove the partition, and, therefore, could be used only as subsidiary papers. But as there was no proof of the partition outside those documents, he agreed that the appeal should be dismissed. It thus appears that both the learned Judges did not hold that the documents were instruments of partition. In 40 Bom. L. R. 202<sup>7</sup> certain memoranda arrived at between the parties who agreed to partition their properties were held to be compulsorily registrable under S. 17, Registration Act. But it appears that there were certain statements in some of those documents that certain lands which remained to be divided "should be divided," and, therefore, the said documents were held to be incompatible with prior division. Such, however, is not the case in the present suit.

In 51 ALL. 79,<sup>6</sup> on the death of one Nathua an application for mutation was made by the first cousin of the deceased, and certain relations of the applicant filed objections to the effect that the applicant's father had been adopted into another branch of the family and he had, therefore, lost all his right to succeed to Nathua's property. Thereafter the applicant and the objectors, by a joint application, stated that they had arrived at a compromise and asked for mutation to be made in a particular manner in the name of each other. Thereafter the applicant filed a suit claiming the whole property against the objectors. The lower Courts held that there had been a family arrangement which was binding, and the question arose whether if the oral contract be followed by a joint petition in a mutation Court, containing the terms of the settlement, in the shape of a request to the Court to record the names of the parties in a particular manner, whether that petition, being an unregistered document, might be treated as substantive evidence of the terms of the settlement; and it was held that in the said document the oral arrangement had been formally reduced to writing and as such being inseparable from the said arrangement, i. e., as being the culminating part of the arrangement, was compulsorily registrable under S. 17, Registration Act. It seems to me that the same principle must apply to the facts of the present case. It is no doubt true that exhibit 31/1 begins by saying that it contains "details of the partition got effected by Laxmappa Goneppa



Sawkar and Bhimappa Goneppa Sawkar" and that "the below mentioned properties and survey numbers have fallen to the share of Bhimappa." But there are two features of this document which conflict with the theory that it is a record of a past partition. In the first place, when it deals with the question of outstandings and debts of the family, it uses the present tense, *e. g.*, "Laxmappa is entrusted with the responsibility of Rs. 8,800." "The entire responsibility is of Laxmappa alone;" and, secondly, towards the end of the document it is described very clearly as "a deed of partition." The evidence of the plaintiff is that the lands were divided in the morning and the houses were divided at 3 P. M. It seems to me very probable that the arrangements with regard to the outstandings and debts were arrived at when the document itself was written, and there can be little doubt that the document was regarded by the parties themselves as the culminating point of the whole transaction, lasting since the morning of the day, and effecting the partition. In I.L.R. 1942 Nag. 73<sup>8</sup> there was a suit for partition and the plaintiff relied on two documents, one of which was called a receipt in which at certain places the present tense was used with reference to property allotted to one of the parties and with regard to certain items of property which were kept joint it was said, "We will have the same partitioned on the decision of the appeal." At the end of the receipt it was stated:

"I have written and signed this receipt list at Sakhara with my free will and pleasure and while in full possession of senses."

It was held that the use of the present tense and the concluding portion and the fact that three attesting witnesses were called showed that the document was meant "to embody the expression of will necessary to effect the change in the legal relation contemplated." Their Lordships remarked (p. 77):

"It has to be remembered that finality is reached orally in nearly every transaction which is reduced to writing and that but for an intention to reduce the matter to writing the oral agreement would in itself constitute a valid and binding contract."

Again they observed (p. 79):

"We can find no meaning in this careful and elaborate document which was so solemnly drawn up with a counterpart signed by the other side if the two together were not intended by the parties to embody and legally effect the actual partition between them."

Though the facts of that case are not on all fours with those of the present case, it seems that these observations apply almost

to the same extent to this case also. In view, particularly, of the fact that the parties themselves regarded the document in question as a deed of partition, it is difficult to take the view either that it is a document recording the fact of a past partition or that it is an acknowledgment taken from defendant 1 of a partition already effected. The *roznama* of the case shows that on 23rd October 1939, the plaintiff made an application for permission to produce "a partition deed." This is also shown by Ex. 31, where "the details of papers filed by the plaintiff's pleader" are thus given:

"Unregistered original *yadi* regarding partition of immovable properties which took place between the plaintiff and the defendant, filed by the plaintiff's pleader on 23rd October 1939."

This shows *prima facie* that the plaintiff himself, when he sought to produce the document, regarded it as a document of partition. That being so, it is difficult to hold that it did not require registration; and if it did require registration, it is clearly not admissible in evidence. Under S. 91, Evidence Act, the terms of the partition having been reduced to the form of a document, it was, again, not possible for the plaintiff to adduce any evidence in proof of the terms of the said partition, and the plaintiff would not succeed unless he proved the alleged terms of the partition. That being the position, it seems to me that the plaintiff was precluded from proving the case either on this document or on oral evidence, and his case, therefore, must fail. The appeal will, therefore, be allowed with costs and the suit will be dismissed. There will be no order as to costs in the two lower Courts.

V.B.

*Appeal allowed.*

[Case No. 28.]

**A. I. R. (33) 1946 Bombay 129**

BHAGWATI J.

*Badrudin Abdulla Hirji—Petitioner*

v.

*Registrar of Marriages—Respondent.*

Misc. No. 82 of 1945, Decided on 25th April 1945.

Indian Christian Marriage Act (1872), Ss. 19, 41 and 42 (c) — Minor bride giving notice of marriage—Minor's father, guardian or mother not in existence — Registrar of marriages whether can insist on getting guardian appointed.

On a proper construction of the provisions of Ss. 19 and 42 (c) of the Act, where the father of the minor is dead or where the guardian of the person of such minor either testamentary or otherwise appointed by the father or by any competent authority is not in existence or where in the ab-

<sup>8</sup>. (41) 28 A. I. R. 1941 Nag. 209 : I. L. R. 1942 Nag. 73 : 196 I. C. 278, Ganpat v. Namdeo.



ence of any such guardian the mother of the minor also is dead, it cannot be stated that there is any person authorised to give the consent to such marriage of the minor. It is only when any person answering any of the three categories above mentioned is in existence and happens to be "not resident" in India that the latter part of S. 19 of the Act comes into operation and the consent of such guardian is dispensed with. It does not, therefore, follow that if any of the persons answering any of the three categories above mentioned is not in existence, a guardian has to be appointed for the purpose of giving such consent to the marriage of the minor. There is no provision in the Act for the appointment of such guardian.

[P 131 C 1]

*R. B. Mehta* — for Petitioner.

*Little & Co. (Vakeel)* — for Respondent.

**Order.** — This is a petition filed by the petitioner Badrudin Abdulla Hirji against the respondent the Registrar of Marriages, Bombay, under S. 43, Indian Christian Marriage Act (15 [XV] of 1872) for an order that the respondent be directed to issue a certificate forthwith before the expiration of fourteen days required by S. 41 of the Act and that the respondent be ordered and directed to take such steps as may be necessary for the solemnisation of the intended marriage between the petitioner and one Miss Nancy Adala Ferguson. Miss Ferguson is a minor within the meaning of the Act, not having completed her age of twenty-one. It appears that on 20th March 1945, Miss Ferguson gave notice of the intended marriage to the Marriage Registrar at Bangalore. The petitioner had also given a notice of marriage to the respondent, he being a resident of Bombay. The Marriage Registrar at Bangalore did issue in accordance with the provisions of S. 41 of the Act, a certificate which is called a Certificate of Receipt of Notice of Marriage on 5th April 1945, with reference to the notice of marriage given to him by Miss Ferguson. The respondent, however, took up the attitude that he would not issue any certificate with reference to the notice of marriage given by the petitioner to him on 16th February 1945, because Miss Ferguson was a minor, that her father and mother were dead, that there was no person resident in India authorised to give such consent to her marriage, and that therefore unless a guardian was appointed of Miss Ferguson for the express purpose of giving consent to such marriage, he would not issue a certificate. A communication to this effect made by the respondent was received by the petitioner on or about 14th April 1945, and the two months' period prescribed under S. 52 of the Act expired before the petitioner could take

any further steps under S. 46 of the Act. In the result the petitioner gave a fresh notice of marriage to the respondent on 16th April 1945. He also filed the present petition before me under S. 43 of the Act for the necessary directions to be given to the Marriage Registrar at Bombay as I have already stated above.

It appears that Miss Ferguson was serving as a Sergeant in W. A. C. (I) Platoon No. 2 at Bangalore and was given leave of absence from Bangalore up to 28th April 1945, for the express purpose of the solemnisation of her marriage with the petitioner in Bombay. It also appears from the petition that after such leave was granted to her, she was transferred from Bangalore to Bombay where she is expected to join after the expiration of the leave on 28th April 1945. The parties are, however, desirous of solemnising their marriage within the period of fourteen days after the entry of the notice of marriage by the petitioner on 16th April 1945, and have, therefore, approached me by this petition under S. 43 of the Act. I required the presence of Miss Ferguson in my Chambers and I satisfied myself with regard to her desire to marry the petitioner. I am also satisfied that there is no person resident in India authorised to give the consent to her marriage within the meaning of S. 19 of the Act, and even though she has a married sister who appears to have been opposed to this idea of her marriage with the petitioner, that is not, in my opinion, any impediment to her marrying the petitioner if she is desirous of doing so.

The only objection taken by the respondent to the issue of this certificate is as I have already stated above, that the father and the mother of Miss Ferguson are dead and, that there is no person resident in India authorised to give such consent to her marriage with the petitioner. From the words of ss. 19 and 42 (c) of the Act it is argued on behalf of the respondent that if the parents are dead and there is no person resident in India authorised to give such consent, a guardian of the minor for the purpose of giving such consent should be appointed, which guardian would exercise his mind in the matter of the desirability or otherwise of the marriage of the minor and would be in a position to enter a protest with him within the meaning of S. 44 of the Act; for it is only with that purpose and end in view that such guardian of the minor could be appointed, the only function of the guardian being to enter up protest against



the issue of the marriage certificate, which protest being entered, the word "forbidden" would be entered opposite to the notice of such intended marriage in the Marriage Notice book and further consequences would follow on the entry of such protest as laid down in the Act. The acceptance of this argument would mean the importing into the Act of the provisions analogous to the appointment of Court Officers as guardians of the interests of minors in immovable properties where sanction of the Court is sought to be obtained in its inherent jurisdiction for sales of the interests of the minors in such immovable properties. The latter provisions certainly are capable of being worked in a reasonable manner because the petitioner is normally expected to and does give the Court Officer appointed in that behalf all necessary materials to enable him to consider the desirability or otherwise of the sale of the minor's interests in those properties. The importing of such a provision in the Indian Christian Marriage Act would, however, create a class of guardians who presumably would know nothing about the status, the position and the desirability or otherwise of the marriage of the minor and who would in the absence of any independent or material information would not have any data for the purpose of arriving at any conclusion as to the desirability or otherwise of the marriage of the minor. I am not, therefore, inclined to read such provisions in the Act. On a proper construction of the provisions of S. 19 and S. 42 (c) of the Act, I have come to the conclusion that where the father of the minor is dead or where the guardian of the person of such minor either testamentary or otherwise appointed by the father or by any competent authority is not in existence or where in the absence of any such guardian the mother of the minor also is dead, it cannot be stated that there is any person authorised to give the consent to such marriage of the minor. It is only when any person answering any of the three categories above mentioned is in existence and happens to be "not resident" in India that the latter part of S. 19 of the Act comes into operation and the consent of such guardian is dispensed with. It does not, therefore, follow as is contended by the respondent that if any of the persons answering any of the three categories above mentioned is not in existence, a guardian has to be appointed for the purpose of giving such consent to the marriage of the minor. There is no provision in the Act for the appointment of such guardian

and no such case has ever come to the Courts where such appointment was ever asked for or was made by the Court.

I am, therefore, of opinion that the only ground on which the respondent has refused to grant the certificate or would refuse to grant such certificate is not tenable in law. Under the circumstances, I direct that the respondent do issue his certificate forthwith before the expiration of fourteen days required under S. 41 of the Act and that he do take such steps as may be necessary for the immediate solemnisation of the intended marriage between the petitioner and Miss Nancy Adela Ferguson.

This was a novel point which has not been adjudicated upon by any Court so far. The respondent was under the circumstances entitled to bring this matter before the Court and therefore I do order that each party will bear and pay their own costs of this petition. The Prothonotary to issue a certificate of this order and the respondent to act on the same.

R.K.

*Order accordingly.*

[*Case No. 29.*]

**A. I. R. (33) 1946 Bombay 131**

**CHAGLA J.**

*Soonderdas Thakersey*

**v.**

*Bai Laxmibai.*

Suit No. 399 of 1943, Decided on 12-12-1944.

**Limitation Act (1908), S. 10 —** Trustee must be express trustee, i. e., for specific purpose—Indian law makes distinction between trust for specific purpose and obligation in nature of trust.

A trust for a specific purpose is one for a purpose that is either actually and specifically defined in the terms of the will or the settlement itself, or a purpose which, from the specified terms, can be certainly affirmed. The Indian law as found in the Trusts Act the Legislature has made a sharp distinction between trusts created by the act of parties and certain obligations which are not trusts but which are considered to be in the nature of trusts. Section 10 does not apply in the case of a person whom the law looks upon as a trustee because he has to discharge certain obligations in the nature of a trust. It only applies to a trustee of a trust in the strict sense of the term i. e., an express trustee : ('22) 9 A. I. R. 1922 P. C. 212, *Rel. on* ; *Case law discussed.* [P 132 C 2; P 133 C 1; P 134 C 1, 2]

*M. L. Maneksha and J. C. Bhatt —*  
for Plaintiffs.

*M. V. Desai and N. P. Engineer, Advocate-General —* for Defendants.

**Judgment.** — In and prior to the year 1923 plaintiffs 1 to 3 with one Raghavji Khimji were carrying on business in partnership in the name of Messrs. Jetha Mulji



& Co. Plaintiff 4, who is the brother of plaintiffs 1 to 3 and who was then a minor, was admitted to the benefit of the partnership. It is now admitted that this partnership out of its assets and funds purchased 50 shares of the New Baroda Mills Co., Ltd., and 25 shares of the Petlad Bulakhidas Mills Co., Ltd. These shares stood in the name of Raghavji Khimji. In 1923 plaintiffs 1, 2 and 3 filed a suit in this Court, being Suit No. 4196 of 1923, for the dissolution of that partnership. A decree was passed in that suit on 6th February 1931. The only provision of that decree with which we are concerned is that that decree declared that plaintiffs 1, 2 and 3 were the owners of the assets, outstandings, claims and books of account of the firm of Jetha Mulji & Co. After the decree was passed, it is clear on the evidence that Raghavji handed over the share certificates to plaintiff 2 on behalf of the other plaintiffs, and since then they have continued to remain with the plaintiffs. In 1932 and 1933 three dividend warrants were received in respect of those shares. Raghavji got the warrants cashed and handed over to plaintiff 2 the three cheques which he received. After this, other dividend warrants were received; but for reasons, which I will consider later, they were not discharged by Raghavji. But these dividend warrants went to the plaintiffs and they have been and are still in their possession.

On 18th October 1934, Raghavji and his brother Harjiwan filed a suit in this Court, being Suit No. 1524, against the plaintiffs for the recovery of a sum of about rupees four lakhs alleged to be due by the plaintiffs at the foot of certain accounts. That suit is still pending. Raghavji died on 14th April 1941, and the defendants are the executrix and the executors of his will. On 23rd December 1941, the plaintiffs' attorneys wrote to the defendants' attorneys stating that the shares in dispute belonged to the plaintiffs and they should not be shown in the schedule to the petition for probate which the defendants might file. On 19th June 1942, the defendants filed the petition for probate, and in the schedule containing the movable and immovable properties of the deceased they showed the shares and the unrecovered dividends thereon as belonging to the estate of the deceased. On that, the plaintiffs filed the suit for a declaration that the shares standing in the name of Raghavji Khimji belonged to the plaintiffs and calling upon the defendants to execute the relative transfer forms and to sign the dividend

warrants. Although various contentions were taken up in the written statement, the only one which has survived is that of limitation.

It is urged on behalf of the plaintiffs that Raghavji as the legal owner of the shares was, while the partnership of Jetha Mulji & Co. subsisted, a trustee for the other partners to the extent of their interest in these shares, and on the passing of the decree in Suit No. 4196 of 1923 these shares became vested in him in trust for the purpose of handing them over to the plaintiffs to whom they belonged as declared by the decree. It is, therefore, urged that Raghavji was an express trustee and the statute of limitation would not run in his favour. Section 10, Limitation Act, 1908, provides that no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property, or the proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time. The marginal note to the section describes such suits as suits against express trustees and their representatives, and the decisions of all the High Courts in India have now made it perfectly clear that although the section does not use that particular nomenclature, the trustees contemplated by it are the same as what is known in English law as express trustees. In 49 I. A. 37<sup>1</sup> at page 43 their Lordships of the Privy Council defined a trust for a specific purpose as one for a purpose that is either actually and specifically defined in the terms of the will or the settlement itself, or a purpose which, from the specified terms, can be certainly affirmed.

There are cases where although no express trust is created, yet a Court of equity from the conduct of parties or the faith reposed in them or in the circumstances of the case raises a trust and imposes an obligation in the nature of a trust. These are known as constructive or resulting trusts. Under English law they are as much trusts as express trusts. Under our law as found in the Trusts Act the Legislature has made a sharp distinction between trusts created by the act of parties and certain obligations which are not trusts but which are considered to be in the nature of trusts, and Chap. 9, Trusts Act,

1. ('22) 9 A.I.R. 1922 P. C. 212 : 49 I. A. 37 : 102 I. C. 832 (P. C.), *Khaw Sim Tek v. Chuah Hooi Gnoh Neoh*.



deals with these obligations. All the obligations considered in that chapter are those which are imposed by the law in the various circumstances set out in the different sections which form part of that chapter. It is clear to my mind that S. 10, Limitation Act, cannot possibly apply in the case of a person whom the law looks upon as a trustee because he has to discharge certain obligations in the nature of a trust. It only applies to a trustee of a trust in the strict sense of the term.

It is impossible to hold that under the decree of 6th February 1931, a trust was created whereby Raghavji was to hold the shares for a specific purpose of handing them over to the plaintiffs. One would ordinarily have expected a provision in the decree after the declaration to which I have already referred that Raghavji should hand over the shares to the plaintiffs and execute the necessary transfer forms, but no such provision finds a place in the decree. But it is clear that the Court did not intend that Raghavji should hold these shares as a trustee for the plaintiffs. The plaintiffs having been declared to be the owners of the shares, the intention undoubtedly was that Raghavji should transfer the legal ownership to them. It is true that after the passing of the decree the beneficial ownership in the shares vested in the plaintiffs, and to that extent Raghavji under S. 94, Trusts Act, held the property for the benefit of the plaintiffs and thus constituted himself a constructive trustee; but no trust for a specific purpose was created and Raghavji was not an express trustee.

Strong reliance has been placed by Mr. Maneksha on (1893) 2 Q.B. 390.<sup>2</sup> In that case the trust fund was entrusted by the trustees to a solicitor for being invested, and on the death of the solicitor an action was brought against his personal representative for an account; and the question was whether the statute of limitation was applicable. The Court held that the solicitor's estate was not protected by the statute. Lord Esher M. R., in delivering the principal judgment, pointed out that in that case although an express trust was created, the solicitor was not at any time nominated as a trustee of that trust. Lord Esher M. R., further observes (page 394) :

"The cases seem to me to decide that, where a person has assumed, either with or without consent, to act as a trustee of money or other property, i. e., to act in a fiduciary relation with regard to it, and has in consequence been in possession of or has

exercised command or control over such money or property, a Court of equity will impose upon him all the liabilities of an express trustee, and will class him with and will call him an express trustee of an express trust. The principal liability of such a trustee is that he must discharge himself by accounting to his *cestui que trusts* for all such money or property without regard to lapse of time."

Bowen L. J. says (page 397) :

"It has been established beyond doubt by authority binding on this Court that a person occupying a fiduciary relation, who has property deposited with him on the strength of such relation, is to be dealt with as an express, and not merely a constructive, trustee of such property. His possession of such property is never in virtue of any right of his own, but is coloured from the first by the trust and confidence in virtue of which he received it. He never can discharge himself except by restoring the property, which he never has held otherwise than upon this confidence . . . ; and this confidence or trust imposes on him the liability of an express or direct trustee."

These observations seem to indicate that according to Lord Esher M. R. and Bowen L. J. even in the case of certain kinds of constructive trust in England, lapse of time would not defeat a claim against a constructive trustee. But it is necessary to point out that Kay L. J. came to the same conclusion on the ground that the solicitor though a stranger to the trust had assumed to act and had acted as trustee of a trust which was undoubtedly for a specific purpose. The observations in every case, even when they emanate from the highest authority, must be read in relation to the facts of that particular case, and I am not prepared to extend the effect of those observations especially when I am conscious of the fact that we have to construe the words of our own statute, whereas in England the Judges proceed on principles of equity. *Soar's case*<sup>2</sup> has been followed in two Bombay cases, 31 Bom. 418<sup>3</sup> and 52 Bom. 184.<sup>4</sup> In the former case, with respect to the learned Judge, it is rather difficult to understand what exactly were the facts on which the decision was arrived at. It seems that one Ladhoo Kara and his uncle Ramji Lakhmidas carried on business in partnership. Ladhoo Kara's share was three-sixteenths and Ramji Lakhmidas' share thirteen-sixteenths. Ladhoo Kara retired from the firm and Ramji Lakhmidas held the three-sixteenths share of Ladhoo Kara in the three-annas share of the commission earned by the partnership in a certain mill and thirty-five shares of the said mill were also appropriated to the share of

3. ('07) 31 Bom. 418, *Narandas v. Narandas*.

4. ('28) 15 A.I.R. 1928 Bom. 58 : 52 Bom. 184 : 107 I. C. 705, *Chintaman Ravji v. Khanderao Pandurang*.

2. (1893) 2 Q.B. 390 : 69 L.T. 585 : 42 W.R. 165, *Soar v. Ashwell*.



Ladhoo. The suit was filed by the executor of Ladhoo Kara against the executor of Ramji Lakhmidas in respect of the shares and the commission held by Ramji. The learned Judge held that Ramji was an express trustee for Ladhoo and the case fell under S. 10, Limitation Act. Now it has to be remembered that at the time of the dissolution there was an express agreement between Ramji and Ladhoo that Ramji should continue to receive the three-annas share of the commission and hold three-sixteenths of it for Ladhoo Kara. With regard to the thirty-five shares, the learned Judge was not in a position to find as a fact whether they were actually transferred to Ladhoo Kara or whether they remained with Ramji; but he held that Ramji, if the shares remained in his hands, was an express trustee for Ladhoo. I do not wish to disguise the fact that this case has caused some difficulty in my mind and it has also been the source of difficulty to other Judges who have considered it. In 10 Bom L. R. 346,<sup>5</sup> Beaman J. at p. 349 sought to confine the effect of that decision to what was actually found and decided and considered the rest of the judgment of Russell J. in 31 Bom. 418<sup>3</sup> as mere *obiter dicta*. The same view of that case was taken in 51 Mad. 549<sup>6</sup> at p. 564 and Carr and Brown JJ. in 3 Rang. 206,<sup>7</sup> have gone to the length of considering that the judgment of Russell J. is unsound. Sitting as a single Judge, the decision of Russell J. is undoubtedly binding on me; but I do not think that the facts before me are in any way comparable to the facts on which that judgment was based.

In 52 Bom. 184,<sup>4</sup> Pandurang's widow left a sum of Rs. 2309 to her brother Ravji for the benefit and education of her minor sons. Ravji spent about Rs. 700 for the benefit of the boys. He then died and his representative was sued for an account of the balance of trust money. On these facts Sir Amberson Marten C. J. and Crump J. held that Ravji was an express trustee. Sir Amberson Marten considered this to be a very simple case, which it undoubtedly is. In the course of the judgment the Chief Justice refers to *Soar's case*,<sup>2</sup> but that does not in any way detract from the simplicity of the case. I might also point out that in two Madras cases

5. ('08) 10 Bom. L. R. 346, Yakub Ebrahim v. Bai Rahimatbai.
6. ('28) 15 A.I.R. 1928 Mad. 509 : 51 Mad. 549 : 111 I.C. 210, Ammalu Amma v. Narayanan Nair.
7. ('25) 12 A.I.R. 1925 Rang. 289 : 3 Rang. 206 : 86 I. C. 297, Ma Thein May v. U Po Kin.

44 Mad. 277<sup>8</sup> and 45 Mad. 415<sup>9</sup> at p. 418 it has been seriously doubted whether the doctrine of (1893) 2 Q.B. 390<sup>2</sup> applies to India. Under these circumstances, I am clearly of opinion that Raghavji was not an express trustee, and S. 10, Limitation Act, does not apply to the facts of this case.

[The rest of the judgment is not material for this report.]

R.K.

*Decree accordingly.*

8. ('21) 8 A.I.R. 1921 Mad. 125 : 44 Mad. 277 : 61 I. C. 907, Raja of Ramnad v. Ponnusami Tevar.

9. ('22) 9 A.I.R. 1922 Mad. 57 : 45 Mad. 415 : 66 I. C. 858, Krishnan Pattar v. Lakshmi.

[Case No. 30.]

**A. I. R. (33) 1946 Bombay 134**

COYAJEE J.

*Nusserwanji Icchaporia and others —  
Plaintiffs*

v.

*Gulcher Munshi and others —  
Defendants.*

O. C. J. Suit No. 1029 of 1944, Decided on 7th December 1944.

(a) Succession Act (1925), S. 113 — Bequest held valid.

H executed a will in favour of her deceased sister's son P. The executors were to hand over the funds to P's trustees, who were to create a trust so that the funds may go to the children of P. P was not married till the death of H. Subsequently P married D and had from her a daughter V, who died shortly after her birth. P then died without any issue but left a will leaving the funds to D absolutely :

Held that P took only a life interest in the funds bequeathed to him and that he would be entitled to will away the accumulation of interest due to him during his life. [P 136 C 1]

Held further that V, immediately she was born and came into existence became entitled to the bequest. It is immaterial whether she was alive or dead at the termination of the prior life interest or life estate given to P under the will, as in the latter event her representatives would take. Hence bequest in favour of D was good and not void : ('44) 81 A. I. R. 1944 P. C. 67, *Rel. on.*

[P 183 C 1]

(b) Will—Construction of—Rules explained.

A will must be construed as a whole and if there are any two clauses conflicting with each other the Court must try and reconcile them with each other. The Court has to see on the plain reading of the will first of all what was the dominant intention of the testator. All parts of the will are to be construed with reference to each other so as to form one consistent whole, and it is only where it is not possible to reconcile all the parts of the will that the latter must prevail : ('35) 22 A. I. R. 1935 P. C. 187 and ('25) 12 A. I. R. 1925 Bom. 282, *Rel. on.* [P 135 C 2]

K. J. Khandalawalla — for Plaintiffs.

F. N. Kalyaniwalla and N. P. Engineer (Advocate-General) — for Defendants 1; 2 and 4, respectively.



**Order.** — The questions arising on this originating summons are to be answered in the following circumstances and facts of the case. The testatrix Bai Hirabai Nusserwanji Motisha died in Bombay on 10th April 1934, leaving a will in the Gujarati language dated 9th April 1934. After giving and setting out certain legacies the testatrix by cl. (9) of her will states as follows:

"If the 'legacies' which I have (directed to be) given by this my 'will' cannot be given for any reason whatever, as to the amounts of those legacies and all my remaining punji (and) property (which I may not have left as 'Bakshis' (gift) to anyone under this will), all that (which I shall hereafter describe in this will as my 'remaining punji') my executors shall divide into four equal parts, and they shall give one such equal part to the persons mentioned below.

- (a) To (my) sister Alamai Dhunjishaw Bhandara,
- (b) To (my) brother Burjorji Nusserwanji Motisha,
- (c) To (my) brother Hormusji Nusserwanji Motisha,
- (d) To Piroz, son of (my) sister Meherbanoo Homji Munshi.

My remaining punji referred to above includes the sum which stands to my credit in the Imperial Bank (of India)."

After setting out the said clause in which she states that the executors shall give one such equal part to the persons mentioned in the said clause, she sets out cl. (10) of her will as follows:

"I direct my executors that they shall hand over the share of Piroz, son of my deceased sister Meherbanoo, as stated in the above clause, to his trustees (1) Mr. Nusserwanji Hormusji Sethna, and (2) Dr. Nusserwanji Icchaporla, and they shall make a formal 'trust' thereof, so that it may go to the children of the said Piroz."

By this clause the testatrix states that the share falling to Piroz, her nephew, shall be handed over by the executors to the trustees of Piroz who are the same trustees as of another deed of settlement by Piroz himself dated 14th December 1931, and such trustees shall make a formal trust thereof so that "it," that is, the share may go to the children of Piroz. Pursuant to the directions contained in cl. (10) the executors executed a declaration of trust dated 23rd October 1934. At the date of the will and at the time of the death of the testatrix the said Piroz was unmarried and he married on 28th December 1939. On 23rd November 1942, a daughter was born to Piroz and his wife and she was named Vilarbanoo, and the said Vilarbanoo, daughter of Piroz, died on 25th June 1943. A few months thereafter, that is, on 23rd October 1943, Piroz died leaving his widow, defendant 1, and without leaving any issue surviving him. By his last will and testament dated 11th January 1943, the said Piroz appointed his wife defendant 1 as the sole executrix

thereof and bequeathed absolutely to defendant 1 the whole of his estate save and except three-fourths of a trust fund which is the subject-matter of the deed of trust referred to above dated 14th December 1931. On the facts and circumstances set out above the main questions arising for determination by this Court are as follows:

1. Whether on a true and proper construction of the will of the testatrix Hirabai, Piroz took the one-fourth share set out in cl. (9) of the will absolutely, or whether he took a life interest in that one-fourth share?

2. Whether under cl. (10) of the will of the testatrix there was an absolute bequest to the children of Piroz or whether the bequest to the children of Piroz is void in the circumstances of the case?

The answers to these questions would determine the questions set out and annexed to the plaint as questions arising on the originating summons. The facts of the case are short and are not complicated. The first question arising is, what is the manner in which the will of the testatrix Hirabai should be construed. It is plain that the will must be construed as a whole and if there are any two clauses conflicting with each other the Court must try and reconcile them with each other. The Court has to see on the plain reading of the will first of all what was the dominant intention of the testatrix. The meaning of cls. (9) and (10) of the will must be concluded from the entire instrument and all parts of the will are to be construed with reference to each other as laid down by the Privy Council in 37 Bom. L. R. 862<sup>1</sup> so as to form one consistent whole, and it is only where it is not possible to reconcile all the parts of the will that the latter must prevail. As observed by Sir Amberson Marten C. J. who was then Marten J. at p. 385 of the case in 27 Bom. L. R. 380,<sup>2</sup> quoting the observations made in (1901) 1 Ch. 939<sup>3</sup>:

"... it is equally clear that the whole of a will is to be looked to, to ascertain the intentions of a testator, and that the Court must, if it can, reconcile the various clauses in a will. Further, as pointed out by Joyce J. in (1901) 1 Ch. 939<sup>3</sup> as being an observation which has been made in a large number of cases, one has first to endeavour to see what is the true construction of the particular will before the Court irrespective of any authority and then to see whether there is any authority which prevents one from coming to that conclusion, and not first to turn to the authorities, and then to see

1. (35) 22 A.I.R. 1935 P. C. 187 : 157 I. C. 888 : 37 Bom. L. R. 862 (P.C.), Rameshwar Baksh Singh v. Balraj Kuar.

2. (25) 12 A.I.R. 1925 Bom. 282 : 49 Bom. 478 : 95 I. C. 229 : 27 Bom. L. R. 380, Gulabji v. Rustomji.

3. (1901) 1 Ch. 939 : 70 L. J. Ch. 591 : 84 L. T. 456, In re Sanford.



whether the particular will before the Court comes nearest to one will or to another will in the decided cases."

I have said this because a series of English and Indian cases were cited before me by Mr. Kalyaniwalla on this and other points. Looking at the whole will and the tenor of different clauses I cannot resist coming to the conclusion that although in cl. (9) the testatrix says "and they shall give one such equal part" to Piroz, yet the clear statement in cl. (10) that that particular share shall be handed over to the trustees so that it may go to the children of Piroz clearly shows that the intention and dominant intention of the testatrix was that Piroz should enjoy the income for life and the corpus should go on the death of Piroz to his children. It is true that Piroz was not married at the date of the will and at the date of the death of the testatrix. But it is clear that she was providing for the marriage of Piroz as she set aside a certain share for the wife of Piroz to be given to her on the marriage of Piroz and she contemplated evidently that the corpus should go to the children of Piroz after the death of Piroz. In these circumstances I have come to the conclusion that Piroz did not take an absolute interest in the one-fourth share set out in the will in favour of Piroz and that he took only a life interest in the said share and that he would be entitled to will away the said accumulation of interest due to him during his life. This conclusion which I have arrived at is the only conclusion I can think of on a proper reading of the whole will and which is in consonance with the dominant intention expressed in the will read as a whole and it does definitely reconcile the two clauses, namely cls. (9) and (10) of the will.

The next question is the one on which there has been considerable argument on both sides, namely whether Vilarbanoo did take under this settlement at all and whether the corpus in the hands of the trustees goes to the estate of Piroz as one of the heirs of Vilarbanoo with defendant 1 as the other heir or whether the gift in favour of Piroz's child or children fails for any reason and that therefore the corpus reverts to the residuary estate of the testatrix Hirabai. The Court has now to see whether Vilarbanoo did or did not take. I have said the dominant intention was that the trustees were to hand over this share to the children of Piroz. Piroz during his lifetime did have a child but she predeceased him.

The question, therefore, is: is there anything in the gift over to the child or children of Piroz repugnant to any principle of law or contrary to any of the sections of the Succession Act which have a bearing on this question? The relevant sections to be considered in this connection are Ss. 111, 112 and 113, Succession Act. Section 111 refers to a simple gift to a described class of persons directly and says that the thing bequeathed shall go only to such of that class as are alive at the testator's death. But the exception to that section clearly lays down that where property is bequeathed to a class of persons described as standing in a particular degree of kindred to a specified individual but the possession of that class is deferred until a time later than the death of the testator because of or by reason of a prior bequest or otherwise, then the exception says that the property shall at that time go to such of them as are then alive and *to the representatives of any of them who have died since the death of the testator*. In this connection see illustrations 2 and 3 under the section. The bequest after the intervention of the life interest as set out in this exception vests in each member of the class as and when he or she comes into being and this is so although he or she may die before the period of distribution in which case the representatives of such as have died since the death of the testator would be entitled along with those alive at the period of distribution. So far as S. 111 is concerned, I do not see how that can come in the way of Vilarbanoo taking an interest under the will.

The next question is with reference to S. 112, Succession Act. This section refers to bequests that are void if made to persons who are not in existence at the testator's death and where the bequest is made by a particular description. The section in terms says that where a bequest is made to a person by a particular description and there is no person in existence answering to that description at the testator's death, the bequest is void. This section would have made the bequest under the will void but for the exception to the section read with illustrations 3 and 5. This exception saves the bequest in the event of there being an intervening life interest or by reason of a prior bequest and it says that if such a person answering the description is alive at the death of the testator or *comes into existence* between that event and such later time, the property shall, at such later time, go to that person. Illustration 3 clearly indicates that



where there is an intervening life interest and thereafter the bequest goes to a person by description who is not born at the date of the death of the testator but is born later and dies before the life interest falls in, the legacy in these circumstances goes to the representatives of such person. The exception, therefore, depends entirely on the vesting of life interest before the bequest to unborn person takes effect, and if that unborn person is born, it is clear under this illustration that whether he or she is alive or dead at the termination of the prior estate it says that his or her representative will take under the bequest. In these circumstances I do not see how S. 112 can come in the way so as to make the bequest in this case void.

The only other section which is to be considered and which was relied upon very strongly is S. 113, Succession Act. Now this section says that where a bequest is made to a person not in existence at the time of the testator's death and is made subject to a prior bequest, the later bequest shall be void in the event of it not comprising the whole of the remaining interest of the testator in the thing bequeathed. This section comes into operation when the bequest to such unborn person is postponed by the intervention of the life or some other interest in the thing bequeathed, and it comes into operation to that extent in the present case. But it says that in order that the bequest to such a person should be valid the only condition is that it must comprise the whole of the remaining interest of the testator and that there should be nothing in the way of a contingency or in the way of a defeasance clause which would restrict the whole of the interest of the testator being bequeathed to such a person. This section is in terms the same as S. 13, T. P. Act. The section has nothing to do directly with the question of perpetuity which is provided for in the next section but deals with the conveying of the whole of the interest of the testator to the person to whom it is bequeathed, the bequest being deferred in the manner set out in the section and has nothing to do with the vesting of the bequest in an unborn person. In this connection the English law is different and has no bearing on the construction of this section. If the matter had rested here, there would have been no difficulty in my coming to a conclusion that there is nothing under any of these sections to prevent the child born to Piroz taking the bequest and Piroz being entitled as an heir of his child. I

have, however, been referred to a recent decision of their Lordships of the Privy Council the case being 71 I. A. 93.<sup>4</sup> In that case their Lordships have construed the implication of S. 113, Succession Act, and have made certain observations which are very pertinent. Their Lordships referred to the section at p. 102 and said that the section must of course be read and construed in connection with the illustrations to be found in the Act and those illustrations ought to be considered. Viscount Maugham observes at pp. 102 and 103 as follows :

"The first illustration to the section shows that a bequest by a testator to his children for their respective lives and after their deaths to their children respectively, unborn at the testator's death, is void, for it is not a bequest of the whole interest that remains in the testator, since it is not certain. A bequest to a son for life and after his death to his children who shall survive him must be bad for the same reason, since there may be no such children." His Lordship thereafter went on to say that the illustrations show the strict sense in which the Legislature has used the words "a bequest is made" and the words "subject to a prior bequest." His Lordship went on to say as follows (p. 103) :

"It may be that a particular bequest must comprise all the testator's remaining interest, if the legatee under it is not in existence at the testator's death; and it is clear that in cases like those two illustrations further gifts, however complete in their operation, do not save 'the bequest'."

The test laid down is at page 103 :

"Whether the later bequest (whatever that means in a particular case) is a complete disposition of the testator's interest."

In that particular case after considering the complicated facts of the case and the manner in which the will was drawn up their Lordships came to the conclusion that if under a bequest in the circumstances mentioned in S. 113, Succession Act, there is a possibility of the interest given to a beneficiary being defeated either by a contingency or by a clause of defeasance, the beneficiary under the later bequest does not receive the interest bequeathed in the same unfettered form as that in which the testator held it, and that the bequest to him does not, therefore, comprise the whole of the remaining interest of the testator in the thing bequeathed.

I have read very carefully this judgment of their Lordships where these propositions are laid down, viz. that where there is any contingency or where a clause of defeasance was there which cuts down or does not convey the whole of the interest of the testator in any manner whatsoever, then that would be

4. (144) 31 A. I. R. 1944 P. C. 67 : 71 I. A. 93 : I.L.R. (1944) Kar. P.C. 238 : 216 I. C. 53 (P.C.), *Sopher v. Administrator General of Bengal*.



repugnant to the provisions of S. 113 and the bequest would be void. I have also quoted the above words of his Lordship Viscount Maugham to show that in that case their Lordships held that where according to ill. (1) to the section a bequest is made by a testator to his children for their respective lives and after their deaths to their children respectively, unborn at the testator's death, it is void as it is not a bequest of the whole of the interest that remains in the testator, and as pointed out it will not be certain that there will be any grandchildren.

These observations of their Lordships must be respected, even if it is argued that these are obiter, as laying down the law under the section. The question remains whether they are applicable to the particular facts of the case before me. The Exceptions to Ss. 111 and 112 expressly provide for the vesting of the bequest to persons unborn, and I have already drawn attention to ill. (3) of S. 112. In the case before me, I cannot find the likelihood of any contingency arising nor is there any defeasance clause which would bring this particular case before me within the four corners of the observations made by their Lordships in 71 I. A. 93<sup>4</sup> or within ill. (1) to S. 113, Succession Act, as explained by their Lordships and set out by me above. The child Vilarbanoo, immediately she was born and came into existence became entitled to the bequest and it is immaterial whether she was alive or dead at the termination of the prior life interest or life estate given to Piroz under the will, as in the latter event her representatives would take.

In these circumstances I do not find anything repugnant in the bequest made in favour of the child or children of Piroz. I, therefore, hold that Piroz's daughter Vilarbanoo did take the bequest and that on the death of Vilarbanoo her heirs were her representatives, namely Piroz and defendant 1 to the suit. I, therefore, hold and answer the second question formulated above by saying that the bequest made in cl. (10) is a good bequest and not void. Costs of all parties to the suit as between attorney and client to come out of the estate. Costs to be taxed on the long cause scale.

*S. A. N. D.* Order accordingly.

Advocate High Court

Jammu & Kashmir

S. A. N.

[Case No 31.]

A. I. R. (33) 1946 Bombay 138

KANIA AND CHAGLA JJ.

*Matildas Bishop and another —*  
*Appellants*

v.

*Suzan Anthony Millard—Respondent.*

O. C. J. Appeal No. 9 of 1945, Decided on 3rd April 1945, from judgment of Bhagwati J. in Suit No. 1347 of 1944.

Provident Funds Act (1925), Ss. 4 and 5 —  
G. I. P. Ry. Provident Fund Rules, R. 25 —  
Nomination—Subsequent marriage of member —  
Nomination does not subsist and widow is entitled to fund — R. 25 is not ultra vires.

Section 5 only deals with and can only deal with nominations which are valid and subsisting nominations under S. 4. It is only with regard to the nominees under valid and subsisting nominations that S. 5 declares the rights. [P 142 C 1]

On the marriage or remarriage of a member (who is not a Hindu, Muhammadan or Buddhist) according to G. I. P. Ry. Provident Fund Rules, R. 25 (b) (1), the declaration of nomination does not subsist and hence on his death the widow becomes entitled to the fund and not the nominee. Rule 25 is not ultra vires the Act. [P 141 C 1; P 142 C 1]

*Sir Jamshedji Kanga and M. L. Manecksha —*  
*for Appellants.*

*S. T. Desai and V. G. Wagle—*for Respondent.

**Kania J.** — This is an appeal from the judgment of Bhagwati J. Eustace Edwin Millard, an employee of the G. I. P. Railway, was a subscriber to the provident fund of the railway company. On 23rd July 1936, he made a nomination under the rules of the fund in the prescribed form, which is headed "The Form of declaration," in favour of his mother. He married the respondent on 18th July 1941, and died on 1st October 1943. He left him surviving his widow the respondent, and two sisters who are the appellants. His mother died on 23rd September 1943, i. e., before his own death. After his death the appellants obtained letters of administration to the estate of their mother and claimed to receive payment of the provident fund due to the deceased from the railway company. The respondent claimed the same fund on the ground that on her marriage the nomination ceased to subsist under the rules. The G. I. P. Railway being owned at all material times by Government, the Governor-General in Council filed an interpleader suit as the plaintiff. He was discharged from the suit on payment of his costs, after he deposited the amount in Court. The only issue which was ordered to be tried first was as follows:

"Whether the marriage of defendant 1 (respondent) to the deceased subsequent to the nomination by the deceased in favour of his mother revokes the nomination?"



I must say that the word "revokes" is not happily chosen. If the word "subsists," which is used in the rules, was retained with proper alterations in the issue, it might have been better. The parties, however, have clearly understood the rival contentions arising on the construction of the rules and the Provident Funds Act, 1925. On behalf of the appellants, it is contended that the Provident Funds Act should be first looked at and S. 5 of the Act determines the rights of the nominee. The relevant portion of that section is as follows:

"Subject to the provisions of this Act, but otherwise notwithstanding anything contained in any law for the time being in force, or any disposition, whether testamentary or otherwise by a subscriber to . . . . the Railway Provident Fund of the sum standing to his credit in the Fund . . . any nomination duly made in accordance with the rules of the fund, which purports to confer upon any person the right to receive the whole or any part of such sum on the death of such subscriber . . . shall be deemed to confer such right absolutely until such nomination is varied by another nomination made in like manner or is expressly cancelled by the subscriber . . . by notice given in such manner and to such authority as is prescribed by those rules."

It was pointed out that although under the Act there was no provision for making rules by Government or the railway administration, the existence of the rules is assumed. It was argued that while rules might be framed for the internal management of the fund, no rule can be framed so as to override S. 5 and prescribe a method by which a nomination duly made under the rules can be varied or cancelled, otherwise than as prescribed by the section. In this connection it was pointed out that in England under the Friendly Societies Act, 1875, there was no provision for revocation of the nomination on the marriage of the subscriber. The provision of revocation on the happening of that event was made by express legislation under the Friendly Societies Act, 1896. It was, therefore, contended that the same result cannot be achieved by making a rule to that effect. The appellants relied on 42 C. W. N. 1143<sup>1</sup> to support the contention that a will cannot revoke a nomination. No authority is required for that proposition, because S. 5 itself provides that a will by itself shall not be considered a sufficient revocation of the nomination. (1899) 1 Q. B. 45<sup>2</sup> was relied upon to support the contention that a nomination made under the Friendly Societies Act, 1875, was not revocable in any manner

other than that prescribed by the corresponding sub-section and was not revocable by a subsequent will of the nominator. In that judgment the Court emphasised that a nomination cannot be revoked otherwise than in the manner prescribed by the section. I think the clear words used in S. 5, Provident Funds Act, are equally emphatic on the point and no authority is needed to support it. It was next contended that R. 25, Provident Funds Rules, which was in force in August 1935, if read as making a nomination revocable on the marriage of the subscriber, was *ultra vires*. It was argued that the notes printed at the foot of the prescribed form of nomination cannot be considered as forming part of the rules. They were mere notes for the guidance of the department. It was next contended that whatever general notes for the guidance of the department may exist, in fact the deceased made the nomination without any reservation and on a form which did not contain any such notes. Therefore, in any event, the nomination made by the deceased was not controlled by any such condition and effect should be given to the nomination, irrespective of the note printed at the foot of the prescribed form. It was lastly contended that this note is an attempt to prescribe a condition subsequent to revoke the nomination, and is made with a view to make the rule a will of the subscriber who was not a Hindu, Muhammadan, Buddhist or a person exempt from the operation of the Indian Succession Act and was thus in conflict with the express words of S. 5, Provident Funds Act. The material part of R. 25 is in these terms:

"25. (a) Subject to the provisions of cl. (b) below, the disposal of the balance at credit of deceased members shall be regulated by S. 4 (1), Provident Funds Act, 1925, reprinted as annexure AAA.

(b) (i) If a declaration made by a member in accordance with the provisions of rules subsists *vide* notes to annexure A, the amount standing to his credit in the fund, or the part thereof to which the declaration relates shall, subject to the other provisions of these rules, be payable in accordance with such declaration."

The whole of the Provident Funds Act is reprinted as annexure AAA. Annexure A is the form of declaration. The material part is as follows:

"I hereby declare that in the event of my death the under-mentioned person or persons shall be entitled to receive payment of my provident fund holding including additional benefits, if any, in the proportion mentioned against their names...." Then follow certain columns, with headings, in which the name of the nominee, his relationship to the member, the proportion

1. ('38) 42 C.W.N. 1143, Secy. of State v. Nagendra Mohan.

2. (1899) 1 Q. B. 45 : 68 L. J. Q. B. 45 : 79 L.T. 324 : 47 W. R. 82, Bennett v. Slater.



of the holdings etc., have to be filled in. Paras. 1 and 2 of the notes are in these terms:

"1. When a deposit account is first opened the member concerned shall be required to give a declaration particularising the person or persons by whom he is desirous that the whole or any portion of his deposit shall be received in the event of his death, and the deposit shall be subject to the other provisions of these rules, be payable in accordance with such declaration. Such declaration should, whenever possible, be in the handwriting of the member and must be signed by him. The declaration which should be attested by two witnesses in the presence of the declarant and of each other will remain in force until it is revised or cancelled by means of a notice in writing given to the Chief Accounts Officer in the prescribed form. Such notice or revised declaration shall also be similarly attested by two witnesses. On the marriage or remarriage of a member who is not a Hindu, Muhammadan, Buddhist, or other person exempted from the operation of the Indian Succession Act, any declaration already submitted by him shall forthwith become null and void and a fresh declaration shall be required.

2. This declaration is made under Provident Fund Rules 24 (a) and 25".

The declaration made by the deceased and filed with the railway company is substantially in the same form, except that at the foot no notes are printed. The definition of "dependent" as found in the Provident Funds Act S. 2 (c) is printed. The Provident Fund Rules and Regulations (a copy of which is put in as exhibit) is headed "Revised Rules and Regulations for the maintenance and management of the fund."

On behalf of the respondent, it is contended on the other hand that the rules of the provident fund govern the rights of the parties. The Act is applicable, but unless any rule is in conflict with the express statute, the rights of the contracting parties, i. e. Government on the one hand and the employees on the other, must be according to the rules. It was argued that the whole argument of the appellants was based on a misreading of S. 5. It was not disputed that a nomination cannot be varied or cancelled except as provided in S. 5. The section however recognises the nomination made in accordance with the rules of the fund. The Act did not prohibit the making of rules in respect of nominations, so as to make them conditional or subsisting on certain contingencies only. It was pointed out that Ss. 3, 4 and 5 contained the scheme of the Act. While S. 5 defined the rights of the nominee, S. 4 was the material section as it contained provisions relating to repayment of the fund. Section 4 (1) (c) (i) was relevant to be considered in this connection. In that clause the sum or the balance of the provident fund which was not payable under cl. (a) or (b)

to the dependent or when it was less than Rs. 5000, was to be paid to "any person nominated to receive it under the rules of the fund." Relying on the general words used in that clause it was argued that the nomination made under the rules controlled the right to receive payment. If the nomination itself was not bad according to the rules, it was wrong to contend that because the nomination was conditional, viz. subsisting on the non-occurrence of a certain event, it should be considered as varied or cancelled otherwise than in the manner prescribed in S. 5.

In my opinion the contention of the respondent on the construction of the section and rules is correct. The proper approach to the question is to consider the scheme of the Act first. While S. 5 of the Act, as shown by the marginal note, prescribes rights of the nominees, the important section to be considered is S. 4. The claim to receive the money must, therefore, be under that section, and that section alone. It cannot rest on S. 5. Under S. 4 (1) (c) (i) a person who is properly nominated according to the rules is entitled to receive the money. The question, therefore, is in whose favour there subsists a nomination on the date the claim to receive the money is made. To answer that question one must turn to the nomination paper. I find nothing in S. 5 to prevent a nomination being considered subsisting under certain conditions only. The words of S. 5 do not prohibit the making of such nomination. The Act only provides for a nomination made according to the rules. There is nothing in the rules to prevent such a nomination being made. Section 5 prevents the variation or cancellation of a nomination, which is filed with the company, otherwise than as prescribed by that section. The question in the present case is not of a variation or cancellation of the nomination so made, but the effect of the nomination itself. That question is not dealt with by S. 5 at all. According to S. 5 a nomination duly made in accordance with the rules of the fund becomes effective and would confer a right to receive the balance of the fund on the death of the subscriber, but such right must be found in the nomination made according to the rules of the fund. I do not think that the section prevents the making of a rule, which would make a nomination subsisting on certain contingencies only. Rule 25 (a) prescribes that, subject to the provisions of cl. (b), the disposal of the balance shall be regulated by S. 4 (1) of the



Act. Therefore before approaching S. 4 (1) the railway authority has to ascertain whether the case is covered by R. 25 (b). That clause of the rule (which I have quoted above) in terms provides "if the declaration made by the member *subsists*." There is an express reference after those words to the note annexed as A. Therefore, the question whether the declaration subsists or not has to be determined on a reference to the notes found in annexure A to the rules. The notes thus form an integral part of the sub-clause. The last part of the first paragraph of the notes prevents the subsistence of such nomination on the marriage or remarriage of a member who was not a Hindu, Muhammadan, Buddhist, or a person exempted from the operation of the Succession Act. It declares that in case of such a member the declaration already submitted by him, on marriage or remarriage, shall forthwith become null and void. Giving proper effect to the words used in the notes it is, therefore, clear that on the marriage or remarriage of such a member according to R. 25 (b) (1), the declaration does not subsist. If the declaration does not subsist one must turn to R. 25 (a) to ascertain the party to whom the fund is payable. It is there prescribed that the fund shall be payable according to the rules found in S. 4 (1). It is not disputed in the present proceedings that if the declaration does not subsist the respondent is entitled to the fund. The only issue on which the Court's opinion is sought is whether on the true construction of the Act and the rules the declaration subsisted after the marriage of the respondent with the deceased.

The fact that in this individual case these notes do not appear at the foot of the nomination paper does not in any way help the appellants because by reference to the notes in R. 25 (b) the notes become a part of the rule, and the nomination, even without containing the notes, is still a nomination under the rules and the effect thereof is controlled by the notes printed at the foot of the prescribed form. The argument that the rule is *ultra vires* the Government is unsound because there is no limitation to the rule-making power of Government under the Act. The rule, as construed above, does not come in conflict with any express provision or condition found in S. 5. The argument that the attempt is to create another condition subsequent is also unsound because what is intended to be attained by the notes

is not to prescribe a condition subsequent and cancel it, but to prescribe the occurrence of an event which limits the existence of the nomination itself. By the nomination, made with this condition, there is no variation or cancellation of the nomination, but the operation of the nomination itself is limited to the period prescribed by the notes. I do not think by the notes an attempt is made to make a will, in the case of an exempted person. I do not find anything in the Act to prevent the contracting parties from agreeing to a rule which will operate only in respect of a certain class of subscribers, as distinguished from certain other class of subscribers. The law of contract does not prevent the making of such contracts. If a member does not like the rules he has always the option not to be a subscriber. If under the terms of his service he has to be a subscriber, there is no obligation on him to take up such service, unless he is willing to accept the conditions offered to him. One of the conditions may be that he has to subscribe to a fund according to the rules framed by the Government.

In England the change was made by legislation. I am, however, unable to find anything in the Provident Funds Act to prevent the same result being achieved by rules here. A change by legislation may have been desirable but may not have been done in view of the fact that there would be discrimination on this point between persons to whom the Indian Succession Act applied and persons to whom it did not apply. We are not concerned with the reasons why the Legislature omitted to include such a provision in the Provident Funds Act in respect of a limited class of members. What we are concerned with is to ascertain whether the framing of the rules is against the Act and I am unable to find any law which prevents the framing of that rule. The learned Judge in the trial Court has approached the matter correctly. The appeal fails and is dismissed with costs. Two counsel certified.

**Chagla J.** — I agree with the judgment just delivered by my brother Kania and have very little to add. In my opinion the vital and operative section of the Provident Funds Act is S. 4. It is that section which regulates the obligation cast upon the officers of the fund to make payment to persons mentioned in that section. It is also that section which lays down the rights of the persons who have to receive from the



fund. It is only under that section that a person becomes entitled to be paid out of the fund of which he is a subscriber. All that S. 5 does is, as its marginal note indicates, to declare the rights of the nominees and it provides that the right of the nominee is absolute and is not qualified or controlled in any manner. But the right of the nominee which is declared by that section is the right of a nominee under a valid and subsisting nomination, and in order to find out what a valid and subsisting nomination is one has to turn not to S. 5 but to S. 4, because S. 4 in terms provides that when a payment has to be made under a nomination it is to a person nominated to receive the fund under the rules of the fund. The right of the nominee to receive as a nominee must be a right given to him under the rules of the fund and not under any provisions of the statute. To my mind what is decisive of this appeal is the answer to the question, "Who is the person in this case who is entitled to receive as a nominee under the rules of the railway provident fund?" It cannot be disputed that, as the rules of the railway provident fund stand, the appellants are not entitled to receive the fund, as the nomination of the deceased's mother came to an end on the marriage of the deceased with the respondent, and the appellant's mother ceased to be the person nominated to receive the amount under the rules of the fund. Once that question is answered under S. 4, it is futile in my opinion to proceed further to examine S. 5, because S. 5 only deals with and can only deal with nominations which are valid and subsisting nominations under S. 4. As I have pointed out it is only with regard to the nominees under valid and subsisting nominations that S. 5 declares the rights and that section further provides that so long as a valid and subsisting nomination is not varied or cancelled in accordance with the rules of the fund, those rights would continue. In this case no question of variation or cancellation arises. I therefore agree with my learned brother that the appeal should be dismissed with costs.

R.K.

*Appeal dismissed.*

[Case No. 32.]

**A. I. R. (33) 1946 Bombay 142**  
**MACKLIN AND RAJADHYAKSHA JJ.**  
*Land Acquisition Officer — Appellant*  
**v.**

*Jamnabai — Respondent.*

First Appeal No. 360 of 1941, Decided on 28th March 1945, from decision of Asst. Judge, Thana, in Ref. No. 9 of 1938.

**Land Acquisition Act (1894), S. 23 (iv)—Loss of earnings — Concern not going — Actual loss and not prospective loss is to be considered — S. 23 is not exhaustive.**

The expression "loss of earnings" used in S. 23 (iv) means loss of earnings from a business which at the time of the acquisition was a going concern. If the claimant's business be a going concern on the land which is the subject-matter of acquisition, then he would be entitled to damages for loss of earnings. A compulsory change of a place of business may result in a serious loss to the persons concerned. Locality often possesses an element of convenience which has an important value in connection with business, and if a person enjoys such special advantage through having established himself in a particular site, it may be for a long period, it is reasonable that he should be entitled to compensation when he is disturbed for the benefit of the general public. Any probable diminution in the value of the claimant's good will in his trade consequent on the taking of the premises in which such trade is carried on and the consequential loss of his earnings would come within the meaning of the word "earnings" and there are well recognised rules for calculation of loss of earnings in such a case.

[P 143 C 2; P 144 C 1]

As the provisions of S. 23, Land Acquisition Act, are not exhaustive, it was held that under the circumstances of the case the Land Acquisition Officer was justified in awarding compensation by way of six per cent. return on the locked up capital over and above the value of the land and the materials thereon.

[P 146 C 1]

*B. G. Rao (Government Pleader) —**for Appellant.**B. G. Thakore — for Respondent.*

**Rajadhyaksha J.** — The only question in this appeal is as regards the claimant's right to receive compensation for the loss of prospective earnings. The land involved in this case is the southern half of survey No. 176 of Juhu, which belonged to one Narsi Monjee. The land was notified for acquisition on 15th June 1937, and the notification under S. 6, Land Acquisition Act, 1894, was published on 2nd December 1937. The land was actually taken possession of by the authorities on 5th October 1938. The contention of the claimant was that he owned a cigarette factory at Santa Cruz, and in order to expand his business he had purchased the land in question in 1935 with the object of building thereon a factory for manufacturing cigarettes. This factory was intended to be capable of manufacturing three times the quantity of cigarettes manufactured in the Santa Cruz factory. For this purpose the claimant had obtained a licence from the Collector of Bombay and had also got certain plans prepared and sanctioned by the authorities concerned. The work of building the factory had proceeded up to three feet above the plinth level when the land was notified for acquisition. By reason of that notification the work of erecting the factory



could not be proceeded with, and ultimately owing to the land being finally acquired, the project of building a factory thereon had to be given up. For this reason the claimant contended that he should be compensated for the loss of his prospective earnings for a period of one year on the basis of the profits which he made on the Santa Cruz factory. He, therefore, claimed, on the estimate made by his experts, Rs. 1,84,500 for the loss of earnings.

The Land Acquisition Officer considered that the claim made by the owner was fantastic and grossly exaggerated. He thought that the claim was purely hypothetical, based as it was on so many uncertain factors such as the probable cost of constructing the buildings, the cost of erecting machinery which would turn out three times the product of the Santa Cruz factory, the difficulty of getting sufficient labour in these days of labour unrest, and, lastly, the difficulty of raising enough capital at a reasonable rate of interest. He considered that if the factory had been a going concern, the claimant would have been justified in basing his claim for loss of earnings. Even so, he thought that the claimant had suffered some damage and was entitled to be compensated therefor. He, therefore, allowed six per cent. interest on the capital invested in the land, the incomplete building and the materials which had been locked up in this business, and he awarded compensation at this rate of interest from 17th June 1937, up to the date of payment as damages due to the acquisition against the claim for loss of earnings. This amount came to Rs. 4610. Against this award the claimant applied to the District Court of Thana, and the learned Assistant Judge who heard the reference was of opinion that the provisions of the Land Acquisition Act should be liberally construed in favour of the claimant and that the claimant was entitled to the damages which he had suffered owing to the land being acquired, even though the buildings had not been completed and the business had not been started. He thought that if the land had not been acquired, the buildings would have been constructed and the factory would have been started, and that as the claimant was prevented by reason of the acquisition from making profits out of the business, he was entitled to be compensated for the loss of his prospective earnings. Having come to this conclusion, the learned Assistant Judge examined the profits which the claimant made from the Santa Cruz factory, and after making due allow-

ance for the various items of expenditure, he thought that the claimant might have been expected to make a net profit of Rs. 18,600 per year. On this basis he made an award for the loss of earnings for a period of eight months. This amount came to Rs. 12,400, and allowing for interest on the extra amount awarded he increased the award made by the Land Acquisition Officer by Rs. 8240. It is against that order that the Land Acquisition Officer has filed the present appeal.

The main ground taken by the learned Government Pleader is that as the business was not a going concern at the date of the acquisition, the claimant was not entitled to anything by way of damages for the loss of earnings. Two points arise for consideration in this appeal: (i) whether the claimant was entitled to any compensation in law for loss of earnings in view of the fact that the construction of the buildings had just started and the business was not a going concern; and (ii) if the claimant was entitled to damages, on what basis should those damages be assessed. There is no doubt that if the claimant's business was a going concern on the land which was the subject-matter of acquisition, then he would be entitled to damages for loss of earnings. A compulsory change of a place of business may result in a serious loss to the persons concerned. Locality often possesses an element of convenience which has an important value in connection with business, and if a person enjoys such special advantage through having established himself in a particular site, it may be for a long period, it seems to be reasonable that he should be entitled to compensation when he is disturbed for the benefit of the general public. Any probable diminution in the value of the claimant's goodwill in his trade consequent on the taking of the premises in which such trade is carried on and the consequential loss of his earnings would come within the meaning of the word "earnings", and there are well recognised rules for calculation of loss of earnings in such a case. As pointed out at p. 260 of *Rai Bahadur Gupta's Land Acquisition Act*:

"Apart from cost of removal and expenses incidental to the business itself which are dealt with in clause *fifthly*...[of S. 23, Land Acquisition Act] matters for consideration in estimating injury to earnings, (or what is commonly called 'loss of earning'), may be analysed thus :—

- (a) Depreciation of fixtures,
- (b) Depreciation of stock,
- (c) Loss on account of 'good will',
- (d) Loss on account of credit-sales."



All these elements which go to constitute loss of earnings presume that there is in existence a going concern the transfer of which is necessitated by the acquisition of land. But we have not been referred to a single case where there has not been in existence any going concern when the land is acquired, and a claim has been made and allowed for the loss of prospective earnings on account of a business which was intended to be established on the acquired land; and we consider that this paucity of authorities for the proposition of this kind is not without significance. In our view the expression "loss of earnings" used in S. 23 (iv), Land Acquisition Act, means loss of earnings from a business which at the time of the acquisition was a going concern. The learned advocate for the claimant gave an illustration of how such a view of law would result in substantial damage to the claimant himself. He gave an instance of a building which had almost been completed in January, in which a business was intended to be started in March and which was notified for acquisition in February. He argued that in such a case, the compensation for the land itself with the buildings thereon under S. 23 (i) would not be an adequate compensation, and the claimant would be entitled to ask for damages for the loss of earnings under S. 23 (iv) even though the business had not actually commenced at the time when that land together with the building was notified for acquisition. We are not sure that the illustration given by the learned advocate is altogether in point. In a case such as the one contemplated by the learned advocate, the claimant would get full compensation under cl. (i) of S. 23 because the compensation would be given not only for the land itself but also for the buildings thereon, and the potentiality of using those buildings for the purpose of business would be a factor governing the market-value of the building; and we are not sure that if a claim were made for the loss of earnings in a case of this type, that claim would be admitted in Court. If the line of reasoning adopted by the learned advocate were to be carried to its logical conclusion, it would mean that if the land was acquired immediately after it was purchased by the claimants for the purpose of erecting a factory the claimant would be justified in putting forth a claim for the loss of earnings by saying that he intended to build a factory thereon, and that the factory when completed would bring him profits at a certain

rate. And the learned advocate was not prepared to say that in such a case the claimant would be justified in making a claim of this kind. Between these two extremes there may be various gradations, and in our view the claim made in the present instance comes nearer to the latter class than to the former class. Nothing had happened in this case except the purchase of land, preparation of plans and the obtaining of the sanction from the Collector for erecting the factory. But, as pointed out by the Land Acquisition Officer there were numerous other uncertain factors which made the completion of the building, the starting of the business and earning profits therefrom largely a problematical affair and we do not think that in a case of this kind the claimant would be justified in claiming compensation for damages for loss of earnings. Although no case precisely in point has been brought to our notice, there are observations in one or two cases which came before the Calcutta High Court which show that the loss of earnings for which a claim can be made under S. 23 (iv), Land Acquisition Act, must refer to the loss resulting from acquisition of land with a going concern. One such case is A. I. R. 1927 Cal. 357.<sup>1</sup> In that case the claimant had leased his lands to Bull Brothers for the purpose of manufacturing bricks. The lease was to last for ten years; but after five years the land was acquired by Government, and the Collector awarded compensation on the basis of the rent reserved by the lease in favour of the Bull Brothers and allowed twenty years' purchase-money to the claimants. But a claim was made that damages should have been awarded by reason of the acquisition injuriously affecting the earnings of the claimants. It was contended that in addition to the market-value of the land as ascertained the claimants were entitled to damages for the loss of any profits they might have made if they had engaged in the business of brick-manufacturing after the expiry of the lease in favour of the Bulls. In support of that contention a reference was made to the case in (1875) 10 Ch. A. 435.<sup>2</sup> In dealing with this argument, the learned Judge observed as follows (p. 359) :

"It seems to me that the principle laid down in that case has no application to the circumstances of the present case. It is no doubt well-settled that in ascertaining the market-value of the land the

1. ('27) 14 A. I. R. 1927 Cal. 357 : 100 I. C. 190, Suresh Chandra v. Secy. of State.

2. (1875) 10 Ch. A. 435 : 31 L. T. 869 : 23 W.R. 685, Ripley v. Great Northern Ry. Co.



Court has to ascertain what is the market-value of the property not according to its present disposition, but laid out in the most lucrative and advantageous manner in which the owner can dispose of it. A familiar example is that of lands in or near a town which are agricultural, but capable of being used as building sites. But when once you assess the market-value of the land by taking every circumstance into consideration, I do not think that the person interested may again ask for damages on the ground that he might have made profits by engaging in a certain trade or business on the land in question.

It seems to me that a person is entitled to claim damages for loss of earnings if he carries on some business in the acquired premises and by virtue of the acquisition he is deprived of his profits by reason of the fact that he cannot find another place where he can carry on the business in which he was engaged on the acquired premises; for example in this case, if the claimant had carried on the trade of brick-making and had proved that after the acquisition he was unable to find a suitable field for carrying on his business of brick-making and by that reason would lose his customers or suffer damage in any other way, he might have made a claim for such damage."

A similar question arose before the same learned Judge in 56 Cal. 819.<sup>3</sup> At page. 823 the learned Judge observes as follows:

"'Loss of business' means that a man pursuing some trade or business, is compelled to give it up or to carry it on elsewhere, which would give him less profit than what he was making at the former place. In that case he would be entitled to compensation on that account."

These observations appear to us to support the view we take, and, in our opinion, the claimant in this case was not entitled to damages for loss of earnings. Even if we are wrong in our view that the expression "loss of earnings" in S. 23 (iv) refers to loss caused on account of acquisition to a running business and not to prospective business, we think that the damages must be proximate damages and must not be too remote. As has been pointed out in S. 56 of Vol. 6 of Halsbury's "Laws of England", 2nd edition "if the right to compensation is established, the amount of compensation is commonly determined by the ordinary rules applicable to damages in actions of *tort*." And as stated in S. 51 of the same volume, "damages which would be too remote to be recovered in an action cannot be recovered by way of compensation." In the present instance we consider that the damages claimed by the respondents are too remote. In this case only the foundation of the building in which a business was to be run subsequently had been laid. There were numerous uncertain factors which would have come into play before the building

could be completed and business begun. The loss on account of acquisition in the earnings of such a business must, in our opinion, be regarded as too remote to justify any compensation being granted. The learned advocate then contended that even if he was not entitled to damages for loss of earnings under S. 23 (iv), the compensation granted to his client for the value of the land might be enhanced by the amount which the learned Assistant Judge has awarded in addition to the amount given by the Land Acquisition Officer. The land itself was purchased by the claimant at Rs. 3-8-0 per square yard in 1935. The Land Acquisition Officer valued the land at Rs. 4 per square yard and the learned Assistant Judge valued it at Rs. 4-8-0 per square yard. The possibility that the claimant may not be able to justify his claim for loss of earnings was visualised by the claimant himself; for the learned Assistant Judge observes in Para. 46 of his judgment as follows:

"No plotting scheme is prepared for survey No. 176 south as on behalf of the claimant Narsi compensation is claimed on the basis of his prospective factory. That claim will be considered later. It is, however, urged that if Narsi cannot be given compensation on the basis of his prospective factory, the scheme applicable to Bhabha's land would equally apply to Narsi's land."

Therefore, the claim of the respondent in the alternative was that if he was not entitled to compensation for loss of earnings under S. 23 (iv), his land should be valued in the same manner as that of Mr. Bhabha, i e., the northern half of the same survey number. The learned Judge has in fact valued both the lands on the same basis and awarded Rs. 4-8-0 per square yard for both the northern and the southern halves of survey No. 176. It would appear, therefore, that the alternative contention of the claimant was accepted by the learned Judge although he has also proceeded to award compensation for the loss of earnings under S. 23 (iv), Land Acquisition Act. It is not, therefore, open to the claimant to ask that his land should be valued at a still higher figure because it possessed any special potentiality on account of its situation. The learned advocate for the respondent argued that the land was specially suited for a cigarette factory, but we do not think that there is anything in the situation of the land which makes it more suitable for a cigarette factory than for any other kind of business. We are, therefore, not prepared to increase the award made by the learn-

3. (29) 16 A. I. R. 1929 Cal. 826 : 56 Cal. 819 : 121 I. C. 572, Madhab Gobinda Ray v. Secretary of State.



ed Assistant Judge in respect of the land on account of this alleged special potentiality.

Although in our opinion no compensation can be granted either under S. 23 (i) or S. 23 (iv), Land Acquisition Act, we consider that the claimant was entitled to some compensation. The provisions of S. 23, Land Acquisition Act, are not exhaustive, and we think that under the circumstances of the case, the Land Acquisition Officer was justified in awarding compensation by way of six per cent. return on the locked up capital over and above the value of the land and the materials thereon. The result, therefore, is that this appeal must be allowed and the award of the Land Acquisition Officer restored. The appellant will get his costs of this appeal and of the proceedings in the District Court from the respondent who will bear his own.

R.K.

*Appeal allowed.*

[Case No. 33.]

**A. I. R. (33) 1946 Bombay 146**

**LOKUR AND BAVDEKAR JJ.**

*Gangadharrao Gopalrao—Plaintiff—  
Appellant*

v.

*Ramchandra and others—Defendants  
—Respondents.*

Joint First Appeals Nos. 288 and 289 of 1940, Decided on 9th March 1945, from decision of Joint First Class Sub-Judge, Dharwar, in Special Suit No. 61 of 1938.

**Hindu law — Joint family — Severance in status—Intention is test —** If demand of partition not persisted and is abandoned by consent of others, severance is not effected.

An unequivocal intention to separate effects a severance in the co-parcenary, and if it is followed by a partition, then the co-parcenary is to be deemed to have come to an end when the notice expressing the intention to separate was given. But it is possible that, after such an intention is expressed, the parties may decide not to effect a severance, but to continue to be joint as before. In such a case the mere giving of a notice expressing an intention to separate is not sufficient by itself to put an end to the coparcenary. An unequivocal demand for partition, which has not been persisted in and has been withdrawn or abandoned with the consent of the other members of the family, cannot be treated as nevertheless effecting a separation : 35 All. 80 (P.C.) ; ('39) 26 A.I.R. 1939 P. C. 174 and ('29) 16 A.I.R. 1929 All. 170, *Rel. on.*

[P 147 C 1, 2]

*R. A. Jahagirdar and P. V. Vaze for G. R. Madbhavi — for Appellant (in 288 and 289 respectively).*

*S. B. Jathar, G. A. Desai, K. R. Bengeri and B. M. Kalagate (for Nos. 5 (1) & (3), 2 to 4, 1 (A) & 2 to 4 and 6, 7 and 8, respectively in No. 288) and R. A. Jahagirdar (in No. 289) — for Respondents respectively.*

**Lokur J.**—These two appeals arise out of a suit filed by the plaintiff to recover a moiety of the properties described in the plaint at serial Nos. 1 to 30 after a partition by metes and bounds, and also for exclusive possession of the properties described at serial Nos. 31, 32 and 33. The plaintiff also asks for a declaration that he is entitled to the movable property allotted to the share of the deceased Keshavrao, and that he is entitled to receive the *judi* amounts specified in the plaint. The plaintiff Gangadharrao had three brothers, Sheshagirirao, Annarao and Keshavrao, and they formed a joint Hindu family. Sheshagirirao died without leaving a widow or any issue, and thereafter Annarao, Keshavrao and Gangadharrao lived in union. Defendant 1 Shreepad is Annarao's son, and defendant 5, Rindabai, is Annarao's daughter. Defendants 2, 3 and 4 are Shreepad's sons. After Annarao's death, defendant 1, Keshavrao and the plaintiff lived as members of a joint Hindu family. In 1917 defendant 1 Shreepad, who was then a student, executed a general power-of-attorney in favour of his uncles Keshavrao and Gangadharrao, as they were managing the joint family estate. After he completed his education, defendant 1 gave a notice to his uncles on 19th September 1921, cancelling the power-of-attorney and demanding his one-third share in the joint family properties. Besides the ancestral joint family property, Keshavrao had inherited three lands, described in serial Nos. 31, 32 and 33 in the plaint, from his wife.

It appears that, although Shreepad gave a notice to Keshavrao and Gangadharrao, he did not immediately file any suit to obtain possession of his one-third share in the family property. On 27th February 1923, Keshavrao and defendant 1, Shreepad, filed suit No. 92 of 1923 against the plaintiff Gangadharrao and his son Dattatraya to recover their two-thirds share in the ancestral joint family property by metes and bounds. Defendant 1 claimed therein certain property for himself as *jesthamsha* (elder's share) on the ground that he belonged to the eldest branch of the family. The suit resulted in a compromise decree on 15th July 1926, whereby Shreepad and Keshavrao were awarded two-thirds share in the joint family property. It appears from the decree that the property claimed by Shreepad for *jesthamsha* was not given to him. The property was subsequently divided, and defendant 1 and Keshavrao were given possession of two-thirds share in the family property. In the



compromise application it was stated that the property which Keshavrao had inherited from his wife belonged to him exclusively; but, as that property was not the subject-matter of the suit, this was not embodied in the decree.

Keshavrao died on 28th March 1936, and the plaintiff filed this suit to recover his property on the ground that he was his next heir in preference to defendant 1, who was his nephew. Defendants 1 and 5 resisted the claim. They contended that Keshavrao had died in union with defendant 1, and, therefore, his undivided share in the joint family property devolved upon him by survivorship, and also that by his two wills he had bequeathed his undivided share in the joint family property to defendant 1 and his self-acquired property to defendant 5. The plaintiff disputed the genuineness of the wills, and contended that Keshavrao did not execute them, and that at the time when he is alleged to have executed them he was lying unconscious and incapable of understanding the contents and the nature of the documents. The lower Court held that the wills propounded were not genuine, and that Keshavrao died in union with defendant 1. Plaintiff's claim to a half share in the properties jointly held by defendant 1 and Keshavrao was, therefore, rejected; but the plaintiff was given a decree for the properties, which Keshavrao had inherited from his wife. The plaintiff has preferred an appeal, No. 288 of 1940, against that part of the decree which disallowed his claim for half share in the property held by defendant 1 and Keshavrao, and defendant 5, Rindabai, has preferred appeal No. 289 of 1940 from that part of the decree which held that the wills of Keshavrao were not genuine and awarded to the plaintiff possession of the self-acquired property of Keshavrao. Both the appeals have been heard together, and this judgment will dispose of them.

Admittedly defendant 1, Keshavrao, and the plaintiff were undivided, till defendant 1 gave a notice to Keshavrao and the plaintiff on 19th September 1921. He says that he had just given the notice for the purpose of cancelling the general power-of-attorney, which he had given to his uncles in 1917; but the notice itself contains an unequivocal intention on the part of defendant 1 to separate from his uncles, and get his one-third share in the ancestral joint family property separated by metes and bounds. Ordinarily such an expression of intention effects a severance in the co-parcenary, and if it is

followed by a partition, then the co-parcenary is to be deemed to have come to an end when the notice expressing the intention to separate was given. This principle was laid down in 40 I. A. 40,<sup>1</sup> in the following terms (p. 45):

"What may amount to a separation or what conduct on the part of some of the members may lead to disruption of the joint undivided family and convert a joint tenancy into a tenancy in common must depend on the facts of each case. A definite and unambiguous indication by one member of intention to separate himself and to enjoy his share in severalty may amount to separation. But to have that effect the intention must be unequivocal and clearly expressed."

But it is possible that, after such an intention is expressed, the parties may decide not to effect a severance, but to continue to be joint as before. In such a case the mere giving of a notice expressing an intention to separate is not sufficient by itself to put an end to the coparcenary. As observed by Sir George Rankin in 41 Bom. L. R. 1136,<sup>2</sup> in order to ascertain whether the family continued to be joint, or became separated, by an expression of the intention to sever the interests, the subsequent conduct of the parties must be looked to. Thus in 51 ALL. 519,<sup>3</sup> where a member of a joint Hindu family sent a registered notice to the other members demanding a partition, but the intention to separate was given up a day or two later as the result of a subsequent agreement of the members at a family meeting and there was no disruption of the family in fact, it was held that the notice did not, by itself, operate to effect a separation in law. An unequivocal demand for partition, which has not been persisted in and has been withdrawn or abandoned with the consent of the other members of the family, cannot be treated as nevertheless effecting a separation.

After defendant 1 gave the notice, he did not insist upon his one-third share being separately put into his possession; but he joined Keshavrao in filing a suit against the plaintiff to recover two-thirds share in the ancestral joint family property, on behalf of both himself and Keshavrao, and that suit ended in a compromise. By that compromise, defendant 1 and Keshavrao were together given two-thirds of the joint family property. Thus the original idea of defen-

1. ('12) 35 All. 80 : 40 I. A. 40 : 16 O. C. 129 : 18 I. C. 30 (P. C.), *Suraj Narain v. Ikbai Narain*.

2. ('39) 26 A. I. R. 1939 P. C. 174 : I.L.R. (1939) All. 680 : I.L.R. (1939) Kar. P.C. 279 : 181 I.C. 929 : 41 Bom. L. R. 1136 (P. C.), *Ram Narayan Sahu v. Mt. Makhna*.

3. ('29) 16 A. I. R. 1929 All. 170 : 51 All. 519 : 116 I. C. 285, *Banke Bihari v. Brij Bihari*.



dant 1 to separate from both of his uncles on taking his one-third share was given up with the consent of his uncles when the suit was compromised, and in its place he and Keshavrao together took a joint two-thirds share, leaving the remaining one-third to the plaintiff. In pursuance of the compromise decree, the plaintiff divided the joint family property in his possession into two parts, one of two-thirds share, and the other of one-third share, and offered the former to defendant 1 and Keshavrao; but they objected to this method of partition, and contended that the plaintiff had included in his one-third share superior lands, and the partition had been unequal. They, therefore, proposed that the plaintiff should make three equal shares in the property, so that defendant 1 and Keshavrao might take two of them for their two-thirds share, and the remaining one-third should be taken by the plaintiff. The Court passed an order to that effect, and the plaintiff divided the property into three shares, of which two were selected by defendant 1 and Keshavrao.

Mr. Jahagirdar contends that by this method the property was divided into three distinct shares and although defendant 1 and Keshavrao got two of them, yet it cannot be said that those shares became combined into one. He contends that, even assuming that for the sake of convenience defendant 1 and Keshavrao got the two shares jointly, still they were tenants-in-common and not joint tenants, so that, after the death of Keshavrao, his share devolved by succession upon the plaintiff, and did not go by survivorship to defendant 1. This reasoning appears to be plausible, but what actually took place was that defendant 1 and Keshavrao took two-thirds share for themselves jointly. The device of dividing the property into three shares was resorted to merely to have an equitable partition of the whole property into one-third and two-thirds. The first partition effected by the plaintiff was found to be inequitable, as he had included better lands in his one-third share, and no choice was given to defendant 1 and Keshavrao. The Court, therefore, directed that defendant 1 and Keshavrao should be given an option to select any two-thirds, and that was possible only if the whole property was divided into three parts, and an option was given to defendant 1 and Keshavrao. This does not mean that the two parts which they took were taken as their separated shares. The subsequent conduct of the parties clearly shows that they intended to treat those two

shares as their joint property. In the Record of Rights the two shares were entered jointly in the names of defendant 1 and Keshavrao. If they had taken their shares separately, as the property had been divided into three equal shares, there was no difficulty in entering the name of defendant 1 for one share and that of Keshavrao for the other. But, instead of doing so, they got the two shares taken by them entered in their names jointly. Mr. Jahagirdar argues that had they continued to be members of a joint family, the name of only the manager would have been entered against the two-thirds share, and there was no necessity of entering the names of both the coparceners; on the other hand, if defendant 1 and Keshavrao were tenants-in-common, and their names were entered against the lands in that capacity, then their shares would have been mentioned after their names. But the fact that the names of them both were entered against all the lands shows that they held them jointly. If they did not intend to continue as coparceners, they could have easily got their separated shares entered against their names individually. Moreover, in a suit filed by the plaintiff in 1930 (suit No. 2 of 1930) against defendant 1 and Keshavrao, they put in a joint written statement on 28th March 1930, and therein they expressly stated that they were not divided, that they were enjoying the joint family property of their share as coparceners, and that there was no severance of coparcenary between them. This conduct clearly shows that they did not intend to put an end to their coparcenary, and even after the partition effected by the compromise decree, they two continued to remain as members of a joint Hindu family. We entirely agree with the view of the lower Court, and hold that, after Keshavrao's death, his undivided share in the ancestral joint family property devolved upon defendant 1 by survivorship, and the plaintiff has no interest in it.

As regards the two wills said to have been made by Keshavrao on the date of his death, the lower Court has come to the conclusion that he was not in a sound and disposing state of mind, but was unconscious when the said documents were executed. Admittedly, when Keshavrao returned to Dharwar from Navalgund, where he was staying for some time with defendant 5, he was seriously ill, and was not in a position to move about. The evidence of defendant 1 and his witnesses Anant, Channappa and Dattatraya is to the effect that Keshavrao



was in full possession of all his faculties when he fixed his thumb impression on the two wills; but all his witnesses are interested, and, as pointed out by the lower Court, their evidence cannot be believed on the point. Keshavrao had swelling all over the body, and yet these witnesses say that he was moving about, when he executed the wills. If that were so, there was no reason why the stamp paper on which the wills were written were not purchased by him in his own name. They were purchased by defendant 1 in his name. The plaintiff's son Dattatraya and the plaintiff's witnesses Shalambhat, Devangowda and Sidappa state that Keshavrao was lying unconscious some time before his death. If the execution of the wills was above board, the Sub-Registrar would have been sent for and registered wills would have been executed. A retired Magistrate was living in the neighbourhood, and at least he might have been sent for. The lower Court which had the benefit of observing the demeanour of the witnesses was impressed by the evidence of the plaintiff, and has come to the conclusion that Keshavrao was not in a sound and disposing state of mind, when the wills are said to have been executed. It is also significant that the thumb impressions on them were not taken clearly and look like mere smudges. It is urged that the drafts of the wills were prepared by Mr. Patwardhan pleader. Those drafts have not been produced nor has Mr. Patwardhan been examined.

In this state of the evidence, we see no reason to differ from the view taken by the lower Court, and we agree with its finding that the wills are not genuine. Hence the decree in favour of the plaintiff in respect of the self-acquired property of Keshavrao must be upheld, and both the appeals dismissed with costs.

R.K.

*Appeals dismissed.*

[Case No. 34.]

**A. I. R. (33) 1946 Bombay 149****LOKUR AND GAJENDRAGADKAR JJ.***Amritlal Maganlal — Appellant*

v.

*Harkisandas Kahandas — Respondent.*

First Appeal No. 231 of 1944, Decided on 4th April 1945, from decision of First Class Sub-Judge, Thana, in Special Suit No. 38 of 1943.

Contract — Specific performance — Draft agreement — Some terms agreed upon not embodied in draft — Formal agreement to be drawn subsequently — Contract held enforceable even though formal document not drawn up.

If the document relied upon as constituting a contract contemplates the execution of a further document between the parties, it is always a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case there is a binding contract, and the reference to the more formal document may be ignored. [P 153 C 1]

Dentered into an agreement to sell his one-third share in certain property during the pendency of the partition suit. A draft agreement was written. Some formal terms were, however, not embodied in the draft since a pacca agreement was to be drawn up shortly. All the terms were, however, already agreed upon. The formal agreement not having been executed, the intended purchaser brought a suit for specific performance:

*Held* that the mere fact that a formal document of contract was to be drawn up embodying all the terms did not render the agreement incomplete. All the terms already agreed upon but not mentioned in the draft were only subsidiary and hence the draft must be deemed to contain a completed and enforceable contract : (1877) 7 Ch. D. 29, (1912) 1 Ch. 284, (1921) 1 Ch. 57 and ('23) 10 A.I.R. 1923 P. C. 47, *Foll.*; ('41) 28 A. I. R. 1941 Bom. 247, (1921) 1 Ch. 291 and (1924) 1 Ch. 97, *Disting.*

[P 151 C 2; P 153 C 2]

*H.C. Coyajee and R. G. Karnik — for Appellant.**A. G. Desai and P. S. Malvankar —**for Respondent.*

**Lokur J.** — This appeal arises out of a suit for specific performance of a contract of sale of the defendant's one-third share in the property called Bapana-Khar in Bassein taluka and for recovery of its possession as well as mesne profits, or in the alternative for the return of the earnest money, together with Rs. 5250 as damages for breach of contract. The main facts which led to this suit are undisputed. Bapana-Khar was owned in equal shares by the defendant Amritlal, his brother Hiralal and their nephew Navanital. They were separated, and had divided their property, but they had kept Bapana-Khar undivided, and wanted to dispose of it. The defendant had already mortgaged his one-third share to his niece Kamalabai, and an estate-broker named Bhagwandas had obtained a money decree against him. So on 24th March 1943, he passed a writing, Ex. 39, to Bhagwandas authorising him to bring about a contract for the sale of his share in Bapana-Khar for Rs. 10,000 within one month. The plaintiff, a businessman of Bombay, wanted to invest some money in lands, and had asked his father Kahandas, as well as the broker Nanuram, to negotiate for the purchase of some suitable lands. It was at the instance of Nanu-



ram that Bhagwandas took the agreement, Ex. 39, from the defendant. Then on 5th April 1943, the plaintiff obtained an agreement, Ex. 38, from Hiralal for the sale of his share in Bapana-Khar, together with some other property for Rs. 15,001. On 10th April 1943, the defendant, at the instance of Bhagwandas, passed a writing (Ex. 39) to the plaintiff agreeing to sell his share to him for Rs. 10,000. On 21st April 1943, Navanital also passed an agreement (Ex. 35) to the plaintiff for the sale of his share for Rs. 9999. Both Hiralal and Navanital executed sale-deeds in favour of the plaintiff in fulfilment of their agreements without any hitch on 22nd June and 16th June respectively. But the defendant's agreement did not run a smooth course, and as he refused to pass a sale-deed, the plaintiff had to institute this suit.

The defendant resisted the plaintiff's claim on two grounds, namely, that he had been fraudulently misled into agreeing to sell his share for Rs. 10,000 on a misrepresentation that his brother Hiralal also had agreed to sell his share for Rs. 11,000, and that the alleged agreement was not a concluded contract and therefore the plaintiff was not entitled to claim its specific performance. The lower Court disallowed both these objections and decreed specific performance of the contract on payment of the balance of the consideration, and also possession of the defendant's one-third share in the Bapana-Khar; but it did not award any damages. The defendant has appealed against the decree and the plaintiff has put in cross-objections claiming Rs. 2200 by way of damages. There is no substance in the defendant's contention of misrepresentation and fraud. The alleged representation that Hiralal had sold his share for Rs. 11,000 is not proved, nor can it be said to be false, since the property sold by Hiralal for Rs. 15,001 included not only his one-third share in Bapana-Khar, but also some other property. This ground of defence was candidly given up and was not pressed in this Court. In support of the defendant's second contention that the agreement, Ex. 39, was not a concluded contract, his learned counsel, Mr. Coyajee, urged two reasons, namely, that Ex. 39 itself expressly stated that a pucca agreement was to be drawn up later, and that all the terms agreed upon were not embodied in Ex. 39. We find that both these reasons are true, but they do not render the agreement unenforceable. To appreciate this, it is necessary to go into some details. When

the defendant entered into the agreement with Bhagwandas on 24th March 1943, he had filed a suit for partition and separate possession of his one-third share in Bapana-Khar against Hiralal and Navanital, and the suit was pending. By that agreement (Ex. 39) the defendant authorised Bhagwandas to bring about an agreement of sale of his one-third share in Bapana-Khar for Rs. 10,000 within one month on the following terms:

(1) On the date of the agreement, he should be paid Rs. 1000 as earnest; (2) Rs. 3000 more should be paid to him within seven days thereafter; (3) the balance of Rs. 6000 should be paid within one month from the date of agreement and the sale-deed executed; (4) the vendee should bear the expenses incurred thereafter for the prosecution of the partition suit pending in the Andheri Court; (5) the vendor should take the income of 1942-43 and thereafter the vendee should take it; (6) the vendee should pay the Government assessment for 1943-44 and thereafter; (7) the vendee should bear the cost of the execution of the sale-deed; and (8) on receipt of Rs. 4000 as provided above the defendant should satisfy Kamalabai's mortgage on the land.

The defendant agreed to pay brokerage at one per cent. to Bhagwandas if he would get a purchaser on these terms. Accordingly Bhagwandas approached the plaintiff's broker Nanubhai and all the parties including the plaintiff's father Kahandas, and his brother Nagindas, who is a solicitor, met together at Papadi on 10th April 1943, and after a discussion of the terms a draft agreement (Ex. 57) was drawn up. It was written by Bhagwandas, signed by the plaintiff and attested by Nanubhai and another. Its terms were:

(1) On the date of the agreement the plaintiff should pay Rs. 100 as earnest. [This amount was paid in cash then and there.] (2) Within seven days, Rs. 400 more should be paid as earnest and *pacca sata-patra* (deed of contract) on a one rupee stamp paper should be executed. (3) Within a fortnight thereafter, the plaintiff should pay Rs. 4000, with which the defendant should redeem Kamalabai's mortgage, and hand over the mortgage-deed to the plaintiff. (4) The sale-deed should be executed within three months of the *pacca sata-khat*, after the plaintiff is satisfied about the defendant's marketable title.

The execution of this agreement is admitted by the defendant. It may be noted that it does not embody the same or all the terms contained in Ex. 39. The terms regarding the payment of the earnest are different, and it is silent about the prosecution of the suit, the enjoyment of the income, the payment of the assessment and the cost of the execution of the sale-deed. It contemplated the execution of a pucca deed on a stamp paper within seven days. Two days later, on 12th April the parties met again at Papadi and Vagh was called to write out the pucca



*sata-patra* on a stamp paper. The defendant had brought extracts of Record of Rights and gave them to Vagh, who then wrote out the agreement. He read it out to the parties and it was found that he had omitted to refer to the redemption of Kamalabai's mortgage, and to some other details. He said that he would rewrite it, but as it was late, and as the plaintiff and his father were in a hurry to catch the train to Bombay, the idea of a formal *pacca sata-khat* was given up, and it was settled that the sale-deed itself should be executed as soon as possible. Kahandas was prepared to pay Rs. 400 as earnest, but the defendant said that the whole of the balance of the price might be paid when the sale-deed was executed. He also asked the plaintiff, his brother Nagindas and his father Kahandas to go to Andheri Court on 17th April to inspect the title deeds and other papers. On the 17th they all went to Andheri Court and the defendant's pleader Mr. Karnik showed them the papers of the partition suit, and Nagindas told Mr. Karnik the terms of the sale that had been agreed upon. Nagindas then returned to Bombay, and all the others went to Mr. Karnik's house. There at Mr. Karnik's dictation, the defendant's clerk, Bhole, wrote out the points to be included in the sale-deed. That document is Ex. 67, and among the points noted in it are that the plaintiff should get his name brought on the record of the partition suit pending in the Andheri Court and proceed with it, that he should pay future Government assessment, and that the plaintiff should take the income up to the date of the sale-deed.

According to the plaintiff, they were to meet on the next day, Kamalabai's dues were to be paid off and the sale-deed was to be executed; but the defendant avoided it. In the correspondence that followed, the defendant never alleged that there was no completed contract for sale, but complained that the plaintiff had broken it. On 10th April 1943, he sent a notice (Ex. 59) to the plaintiff through his pleader Mr. Karnik, in which he stated that the plaintiff had made an agreement on 10th April 1943, to purchase his Bapana-Khar for Rs. 10,000 and had failed to observe the conditions of the contract, that the said agreement should, therefore, be treated as cancelled and that the earnest of Rs. 100 paid by the plaintiff was forfeited. The plaintiff sent a reply to it on the next day stating that he had not broken the contract and calling upon him to satisfy Kamalabai's mortgage, receive the

balance of the price fixed and execute a sale-deed. When the plaintiff sent him some more notices and threatened to file a suit, the defendant replied on 21st May 1943, that there was no completed contract of sale, and that he had been mis-informed by the plaintiff that Hiralal had sold his share for rupees 11,000 only. After some further correspondence the plaintiff filed this suit.

The suit is based on the agreement of 10th April 1943, (Ex. 39), and some of the formal terms which had been agreed upon were not set out in it, as a formal *sata-khat* on a stamp paper was intended to be shortly drawn up. Bhagwandas himself has stated in his deposition what those terms were. He says that in the *pakka sata-khat* it was to be mentioned that the purchaser should bear the cost of the execution of the document, that the purchaser should continue the partition suit in the Andheri Court, that the vendor should take the income of 1942-43, and that thereafter the purchaser should pay the assessment and take the income. All these terms were agreed upon before the agreement was written out on 10th April 1943. The mere fact that a formal document of contract was to be drawn up embodying all the terms does not render the agreement incomplete. In 21 Bom. L. R. 302<sup>1</sup> Marten J. held that such an agreement did not amount to a contract since the reference to the drawing up of a bargain paper prevented the completion of the contract until such a bargain paper was executed. That decision was set aside in appeal, and in 50 I. A. 25<sup>2</sup> the Privy Council held that where a contract of sale of land contained all the necessary terms and provided that the bargain paper should be prepared by a *vakil*, that provision could not be construed as a condition precedent, and that the purchaser was entitled to have specific performance of the contract.

The writing, Ex. 39, read by itself, contains a complete contract. If there were some other terms, which had been agreed upon, but were not included in the writing as another formal *pacca sata-khat* was to be drawn, it is open to the parties to prove what those terms were, provided they were clearly agreed upon and are not inconsistent with the written agreement. They would clearly fall within the second proviso to

1. (19) 6 A. I. R. 1919 Bom. 154 : 50 I. C. 403 : 21 Bom. L.R. 302, Govind Laxman v. Harichand Mancharam.  
2. (23) 10 A. I. R. 1923 P. C. 47 : 47 Bom. 335 : 50 I. A. 25 : 71 I. C. 763 (P. C.), Harichand Mancharam v. Govind Laxman Gokhale.



S. 92, Evidence Act, as pointed out by Pontifex J. in 6 Cal. 328.<sup>3</sup> A large number of cases were cited at the bar as to whether in the absence of a formal deed of agreement which was contemplated, an agreement already entered into is not binding on the parties and is, therefore, unenforceable. The effect of the English cases on the subject is accurately summed up in Halsbury, Vol. 29, p. 237, paras. 321 and 322, as follows :

"An acceptance must be absolute and unqualified. There is no completed contract if the acceptance is 'subject to approval of terms of contract,' or 'subject to a formal contract being prepared and signed by both parties as approved by their solicitors,' or simply 'subject to contract,' or where it otherwise appears that all the terms of the contract are not definitely settled or that additional terms are to be agreed to and inserted in the formal contract.

On the other hand, if it appears that the parties have agreed upon the essential terms of the sale a mere intimation of a desire that the agreement shall be embodied in another document of a more formal nature, or the expression of what is necessarily a condition, not of the acceptance, but of the contract itself, does not prevent the agreement being enforceable.

It is a question of construction whether the parties have come to a final agreement, though they intend to have a more formal document drawn up."

The law is the same in India, except that there being no statutory provision corresponding to the Statute of Frauds, the agreement need not be in writing. Mr. Coyajee, for the appellant, cited several cases which fall within the first of the three paragraphs quoted above, while in our opinion the facts of the present case bring it under the second paragraph. The test of the difference between the two cases is clearly expressed by Jessel M. R. in (1877) 7 Ch. D. 29<sup>4</sup> as follows (p. 32): "... where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says ; it is subject to and is dependent upon a formal contract being prepared. When it is not expressly stated to be subject to a formal contract it becomes a question of construction whether the parties intended that the terms agreed on should merely be put into form, or whether they should be subject to a new agreement the terms of which are not expressed in detail."

The same view was expressed in (1912) 1 Ch. 284<sup>5</sup> and (1921) 1 Ch. 57.<sup>6</sup> The principles laid down in these cases were applied in 50 I. A. 25<sup>2</sup> and their Lordships of the Privy Council observed (p. 31) :

3. ('81) 6 Cal. 328, Cutts v. Brown.

4. (1877) 7 Ch. D. 29 : 47 L. J. Ch. 139 : 26 W. R. 230, Winn v. Bull.

5. (1912) 1 Ch. 284 : 81 L. J. Ch. 184 : 105 L. T. 434, Von Hatzfeldt-Wildenburg v. Alexander.

6. (1921) 1 Ch. 57 : 90 L. J. Ch. 204 : 124 L. T. 294, Rosedale v. Denny.

"Exhibits A and A-1 show clearly that the parties had come to a definite and complete agreement on the subject of the sale. They embodied in the documents that were exchanged the principal terms of the bargain on which they were in absolute agreement, and regarding which they did not contemplate any variation or change. The reservation in respect of a formal document to be prepared by a vakil only means that it should be put into proper shape and legal phraseology, with any subsidiary terms that the vakil might consider necessary for insertion in a formal document."

These remarks are aptly applicable to the agreement in the present case. The three terms referred to by Bhagwandas and also by the defendant regarding the cost of the execution of the document, the continuation of the Andheri suit and the appropriation of the income, which were to be embodied in the agreement to be drawn up on a stamp paper, were only subsidiary. Even in the absence of any express mention, those terms would have been implied as a legal consequence of the sale. Under S. 29, Stamp Act, the purchaser has to bear the cost of the execution of the sale-deed. Under S. 55, T. P. Act, the vendor takes the income till the execution of the sale-deed, and thereafter the purchaser. After the sale, the vendor would have no interest left in the land, and the purchaser would necessarily have to get his name substituted in the suit about the property purchased by him and to proceed with the suit. In fact after purchasing the shares of Hiralal and Navanilal, the plaintiff joined the suit as a defendant in their place, and had the defendant sold his share, the plaintiff would have become the owner of the whole of Bapana-Khar and the suit for its partition would not have survived. The complaint of the defendant that he had to carry on the suit is groundless, since the plaintiff could not get his name substituted for him, until he got the sale-deed from him. He must thank himself if he was put to any expense in prosecuting the suit until it was compromised. Moreover the defendant expressly admits in his statement that all these terms had been agreed upon before Ex. 39 was written out. To quote his own words :

"These points were settled between us and decided already on 10th April. Only our decisions were to be embodied in the formal agreement of sale which was to be drawn up later."

Bhagwandas says that although all the terms had been settled, the *pakka sata-khat* could not be written on 10th April as the survey numbers of the lands to be sold were not available. It is thus evident that all the principal terms of the agreement were noted down on the 10th and a formal



deed of agreement, embodying the subsidiary terms also, was to be drawn up after the defendant supplied the information about the survey numbers of the lands. It was not contemplated that the terms agreed upon were to be further discussed or varied or that any other terms were to be added. Mr. Coyajee has relied upon the ruling of this Court in I. L. R. (1941) Bom. 361.<sup>7</sup> That case bears some resemblance to the facts of this case, but can be easily distinguished. In that case Broomfield J. has laid great stress upon the ruling in (1921) 1 Ch. 291,<sup>8</sup> and has significantly remarked that it was not cited before their Lordships of the Privy Council when they decided 50 I. A. 25.<sup>2</sup> With respect, we do not think that (1921) 1 Ch. 291<sup>8</sup> lays down any different principle. The facts of that case show that the agreement of sale was *subject* to the condition that a written contract made *inter partes* should be formally entered into, and in the absence of such a document it was held that there was no enforceable contract. The other case relied upon by Broomfield J. was (1924) 1 Ch. 97.<sup>9</sup> There too there was an agreement to purchase land "subject to a proper contract to be prepared by the vendor's solicitors." It was held that in the absence of such an executed agreement, either party was entitled to break off negotiations on the simple ground that there was no contract capable of enforcement. These cases clearly fall under the first of the three paragraphs quoted above from Halsbury. Broomfield J. has also referred to Halsbury's footnote to the said para. 322, which says:

"In practice the reference to a future contract is now treated as making the acceptance conditional on the signing of a formal contract."

We respectfully prefer to follow the ruling of the Privy Council in 50 I. A. 25,<sup>2</sup> which is binding on us. As pointed out by Parker J. (afterwards Lord Parker) in (1912) 1 Ch. 284,<sup>5</sup> if the document relied upon as constituting a contract contemplates the execution of a further document between the parties, it is always a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no en-

forceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract, and the reference to the more formal document may be ignored. The reference to a formal document in Ex. 39 belongs to the latter class. In I. L. R. (1941) Bom. 361<sup>7</sup> Broomfield J. observed (p. 372):

"It will be seen that there are a number of other terms besides those agreed on between Nandurdikar and Sir Shapurji. Some of them may be said to be matters of form, that is terms which would have been implied anyhow under the Transfer of Property Act. But this does not by any means apply to all of them, for instance the provision about the fire policy and about the press pool and ginning pool agreements."

Divatia J. also distinguished the Privy Council case on the ground that the terms alleged to have been agreed to in the first instance were not all the terms embodied in the draft agreement and they could not be regarded as merely subsidiary. In the present case, as already pointed out, all the terms already agreed upon but not mentioned in Ex. 39 were only subsidiary and hence Ex. 39 must be deemed to contain a completed and enforceable contract. In I.L.R. (1941) Bom. 361<sup>7</sup> specific performance was refused also on the ground that the plaintiff had asked for specific performance not of the terms agreed to between his broker and the defendant, but of the terms in the draft agreement. Mr. Coyajee argues that here too the plaintiff has sought specific performance of the agreement contained in Ex. 39, ignoring the other terms orally agreed upon. But those are only subsidiary terms which legally follow the sale, though not specified, and the plaintiff has never refused to abide by them.

As admitted in the written statement, the plaintiff was ready to pay the balance of the earnest, but the defendant refused to accept it. If the defendant had passed the sale-deed, there would have been no need to prosecute the Andheri suit. The plaintiff is not shown to have broken the contract, but the defendant's notice to the plaintiff shows that he wanted to back out of it, on the false excuse that a false representation had been made to him that Hiralal had agreed to sell his share for Rs. 11,100. The plea that there was no completed contract of sale was an afterthought, and as both the grounds of defence have failed, the plaintiff is rightly given a decree for specific performance and other ancillary reliefs granted by the lower Court. The plaintiff had claimed Rs. 2200 as

7. ('41) 28 A.I.R. 1941 Bom. 247 : I. L. R. (1941) Bom. 361 : 196 I. C. 146, New Mofussil Co. Ltd. v. Shankarlal Narayandas.

8. (1921) 1 Ch. 291 : 90 L. J. Ch. 61 : 124 L. T. 402, Coope v. Ridout.

9. (1924) 1 Ch. 97 : 93 L. J. Ch. 129 : 129 L. T. 808, Chillingworth v. Esche.



mesne profits, but the lower Court refused to award him any mesne profits on the ground that the defendant's possession was not wrongful till the sale-deed was executed. The plaintiff has put in cross-objections claiming that amount in this appeal. Technically the view of the lower Court is correct, but when the plaintiff produced the balance of the purchase-money in Court, he became entitled to the execution of the sale-deed and possession of the property. Hence the proper order would be to award to the plaintiff damages equivalent to mesne profits from the date of his paying to the defendant or into the Court the unpaid balance of the purchase-money as ordered by the lower Court till the recovery of possession, the amount to be determined in execution proceedings. With this modification, we confirm the decree of the lower Court and dismiss the appeal with costs. The parties shall bear their own costs of the cross-objections.

R.K.

*Appeal dismissed.*

[Case No. 35.]

**A. I. R. (33) 1946 Bombay 154****LOKUR AND WESTON JJ.***Ahmedabad Municipality—Applicants*  
v.*Mulchand — Opponent.*

Civil Revn. Appln. No. 401 of 1943, Decided on 3rd April 1945, from order of Registrar, Court of Small Causes, Ahmedabad, in Suit No. 971 of 1942.

Defence of India Rules (1939), Rule 38B — Borough Municipality — Supersession under R. 38B—Administrator continuing suit filed — Provincial Government is not necessary party — Bombay Municipal Boroughs Act (1925), Section 219.

The powers and duties conferred upon the Administrator of a superseded Borough Municipality under sub-r. (2) (b) of R. 38B, Defence of India Rules, 1939, include the powers and duties of the Municipality to institute and defend suits under S. 204, Bombay Municipal Boroughs Act, 1925. The Administrator has, therefore, the right to continue the suit instituted by the Municipality prior to its supersession. He sufficiently represents the superseded Municipality and any liability arising out of a proceeding to which he is a party will have to be met out of the municipal fund created under S. 65 of the Act and held and applied by the Municipality as a trustee. Hence even after the fund has vested in the Provincial Government, it shall be liable to pay the expenses of any civil proceeding prosecuted or defended by the Administrator although the Provincial Government may not be a party to the proceeding. The Provincial Government, therefore, is not a necessary party to a suit filed or continued by the Administrator of a superseded Municipality: ('06) 29 Mad. 539 and ('42) 29 A. I. R. 1942 F. C. 14, *Rel. on.* [P 155 C 1, 2]

*J. C. Shah and N. C. Shah — for Applicants.*

**Lokur J.** — This revision application raises the important question of the necessity of impleading the Provincial Government in a suit filed by or on behalf of a superseded local authority. The suit out of which this application arises was filed by the Municipal Borough of Ahmedabad against its contractor Mulchand to recover Rs. 46-14-0 by way of damages for loss caused by his negligence by reason of which the plaintiff had to pay damages to one Sakrabhai Motichand. The suit was filed in the Court of the Registrar of the Small Cause Court, Ahmedabad, and when it was pending, the Government of Bombay, in exercise of its powers under sub-r. (1) of R. 38-B, Defence of India Rules, 1939, issued a notification superseding the Ahmedabad Municipality and appointing the Collector of Ahmedabad to exercise all the powers and duties of the Municipality under cl. (b) of sub-r. (2). A few days later Mr. Whitworth was appointed as the Administrator of the Municipality under that clause, and he took over the charge from the Collector on 7th September 1942. He applied to the Court to be joined as plaintiff 2. He was added as plaintiff 2, but on the defendant's objection, the Court held that the Government of Bombay was a necessary party, and refused to proceed with the suit until the Government of Bombay was added as a defendant. The plaintiffs have now come in revision against that order. Sub-rule (1) of R. 38B, Defence of India Rules, 1939, empowers the Provincial Government to supersede a local authority under certain circumstances for such period as it may think necessary. Sub-rule (2) provides that when such an order of supersession has been made under sub-rule (1) —

"(a) all the members of the local authority shall, as from the date of supersession, vacate their offices as such members; (b) all the powers and duties which may, by or under any law for the time being in force, be exercised or performed by or on behalf of the local authority shall, until the local authority is reconstituted . . . . be exercised and performed by such person or persons as the Provincial Government may direct; (c) all property vested in the local authority shall until the local authority is reconstituted . . . . vest in the Provincial Government."

These provisions correspond to S. 219, Bombay Municipal Boroughs Act, 1925. Under s. 8 of that Act, the Ahmedabad Borough Municipality is a body corporate having a perpetual succession, and it may sue or be sued in its corporate name through its Chief Officer. Section 204, sub-s. (1) empowers a Borough Municipality to file a suit



and to compound or compromise a suit instituted by or against it. Sub-section (4) of that section renders municipal fund liable to pay the expenses of any civil proceeding prosecuted or defended on its behalf. The powers and duties conferred upon the Administrator of a superseded Borough Municipality under sub-rule (2) (b) of Rule 38B, Defence of India Rules, 1939, include the powers and duties of the Municipality to institute and defend suits under S. 204, Bombay Municipal Boroughs Act, 1925. It is, therefore, clear that the Administrator has the right to continue the suit instituted by the Municipality prior to its supersession. But as all property vested in the Municipality has now vested in the Provincial Government under sub-r. (2) (c), the lower Court thinks that if the defendant succeeds and is allowed the costs of the suit, he will not be able to recover them as it will be open to the Government to say that it is not bound by the decree and that the property vested in it is not liable to the costs in a suit to which it was not a party. This fear is unfounded since S. 204, sub-s. (4), expressly declares the municipal fund to be liable to pay the expenses of any civil proceeding, prosecuted or defended on behalf of the Municipality. As pointed out in 29 Mad. 539,<sup>1</sup> a supersession has not the effect of a dissolution, and when the Municipality is reconstituted in pursuance of an order under cl. (b) or cl. (c) of sub-s. (3) of R. 38B, it is a revival of the old corporation and not the creation of a new one, and as pointed out by the Federal Court in A. I. R. 1942 F. C. 14<sup>2</sup> during the period when the order of supersession is in force, the statute makes it clear that all the members of the Committee vacate their seats and that all the powers and duties of the Committee are to be exercised and performed by the Administrator. It was held in that case that the person competent to take the proceedings was the Administrator. He, therefore, sufficiently represents the superseded Municipality and any liability arising out of a proceeding to which he is a party will have to be met out of the municipal fund. That fund is created under S. 65 of the Act, and it is to be held and applied by the Municipality as a trustee, subject to the provisions and for the purpose of the Act. Hence even after it has

vested in the Government of Bombay, it shall be liable to pay the expenses of any civil proceeding prosecuted or defended by the Administrator although the Government may not be a party to the proceeding.

We, therefore, hold that the Government of Bombay is not a necessary party to a suit filed or continued by the Administrator of a superseded Municipality. We make the rule absolute and order the lower Court to proceed with the suit without requiring the plaintiffs to join the Government of Bombay as a defendant. Opponent 1 shall pay the costs of the petitioners and bear his own.

R.K./V.S. *Rule made absolute.*

[Case No. 36.]

**A. I. R. (33) 1946 Bombay 155**

MACKLIN AND RAJADHYAKSHA JJ.

*Land Acquisition Officer — Appellant*  
v.

*Jivanlal and others — Respondents.*

First Appeals Nos. 81 and 82 of 1942, Decided on 20th March 1945, from decision of Joint Judge, Ahmedabad, in Compensation Cases Nos. 34 and 28 of 1941.

Land Acquisition Act (1894), S. 23 — Valuation, mode of—Court not precluded from estimating value of buildings apart from land.

Where it is not possible to ascertain the value of the property being acquired except by reference to transactions relating to property in the neighbourhood, the Court is not precluded from coming to an independent estimate of the value of the buildings apart from the land. [P 155 C 1 ; P 156 C 1]

*B. G. Rao, Government Pleader—*for Appellant.

*G. N. Thakor and V. N. Chhatrapati*

— for some Respondents.

*J. C. Shah and N. C. Shah*

— for Respondents 1 and 2.

**Macklin J.** — These two appeals are concerned with the acquisition of certain properties for the Kalupur Relief Road under construction in Ahmedabad. The amount involved in these appeals is very small, but we are told that they have been presented because they involve a question of principle, namely, the question of the extent to which it is permissible to separate the value of the land itself from the value of the buildings on the land for the purposes of comparison with sales and other dispositions of property in the neighbourhood. It is stated in 10 Bom. L. R. 907<sup>1</sup> at p. 912 that land is a marketable commodity of one description, and land with buildings on it is a marketable commodity of another and a different description, and that there is no known process by which, from the as-

1. ('06) 29 Mad. 539, Mahamahopadyaya Rangachariar v. Municipal Council of Kumbakonam.

2. ('42) 29 A. I. R. 1942 F. C. 14 : I. L. R. (1942) Kar. F. C. 34 : I. L. R. (1944) Lah. 373 : (1942) F. C. R. 31 : 199 I. C. 331 (F. C.), Lahore Municipality v. Daulat Ram.

1. ('08) 10 Bom. L. R. 907, Government of Bombay v. Merwanji Muncherji.



certained value of land *plus* buildings as an investment, it is possible to deduce the value of the land alone. With that remark we are in entire agreement. But the difficulty in this case is that it is not possible to ascertain the value of the property being acquired except by reference to transactions relating to property in the neighbourhood, and, in many cases, it happens that the comparison, owing to substantial differences between the nature of the structures on the land, or even owing to the fact that there may be no structure at all on the land, cannot be made except by attempting to estimate the value of the buildings apart from the land. As the learned Judge of the trial Court remarks, we have to do the best we can with the available evidence of transactions relating to the property in the neighbourhood. It is not disputed by the learned Government Pleader that we are entitled to compare, for example, the price of land with buildings on it with the price of land without buildings on it. But his contentions ignore the practical difficulty of making any such comparison without coming to an independent estimate of the value of the buildings apart from the land.

Dealing first with Appeal No. 81 of 1942, it consists of three blocks of property. I have dealt with the question of separating the value of the structures from the value of the land; and in this particular instance it was absolutely necessary to do so. The basis of the learned Judge's decision is the price of properties referred to as A and B. The buildings on those properties were negligible. The learned Judge came to an estimate of the value of the buildings apart from the land to be acquired and estimated them at Rs. 7740. It is not suggested that this valuation is wrong. All that is suggested is that it was wrong to come to any valuation of the buildings at all. The Land Acquisition Officer estimated Rs. 125 a square yard as a fair price for land *plus* buildings on the frontage of the Swaminarayan Temple Road and Rs. 70 a square yard as a fair price for land *plus* buildings to the rear. Having estimated the value of the buildings the learned Judge deducted this value from the total amount awarded by way of compensation and treated the value awarded for the land on the frontage of the road as Rs. 80 and the value awarded for the land to the rear as Rs. 70. He thought that in each case this was too low a valuation and that he ought to increase it by Rs. 4 having regard to the price awarded for properties

A and B on the basis of the land value alone. Having done so he increased the value of the land to Rs. 84 and Rs. 74 a square yard respectively and increased the total award by a sum of Rs. 1048. We are quite unable to say that the valuation arrived at by the learned Judge is incorrect. It is impossible for a Court of Appeal to distinguish such small differences between the valuation of the District Court and the valuation of the Land Acquisition Officer. One of them may be right or both of them may be wrong. But if one of them is right, we are quite unable to say which is right. We are satisfied that neither in principle nor in fact is there anything wrong with the estimate reached by the District Court.

So far I have dealt with City Survey Nos. 4233 to 4237. The next item with which we are concerned in this appeal is property No. 4334. The Land Acquisition Officer awarded Rs. 50 a square yard, and the District Court awarded Rs. 57-8-0 a square yard, a total increase of Rs. 341. This was a piece of open land, and the only transactions capable of comparison relate to land with buildings. The learned Judge felt obliged to separate the land from the buildings, and having done so he has given good reasons for considering Rs. 57-8-0 as the value of the land being acquired. The same remarks apply to No. 4335. Neither with respect to this property nor with respect to any of the other properties which are the subject of Appeal No. 81 do we feel ourselves in a position to say that the District Court has come to a wrong valuation. As to Appeal No. 82 of 1942, that again relates to open land, and once more it has not been possible to find any transaction except transactions relating to land with buildings on it. Having separated to the best of his ability the value of the land used for comparison from the value of that land together with the buildings on it, the learned Judge has come to the conclusion that Rs. 80 per square yard is a fairer valuation than Rs. 70. He says that on a consideration of the evidence derivable from four transactions he feels that the land value of Rs. 70 awarded by the Land Acquisition Officer is rather too low and that he ought to put it at Rs. 80. On what principles an appellate Court is expected to differ from that conclusion and interfere is not clear. At any rate we feel ourselves entirely unable to do so. The result is that both the appeals fail and are dismissed with costs.

R.K./V.S.

Appeals dismissed.



[Case No. 37.]

**A. I. R. (33) 1946 Bombay 157**

DIVATIA AND LOKUR JJ.

- *Ratanchand Fakirchand* — Appellant  
v.*Deochand Dahyabhai* — Respondent.

First Appeal No. 74 of 1942, Decided on 14th March 1945, from decision of First Class Sub-Judge, Surat, in Darkhast No. 284 of 1939.

(a) Husband and wife — Sale-deed in wife's name — Whether transaction is benami — On whom burden of proof lies explained — Rule of advancement does not apply in India.

Where the sale-deed is in favour of the wife and there is nothing in it to indicate that she was only a benamidar for her husband, the onus lies on the other side to make out that the transaction was benami. No doubt the rule of English law that the purchase of property by a husband in the name of his wife is assumed to be for her advancement, has no application in India; but there is no presumption that property standing in the name of the wife belongs to the husband. [P 157 C 2]

The mere fact of marriage does not raise a presumption that any property standing in the name of the wife must be regarded as held by her in benami for her husband. The ordinary rule is that a husband claiming that property standing in the name of his wife really belongs to him must prove that the wife is only a benamidar for him, and the burden is discharged if the husband succeeds in proving that the purchase-money was paid by him. Until the contrary is shown, it is assumed that he who supplied the purchase money is the owner of the property though it was purchased in another's name. If the husband has paid the purchase-money, and it is contended that he had purchased it in his wife's name for her benefit, the burden of proof is thrown on the wife. [P 158 C 1]

Where the husband actually purchases property in the name of his wife, such a transaction standing alone and unexplained by other proved and admitted facts should be regarded as a benami transaction : ('25) 12 A.I.R. 1925 P. C. 181, *Ref.*

[P 158 C 1]

(b) Benami—Motive alleged could be served only by genuine purchase — Purchase is not benami but genuine.

Where the motive alleged for a benami transaction itself suggests that the purpose in view could be served only by a genuine purchase and not by a mere benami transaction, the more reasonable inference is that the purchase was intended to be operative as a genuine purchase and not a benami transaction : ('38) 25 A.I.R. 1938 Mad. 8, *Foll.*

[P 159 C 1]

*H. C. Coyajee and H. M. Choksi* —  
for Appellant.

*G. N. Thakor and B. G. Thakor* —  
for Respondent.

**Lokur J.** — This appeal arises out of darkhast proceedings in the Court of the First Class Subordinate Judge at Surat. The decree under execution was obtained by the respondent Deochand against the appellant Ratanchand and his minor step-brothers Hirachand and Jivachand by their mother

Subhadra as their guardian *ad litem*, for the recovery of Rs. 4100 with interest and costs out of the property of their deceased father Fakirchand which might have come into their possession. The decree expressly stated that there was no liability against the persons or against the exclusive properties of the defendants. In the suit Deochand had claimed that survey Nos. 22/1 and 33 at Rundh belonged to Fakirchand, and the appellant Ratanchand had contended that he had inherited them from his mother Bai Jaskor on her death in 1923; but that question was left open. Deochand presented this darkhast to recover the decretal amount by sale of those two lands in execution of his decree, and the appellant resisted it on the ground that they had been purchased by his mother Bai Jaskor from one Manekji Aderji for Rs. 24,500 on 27th March 1922, and that on her death on 20th December 1923, they had devolved upon him as her heir. The sale-deed was passed by Manekji in favour of Bai Jaskor, but Deochand contended that her husband Fakirchand himself had purchased the lands in her name and that she was only a benamidar for him. The executing Court upheld that contention and ordered the sale of the lands. It is against that order that this appeal is preferred by Ratanchand alone. His step-brothers are still minors, and their mother Subhadra thought it prudent to remain absent and not to put in any written statement. Evidently she did not wish to support the decree-holder by admitting that the lands belonged to Fakirchand, or to support the appellant by admitting that they belonged to Jaskor, thereby depriving herself and her sons of all interest in them. Being thus placed in a dilemma, she seems to have been advised not to say anything in the darkhast.

The only question which thus arises for decision in this appeal is whether it is proved that Bai Jaskor was only a benamidar and Fakirchand the real owner of the two lands in dispute. The sale-deed is in favour of Bai Jaskor and there is nothing in it to indicate that she was only a benamidar for her husband Fakirchand. The onus, therefore, lies on the decree-holder to make out that the transaction was benami. It is true that the rule of English law that the purchase of property by a husband in the name of his wife is assumed to be for her advancement, has no application in India; nor is there any presumption that property standing in the name of the wife belongs to the husband. Our attention is



called to the following observations of Sir John Edge in 52 I. A. 286<sup>1</sup> (p. 289) :

"There can be no doubt now that a purchase in India by a native of India of property in India in the name of his wife unexplained by other proved or admitted facts is to be regarded as a benami transaction, by which the beneficial interest in the property is in the husband, although the ostensible title is in the wife. The rule of the law of England that such a purchase by a husband in England is to be assumed to be a purchase for the advancement of the wife does not apply in India."

With respect, we do not think that this passage is intended to lay down any wide proposition of law that the mere fact of marriage raises a presumption that any property standing in the name of the wife must be regarded as held by her in benami for her husband. In the Privy Council case the property had been actually purchased by the husband in the name of his wife and their Lordships refused to apply the English rule of presumption that the purchase was for the advancement of the wife. The first sentence in the above passage should not be taken apart from the context in which it occurs. The ordinary rule is that a husband claiming that property standing in the name of his wife really belongs to him must prove that the wife is only a benamidar for him, and the burden is discharged if the husband succeeds in proving that the purchase money was paid by him. Until the contrary is shown, it is assumed that he who supplied the purchase money is the owner of the property, though it was purchased in another's name. In the Privy Council case, it was admitted that the husband had paid the purchase money, and it was contended that he had purchased it in his wife's name for her benefit. It was in view of these pleadings that the burden of proof was thrown on the wife, and it was laid down that where the husband actually purchased property in the name of his wife, such a transaction standing alone and unexplained by other proved and admitted facts should be regarded as a benami transaction. To apply this test, it is first necessary to ascertain the source of the purchase money.

Fakirchand's uncle, Rao Bahadur Naginchand, was a well-known and prosperous businessman in Surat. Naginchand, his son Sobhagechand and Fakirchand lived in union, but unfortunately they fell on bad times and were adjudged insolvents in 1914 and they remained undischarged insolvents till 1918-19. Naginchand died in 1917 and after

their discharge Sobhagechand and Fakirchand started business afresh and became affluent again. The darkhastdar Deochand says that it was thereafter in 1922 that Fakirchand purchased the two lands in dispute for Rs. 24,500, but took the sale-deed in the name of his wife Bai Jaskor with a view to shield them from possible creditors in case of loss in business. Admittedly he was not present when the transaction took place, and his interested statement that Fakirchand himself once told him that he himself was the owner of the lands standing in his wife's name carries no weight. His witness Jamnadas, who was in the service of Fakirchand's family for nearly 20 years till 1928, indirectly supports the appellant's case that the purchase money was paid out of Bai Jaskor's funds. He admits that at the time of the insolvency some amounts were transferred by the insolvents to the names of their wives, and their wives retained their ornaments worth Rs. 10,000 to Rs. 12,000, and also possessed some shares standing in their names. The sale-deed shows that out of the consideration Rupees 17,500 were paid in cash, and for the balance of Rs. 7000 the lands themselves were given in mortgage by Bai Jaskor. Jamnadas admits that there was a khata of Jaskor in Fakirchand's accounts and that the amount of Rs. 17,500 was debited to her in that khata when the lands were purchased by her. He admits that at that time there was a large credit balance in her khata. He used to write Fakirchand's accounts and so he knew the state of her khata. The next witness Naginbhai admits that when Jaskor was married to Fakirchand, the family was flourishing and affluent, and that it spent lavishly on the marriage. The appellant was a minor when the lands were purchased, and so he cannot be expected to have any personal knowledge. But his maternal uncle Panachand says that at the time of Jaskor's marriage, the presents and the cash received by her were worth in all about Rs. 21,000 and that does not seem unlikely. Deochand has examined Bai Rami, the family maid-servant, to prove that the talk of the purchase of the lands took place in her presence and that Fakirchand paid Rs. 17,000 to the vendor in her presence. The lower Court has rightly held her evidence as an exaggeration.

Jaskor died in December 1923, when the appellant was still a minor, and Fakirchand, as his guardian, paid off the mortgage and obtained a deed of reconveyance in the

1. (25) 12 A. I. R. 1925 P. C. 181 : 48 Mad. 605 : 52 I. A. 286 : 88 I. C. 327 (P. C.), *Sura Lakshmiah Chetty v. Kothandarama Pillai*.



name of the appellant. Hirachand, the writer of that deed, frankly says that he does not know whence Fakirchand brought Rs. 7000 to pay off the mortgage; but the maid-servant Bai Rami says that he obtained it from Mullaji. She had no reason to know this and no evidence is adduced to prove it. When Jaskor died she had still some shares in her name, and Fakirchand obtained a succession certificate in respect of those shares on behalf of the minor appellant in October 1924. Thus, while all the evidence indicates that the purchase money belonged to Jaskor, there is no evidence on behalf of the decree-holder to show that it was supplied by Fakirchand. Even assuming that a part of the purchase money was contributed by Fakirchand, yet, his motive in doing so and his subsequent conduct have to be taken into consideration. The evidence of the decree-holder's witness Jamnadas, arranged in its proper order, comes to this:

"In 1920, Fakirchand and his cousin Sobhagchand purchased properties in their own names with the joint family funds. In 1922 Fakirchand had plenty of money and no debts. Yet he took the sale-deed of the lands in suit in the name of his wife Bai Jaskor to safeguard against future setback in trade. Jaskor had got ornaments worth Rs. 10,000 to 12,000. Some shares stood in her name. At the date of the sale there was a large credit balance in her khata and the purchase money was debited in that khata. Fakirchand did tell me that the property was to be purchased in Jaskor's name to provide for future contingency."

This shows that even if Fakirchand may have paid some amount to make up the purchase money, he evidently wanted Jaskor to be the owner, so as to provide for future contingency. As observed in *I. L. R. (1938) Mad. 220*,<sup>2</sup> where the motive alleged for a benami transaction itself suggests that the purpose in view could be served only by a genuine purchase and not by a mere benami transaction, the more reasonable inference is that the purchase was intended to be operative as a genuine purchase and not a benami transaction.

The lands were entered in the name of Jaskor and after her death they were transferred to the name of the appellant, Fakirchand being shown as his guardian. Some property in Bombay was also purchased by Jaskor in 1920, and when the appellant filed an application for heirship certificate in respect of that property in 1935, Fakirchand put in a purshis admitting his claim. During the appellant's minority, Fakirchand managed Jaskor's property as his guardian. After the appellant attained

2. (38) 25 A. I. R. 1933 Mad. 8 : I. L. R. (1938) Mad. 220; 176 I. C. 535, *Sitamma v. Sitapatirao*.

majority in 1934, he leased the lands to Limba and Jetha. Thereafter Fakirchand leased them to the present darkhastdar Deochand, and the appellant accepted that lease. Deochand himself thus became the appellant's tenant. Limba then filed a complaint against the appellant and Fakirchand. The lower Court has remarked that if the appellant was the owner, he would not have accepted the lease given by his father to Deochand. There was no dispute between the father and the son, and there is nothing unnatural in his yielding to his father's wishes. Mr. Thakor for the decree-holder lays stress on the appellant's admission in his deposition that till his father's death in January 1936, he had not received a single pie out of the income of the lands. There is nothing strange in this as they were living together. In our opinion the more important circumstance is that although Fakirchand had two sons Hirachand and Jivachand by his other wife Subhadra and though they attained majority in 1920 and 1930 respectively and he lived till 1936, he never cared to have the lands transferred to his own name if they were his. He must have known that if they remained in Jaskor's or the appellant's name, his other sons would not get a share in them, and yet he took no steps to assert his ownership of the property purchased in Jaskor's name. We are, therefore, satisfied that she was the real owner, and after her death the appellant became the owner as her heir. The lands in dispute are, therefore, not liable to be attached and sold in execution of the respondent's decree in Suit No. 4 of 1938. The appeal is allowed, the order of the lower Court set aside, and the darkhast dismissed with costs throughout.

R.K.

*Appeal allowed.*

[Case No. 38.]

**A. I. R. (33) 1946 Bombay 159**

LOKUR AND BAVDEKAR JJ.

*Ahmedabad Municipality — Appellant*  
v.

*Government of Bombay — Respondent.*

Second Appeal No. 822 of 1942, Decided on 8th March 1945, from decision of Assistant Judge, Ahmedabad, in Appeal No. 278 of 1940.

(a) Interpretation of Statutes—Statement of objects cannot be referred when section is clear.

When the section itself is clear, it is not permissible to refer to the statement of objects and reasons for its interpretation. [P 161 C 2]

(b) Trusts Act (1882), S. 20 (d)—Debentures of Municipality outside Presidency-town is not specified security.



It is not open to a trustee to invest trust funds in debentures of a municipal body outside a Presidency-town or Rangoon Town. [P 162 C 1]

(c) **Bombay Municipal Boroughs Act (18 [XVIII] of 1925)**—Provident Fund of Municipal employees—Municipality can invest in its own debentures.

A borough municipality can invest provident fund of its employees in its own debentures issued under Local Authorities Loans Act, 1914, if it does not make itself a trustee with respect to the fund.

[P 162 C 1,2]

*J. C. Shah and N. C. Shah*—for Appellant.

*S. G. Patvardhan* (Assistant Government Pleader) — for Respondent.

**Lokur J.** — The facts out of which this appeal arises are not in dispute. The Ahmedabad Municipality established a Provident Fund for the benefit of its employees in 1914, and in exercise of the powers under s. 8, Provident Funds Act, 1925, the Government of Bombay applied the provisions of that Act to that fund by a Notification dated 2nd July 1929. The Municipality used to invest the Provident Fund in public securities including its own debentures. Those debentures had been issued by the Municipality under the Local Authorities Loans Act, 1914. On 20th June 1933, the Collector of Ahmedabad wrote a letter to the Municipality that the moneys of the Provident Fund could not be invested by the Municipality in its own debentures as they were not securities within the meaning of s. 20 (d), Trusts Act, 1882. The President of the Municipality was, therefore, requested to take steps to dispose of the debentures and to reinvest the proceeds in public securities. Later on, Government issued a Circular (No. 216/33 of the General Department) dated 10th February 1934, that the funds accumulated in the Provident Fund established by Municipalities, being moneys held by Municipalities in trust on behalf of their employees, could not be invested in loans or debentures issued by themselves under the Local Authorities Loans Act, 1914, as such loans or debentures were not securities within the meaning of s. 20 (d), Trusts Act, 1882, which applied only to securities issued by the Municipalities, Port Trusts, or Improvement Trusts of the Presidency-towns and of Rangoon and Karachi. Accordingly the Ahmedabad Municipality withdrew an amount of nearly six lacs of rupees from its own debentures and invested the amount in other public securities, although it protested against the view taken by Government. The Municipality again took up the subject and made a representation in September 1935, that the amount should be allowed to be

invested in its own debentures. In view of the Circular issued by Government, the Collector declined to reconsider the matter. The Municipality then invested Rs. 500 out of the Provident Fund amount in its own debentures to make a test case and requested the Collector to refer the matter to Government. Government then reconsidered the matter and gave a reply that there was no doubt as regards the legal position and asked the Commissioner to instruct the Collector of Ahmedabad to call the attention of the Municipality to the illegality of its action in investing a nominal sum of Rs. 500 out of the Provident Fund balances in its own debentures and to ask it to remedy the action. That order was issued on 27th October 1937 and being dissatisfied with the decision of Government, the Municipality gave a notice to the Collector and filed this suit on 23rd September 1938, for a declaration that it was entitled to invest the Provident Fund of its employees in loans or debentures issued by it under the Local Authorities Loans Act, 1914, and for an injunction restraining Government from objecting to its doing so. The defence was based mainly on two grounds, namely, that the suit was time-barred under Art. 14 to Sch. 1, Limitation Act, 1908, and that it was unlawful for the Municipality to invest the amount of the Provident Fund in its own debentures as it contravened the provisions of s. 20 (d), Trusts Act, 1882. These contentions did not find favour with the trial Court, which decreed the plaintiff's claim. In appeal the learned District Judge held that the suit was time-barred and that although the municipal debentures were public securities, yet the Municipality could not invest the amount of the Provident Fund in its own debentures, both because it was against the provisions of s. 20 (d), Trusts Act, 1882, and also because it would be illegal for the Municipality to become both a creditor and a debtor in respect of the said Fund. The appeal was, therefore, allowed and the Municipality's suit was dismissed with costs.

The order which is now sought to be impeached was issued by Government on 27th October 1937, and this suit was filed within one year thereafter, but it is urged on behalf of Government that the cause of action really accrued in 1933 when the Collector directed the Municipality to withdraw the amount of the Provident Fund from its own debentures and invest it in other public securities. The Collector's instructions in 1933 were in



the nature of an advice. In his opinion the amount of the Provident Fund held by a Municipality could not be invested in its own debentures. He, therefore, requested the President to invest that amount in other public securities. He did not expressly say that it was "unlawful" to do so. In his letter he expressed an opinion that the debentures of the Ahmedabad Municipality were not public securities. Rule 308 of the Rules in the Ahmedabad Municipal Code is as follows:

"The subscriptions of employees and contributions of the Municipality to the fund shall, every half year or oftener if necessary, be invested in public securities and the interest accruing thereon shall be placed to the credit of the Municipal accounts and the Municipality shall in return place to the credit of the subscribers' account compound interest at the fixed rate of  $3\frac{1}{2}$  per cent. per annum calculated on the payments of each subscriber. Such interest shall be added to the employee's account at the end of the year, unless the employee's account is closed before the end of the year in which case the interest due to the date of closure shall be added."

This rule authorises the Municipality to invest the subscriptions of its employees and its contributions to the fund in public securities. Under R. 2 (6) of the said rules all words and expressions used are to be deemed to be used in the same sense in which they are used in the Act and according to S. 3 (15) (e), Bombay Municipal Boroughs Act, 1925, public securities include—

"debentures or other securities for money issued by or on behalf of any local authority in exercise of powers conferred by an Act of a Legislature established in British India."

According to this definition the expression "public securities" used in R. 308 includes the debentures issued by the Ahmedabad Municipality. But the Collector took a different view and when he expressed his opinion to the Municipality, the Municipality, though it disagreed with that view, did withdraw all the amount of the Provident Fund from its own debentures. Therefore, there was no occasion for the Collector to issue any order, which the Municipality was bound to get set aside within one year under Art. 14 of Sch. 1, Limitation Act. If the Municipality had refused to accept the advice given by the Collector, and if he thought that the action of the Municipality was unlawful, then he had power to issue an order in writing under S. 214 (1), Bombay Municipal Boroughs Act, 1925, prohibiting future investments of the amount of the Provident Fund in its own debentures. But no such order was passed by the Collector and, therefore, there was no need for the Municipality

to file a suit within one year. Such an order was passed under instruction from Government only in 1937, and as this suit was filed within one year thereafter, it is not time-barred. According to S. 20, Trusts Act, 1882, where the trust-property consists of money and cannot be applied immediately or at an early date to the purposes of the trust, the trustee is bound (subject to any direction contained in the instrument of trust) to invest the money in certain specified securities and in no others. Such securities in cl. (d), as amended by Act 3 [III] of 1908, are:

"debentures or other securities for money issued, under the authority of any Act of a Legislature established in British India, by or on behalf of any municipal body, port trust or city improvement trust in any Presidency-town, or in Rangoon Town, or by or on behalf of the trustees of the port of Karachi."

In the opinion of Government, the Municipality is a trustee in respect of the amount of the Provident Fund on behalf of the subscribers to the fund and as such it cannot invest the amount in any municipal debentures not falling within S. 20 (d). That clause is interpreted to include only debentures issued by or on behalf of any municipal body in any Presidency-town, or in Rangoon town, and therefore any debenture issued by any municipal body in the mofussil does not fall within S. 20 (d). It appears from the correspondence that the Commissioner referred to the Bill of the Trusts (Amendment) Act (3 [III] of 1908) by which S. 20 (d) was amended. Before the amendment, cl. (d) stood as follows:

"in debentures or other securities for money issued by, or on behalf of any municipal body under the authority of any Act of a Legislature established in British India."

It was then clear that the debentures issued by any municipal body were public securities in which trust-funds could be invested. But by Act 3 [III] of 1908 the clause was amended in order to enable trustees to invest trust-moneys even in debentures and other securities issued by certain other bodies, and from the statement of objects and reasons of the Bill it appears that it was also intended to limit the clause to municipal bodies in Presidency-towns and Rangoon town. But when the section itself is clear, it is not permissible to refer to the statement of objects and reasons for its interpretation. It is pointed out that in the original Bill there was a comma between the words 'city improvement trust' and the words 'in any Presidency-town' which made the meaning quite clear. But we think that the absence



of a comma there does not make any difference. The repetition of the expression 'by or on behalf of' before the last clause 'trustees of the port of Karachi' indicates that all the three bodies—any municipality, port trust and city improvement trust—are governed by the following clause 'in any Presidency-town or in Rangoon town.' We, therefore, agree with the interpretation placed upon that clause by Government: and under that clause it is not open to a trustee to invest trust-funds in debentures of a municipal body outside a Presidency-town or Rangoon town.

But that section has no application to the present case. Section 20 itself allows an exception where there is any direction for investment in the instrument of trust. There is no instrument of trust in the case of the Provident Fund in the hands of the Ahmedabad Municipality, nor is it clear that the Municipality is a trustee in respect of that Fund. In the Provident Funds Act, 1925, there is no provision that the amount of the fund should be set apart and should not be utilised by the body which established that fund. It is admitted that in the case of a Government servant, Government does not separately invest the amount of the Provident Fund payable to the subscribers, but when any subscriber's amount becomes due, it is paid to him from its general funds. The employees of the Municipality allow their contributions to the Provident Fund to be deducted from their salaries and the Municipality also contributes an equal amount and agrees that when the Provident Fund of any subscriber becomes due it would be paid to him or his nominee or his successor. A separate account is maintained and the amount of each subscriber is shown as standing at his credit. Thus, the Municipality becomes a debtor of the subscriber and under the provisions of R. 308 it undertakes to pay compound interest at the fixed rate of three and three-fourths per cent. per annum. If the amount was a mere trust fund, the Municipality would have been bound to pay to the subscriber whatever interest it realised on that fund. But the agreement to pay a fixed rate of interest and the absence of an agreement to set apart his fund show that the Municipality is not a mere trustee in respect of that fund. But for R. 308 it could utilise the amount as it chose and was only liable to pay the amount due to the subscriber when it became payable. Thus the Municipality is acting more as a debtor than as a trustee. The terms of

the agreement between the subscriber and the Municipality are contained in the rules framed by the Municipality, and R. 308 expressly authorises the Municipality to invest the Provident Fund in "public securities," a term which includes its own debentures. If it was intended that the amount should not be invested in its own debentures, such an exception would have been expressly made in R. 308. The Municipality is given liberty to utilise in any way the amount of interest until it becomes payable to the subscriber, and that amount is not required to be invested in public securities. If the Municipality was a mere trustee, it would have been necessary to invest even that amount in the securities mentioned in S. 20, Trusts Act, 1882. But R. 308 tacitly exempts it from the application of that section. As regards the principal amount of the fund, R. 308 requires it to be invested in "public securities" and hence S. 20, Trusts Act, is not applicable to it so as to restrict the discretion given by the rule.

The object of R. 308 is to ensure that the Municipality has sufficient funds ready at hand for being paid to a subscriber when his Provident Fund becomes due. Since the debentures of the Ahmedabad Municipality have been authorised under the Local Authorities Loans Act, 1914, they are sufficiently safe, and if Government desires that the Provident Fund should not be invested in those debentures, the proper course is to amend R. 308 by adding the words "except its own debentures" after the words "in public securities".

It is not correct to say that by investing the amount of the Provident Fund in its own debentures, the Municipality becomes both a creditor and a debtor. By such investment the Municipality merely sets apart in safety the amount of the Provident Fund. The employees are described in the Provident Funds Act, 1925, as subscribers or depositors and the rules require that the amount should be entered in the accounts to their credit. It would be ordinarily open to the Municipality to make use of the amounts thus subscribed, subject to the liability to repay them when they become due. It is only under R. 308 that it becomes necessary for the Municipality to set apart the amounts and invest them in public securities, and as that rule allows the Municipality to invest the Provident Fund in any public securities, there can be no prohibition against its investing it in its own debentures. We, therefore, hold that the plaintiff Muni-



cipality is entitled to the declaration sought for and that Government should be restrained from preventing the Municipality from investing moneys of the Provident Fund in its own loans or debentures. We set aside the decree of the lower appellate Court and restore that of the trial Court. The respondent shall pay the costs of the appellant throughout.

R.K.

*Decree set aside.*

[Case No. 39.]

**A. I. R. (33) 1946 Bombay 163**

MACKLIN AND RAJADHYAKSHA JJ.

*Birdibai Mohanlal and others —*  
Appellants  
v.

*Chunilal Chandmal and others —*  
Respondents.

First Appeal No. 256 of 1941, Decided on 8th March 1945, from decision of First Class Sub-Judge, Ahmednagar, in Appln. No. 137 of 1940.

Court-fees Act (1870), S. 19D—Shares of joint stock company in name of father as manager of joint Hindu family—Widow for herself and her sons can apply for letters of administration limited to such shares—Whole joint family property need not be included—Such application is exempt from court-fees.

When a Hindu manager of a joint Hindu family or the father dies possessed of the joint family properties and also of certain other properties of which (although members of the coparcenary have beneficial interest in them) the legal title vests in him, it is competent to take out letters of administration limited to that part of the property, the legal title of which vested in the manager or the father. When, therefore, the widow of the deceased for herself and her minor sons applies for letters of administration with respect to all the shares of the joint stock companies standing in the deceased's name, the legal title to which (as distinct from the beneficial interest in them which belongs to the whole body of coparceners) vested in him, she is asking for letters of administration in respect of the assets of the deceased. The beneficial interest in the other joint family property having already passed by survivorship is no longer an asset of the deceased to which representation is required to be taken out. There is, therefore, nothing irregular in asking for letters of administration with respect to the shares in the joint stock companies without mentioning in the application all the other property belonging to the joint Hindu family, and the application would be exempt from the payment of any court-fee: 24 Bom. 350; ('42) A. I. R. 1942 Lah. 173 (F.B.); 29 Bom. 161 and ('24) 11 A.I.R. 1924 Bom. 228 (F.B.), *Rel. on.* [P 165 C 1, 2]

D. A. Tulzapurkar — for Appellants.

B. G. Rao (*Government Pleader*) —  
for the Government.

**Rajadhyaksha J.**—The facts that have given rise to this appeal may be stated in a very narrow compass, and they are as fol-

lows: One Mohanlal died on 17th April 1940 leaving three sons and a widow. The sons were minors and the widow was their natural guardian. Thereupon the widow on her own behalf and as the guardian of her three minor sons applied for letters of administration of the movable property of Mohanlal consisting mainly of shares in joint stock companies and certain deposits. There was no opposition to the application, but the learned Judge was of opinion that the application ought to have been made in respect of the whole property, both movable and immovable, and further that court-fee was chargeable on the whole of the estate. In this appeal it is contended, firstly, that the learned Judge was wrong in holding that an application should have been made with respect to the whole of the property, and secondly, that the lower Court was in error in coming to the conclusion that the property was not exempt from court-fee, although the property in the hands of Mohanlal was a joint family property.

There has been no appearance for the opponents-respondents, but as the decision of both the questions arising in this appeal was in some measure likely to affect the public revenue, a notice was ordered to be issued to the Government Pleader.

As regards the first contention, the question is whether letters of administration can be issued limited only to a part of the estate of the deceased who was a manager of the joint family property, viz., that part which consists of shares in joint stock companies. The learned Government Pleader has not been able to cite any provision of law or any decision of any High Court which requires that if such an application is made it must be made with respect to the whole of the joint family property of the deceased. There is no doubt as to what the legal position is with respect to the personal property of the deceased. Under s. 273, Succession Act

"letters of administration have effect over all the property—moveable or immoveable—of the deceased throughout the province in which the same is granted and is conclusive as to the representative title against all the debtors of the deceased and all persons holding property which belonged to him."

Section 278 lays down the requirements of an application for letters of administration. Under cl. (d) of sub-s. (1) the applicant has to state the amount of assets which are likely to come to the petitioner's hand. When the letters of administration are granted, they are, under s. 290, granted in



the form prescribed in Sch. VII and that schedule says

"I the District Judge of . . . . . hereby make known that on the . . . . . day of . . . letters of administration of the property and credits of . . . . . late of . . . . , deceased, were granted to . . . . of the deceased, he having undertaken to administer the same and to make a full and true inventory of the said property and credits and exhibit the same in this Court."

It would appear from these provisions of the Succession Act that when representation is taken out to the assets of the deceased person, it is taken out with respect to all his assets and not with respect to only a part of them. There are other provisions of the Succession Act which enable letters of administration to be taken out limited by certain circumstances; for instance, under Chap. II letters may be taken out which are limited in duration. Letters may also be taken out for specific purposes, but there is no provision, except in S. 250 and in S. 255, which enables letters being taken out only with respect to a part of the assets of the deceased person. The implication, therefore, is that in every case the representation must be taken out with respect to all the assets of the deceased person. That this is so can be seen by contrasting the provisions relating to the letters of administration with those relating to the grant of a succession certificate. Under Sch. VIII, Succession Act, when a succession certificate is issued, it is issued with respect to certain specified debts and securities only, and the succession certificate operates only with respect to those debts and securities. Then there is a provision made in S. 376 for the extension of succession certificates to cover other debts and securities. The absence of provisions similar to these with regard to the grant of letters of administration would suggest that when letters are taken out they must be taken out in respect of all the assets of the deceased and, therefore, there is no occasion either for specifying the details of the assets in the application or for the extension of the letters of administration. Although this is the position so far as the personal assets of the deceased are concerned, the position is not quite the same when the deceased dies in possession of the joint family properties. In the case of a joint family property, both the legal and the beneficial interests vest in the whole body of coparceners, and on the death of the manager or the father, as the case may be, his interest becomes extinct, and the property passes by survivorship to the remaining

body of coparceners. In the case of a joint family property, therefore, there is no occasion for taking out letters of administration because the legal title has already passed on the death of the manager or the father to the whole body of coparceners. But in the case of shares of joint stock companies which stand in the name of the manager or the father, the legal title vests in the manager or the father and the beneficial interest thereof remains in the whole body of coparceners. In such a case, the joint stock companies require that letters of administration must be taken out; for in the case of shares the legal title to the shares vests *vis-a-vis* the companies in the person in whose name the shares stand. It is the exclusive property of the registered shareholder and letters of administration are taken out in order to enable the company to transfer the shares from the name of the deceased person to the name of the person representing the estate of the deceased. This was decided in 24 Bom. 350.<sup>1</sup> The learned Chief Justice observed as follows (headnote):

"For a share in the Bank, for the purpose of devolution or survivorship, must be deemed, as far as the Bank was concerned, the exclusive property of its registered holder, and that, therefore, the sole surviving coparcener of a deceased Hindu cannot demand that the Bank of Bombay should by reason of his survivorship register him as a shareholder in respect of shares in the Bank which stand in the name of his deceased coparcener."

Referring to the argument that the beneficial interest in the share also passed by survivorship and the share would not, according to the words of S. 4, vest in the executor or the administrator, the learned Chief Justice observed as follows (p. 358):

"... this argument is founded on an obvious fallacy; it confuses the legal title and the beneficial interest, and assumes that because the beneficial interest has survived, the legal title must follow suit. But as I have pointed out, it is with the legal title alone that we are concerned, and that has not survived."

It is for this reason that letters of administration are taken out in order to obtain representation to the assets of the deceased manager or the father in respect of the shares in the joint stock companies. This very point was considered in a Full Bench ruling of the Lahore High Court in A.I.R. 1942 Lah. 173<sup>2</sup> and the question was framed as follows: Whether in view of the admitted

1. (1900) 24 Bom. 350, *Bank of Bombay v. Ambalal Sarabhai*.

2. ('42) 29 A.I.R. 1942 Lah. 173 : I.L.R. (1942) Lah. 717 : 202 I.C. 114 (F.B.), *Sri Ram v. Collector, Lahore*.



fact that the deceased was a member of a joint Hindu family with the petitioner and others letters of administration could at all be granted to the petitioner or any other person in respect of any part of the property held by him in coparcenary with his sons, and the answer of the Full Bench was that they could be so granted. With respect, we are in agreement with the view taken by the Full Bench of the Lahore High Court and we are of opinion that when a Hindu manager of a joint Hindu family or the father dies possessed of the joint family properties and also of certain other properties of which (although members of the coparcenary have beneficial interest in them) the legal title vests in him, it is competent to take out letters of administration limited to that part of the property, the legal title of which vested in the manager or the father. When, therefore, as in the present case, the applicant applied for letters of administration with respect to all the shares of the joint stock companies standing in Mohanlal's name, the legal title to which (as distinct from the beneficial interest in them which belongs to the whole body of coparceners) vested in him, she was asking for letters of administration in respect of the assets of the deceased; for under S. 217, Succession Act, letters of administration can be taken out only with respect to the assets of the deceased in the case of intestate succession. The beneficial interest in the other joint family property had already passed by survivorship and was no longer an asset of the deceased to which representation was required to be taken out. There is, therefore, nothing irregular in asking for letters of administration with respect to the shares in the joint stock companies without mentioning in the application all the other property belonging to the joint Hindu family. In fact this is the practice which is invariably adopted; and even if we are wrong in the view we take, we should be most reluctant to change the practice which has been in vogue for so many years and which has received the implied recognition of this Court in various cases. I have already referred to the case in 24 Bom. 350.<sup>1</sup> In 29 Bom. 161<sup>3</sup> an application for letters of administration was entertained only with respect to the shares in the joint stock companies without it being made obligatory on the applicant to include in the application all other joint family properties in the possession of the deceased person. Further

3. ('05) 29 Bom. 161, *Collector of Kaira v. Chunilal*,

in the Full Bench case in 25 Bom. L. R. 1240<sup>4</sup> it was held that

"where, in a joint Hindu family governed by the Mitakshara, on the death of the father, the son applies for limited letters of administration to the family property, standing in the name of the father, the grant of letters [of administration] is exempt from payment of court-fees."

It is true that the decision in that case mainly related to the liability to the payment of court-fees, but the learned Chief Justice in the course of his judgment observed that there was no dispute about the right to the letters of administration. There also the estate included certain shares of various companies registered under the Companies Act, and the application for letters of administration was entertained from the two sons in respect of the shares which came to their share on a partition after the death of the father. We are, therefore, of opinion that in the present case the application as it stood originally,—confined as it was to the property in the form of share certificates and bank deposits,—was in order and that the learned Judge was in error in directing the applicant to include all the other property of which the deceased died possessed though that property was a joint family property the beneficial interest of which had already passed to the survivors on the death of Mohanlal. The second question is whether any court-fees were payable in respect of the properties mentioned in the original application. It has been held by a Full Bench of this Court in the case to which I have just referred, *viz.*, 25 Bom. L. R. 1240<sup>4</sup> that "where, in a joint Hindu family governed by the Mitakshara, on the death of the father, the son applies for limited letters of administration to the family property, standing in the name of the father, the grant of the letters [of administration] is exempt from payment of Court-fees."

That ruling would fully apply to the facts of this case and thus the application would be exempt from the payment of any court-fee. The learned trial Judge, however, has distinguished that case from the one with which we have to deal and considered that the ruling did not apply because the applicant 1, *viz.*, the widow of the deceased, was an heir and was not legally a coparcener. It is true that applicant 1 was not a coparcener in the joint Hindu family during the lifetime of her husband. She could not have asked for a partition during the lifetime of her husband although she could have obtained a share if there was a partition in the family. Section 3 (2), Hindu Women's

4. ('24) 11 A.I.R. 1924 Bom. 228 : 48 Bom. 75 : 77 I. C. 749 : 25 Bom. L. R. 1240 (F.B.), *Keshavlal v. Collector of Ahmedabad*.



Rights to Property Act, 1937, however, provided that

"when a Hindu governed by any school of Hindu law other than the Dayabhag school or by customary law dies having at the time of his death an interest in a Hindu joint family property, his widow shall, subject to the provisions of sub-s. (3), have in the property the same interest as he himself had."

The interest of the widow, therefore, comes into existence after the death of her husband and during the lifetime of the husband she has no interest in the property. The position resulting from the Hindu Women's Rights to Property Act, 1937, is summarised in the latest edition of Mulla's "Principles of Hindu Law," 9th Edn., at p. 26-a, as follows:

"The statute was enacted to enlarge the rights of women, or as it says, to give better rights to them and there is no indication that, except for this limited purpose, the Legislature intended to interfere with the established law relating to succession or to a joint family. The provision that the widow of a member of a joint family is to have the same interest in the joint property as her deceased husband, and further the provision that she is entitled to claim partition, would seem to indicate that mere devolution of the husband's interest would not otherwise affect the joint family status as such, or to confer upon the widow all the rights of a male coparcener other than those necessary for enforcing the rights expressly conferred on her."

Therefore, until the husband died the property was a joint family property and according to the Full Bench decision it was in the nature of a trust property. It is to such a property that S. 19-D, Court-fees Act, applies irrespective of the fact that after the death of the husband applicant No. 1 got by the special Act a right on par with the other members of the coparcenary, but which she did not share with them during her husband's lifetime. If necessary we could even say that Mohanlal was a trustee, in the sense of the Full Bench decision, of the interest of the other coparceners and of the contingent interest of his own wife—but a trustee all the same. We must have regard to the nature of the property in the hands of the deceased at the time of his death and not to what rights come into being after his death. Section 19-D refers to "the moveable or immovable property whereof or whereto the deceased was possessed or entitled, either wholly or partially as a trustee." It is the character of the property in his hands that determines the liability to the payment of the court-fees. If that property in his hands is in the nature of the trust property, the application for letters of administration with respect to that property

is exempt from the payment of court-fees. In view of the Full Bench decision referred to above, it must be recognized that the holder of a joint Hindu family property governed by the Mitakshara law can be said to have died possessed of such family property as a trustee. That is the view of the Full Bench of the Lahore High Court also in the case to which I have already made a reference. It has already been held in 29 BOM. 161<sup>3</sup> that

"the exemption of trust estates from the payment of *ad valorem* court-fee is not conditional on the circumstance that there had been a previous grant of probate or letters of administration on which a court-fee had been paid. The exemption has reference to the character of the property and not to the procedure adopted."

We must, therefore, allow this appeal, set aside the order of the lower Court and direct that the letters of administration should issue to the petitioners free from the liability for the payment of any court-fees in respect of the property which was originally included in the petition.

There will be no order as to costs.

**Macklin J.** — I agree, and accept the reasoning of my learned brother and have nothing to add on the legal question involved. I note that there is undoubtedly a well-established practice of permitting applicants for letters of administration to take out letters for a limited purpose. Whether that is or is not a practice which ought to be permitted on general principles it is not for me to say. But I have been unable to find anything in the Succession Act or elsewhere which can be said to be definitely inconsistent with such a practice, and I think it would in any event be too late to challenge the practice now. We must stand by the decisions (of which there are plenty) in which the practice has been recognised. I note also that there is a practice by which court-fee is not paid for letters of administration to property of which the deceased was a trustee. I have some doubts as to whether S. 19-D, Court-fees Act, justifies such an exemption in every case. *Prima facie* the section means that if letters have been taken out which do not cover the trust property, still the holder of the letters would be allowed to deal with the trust property. But whatever the meaning of S. 19-D, it is clear that it is as a matter of practice interpreted as giving a right to the administrator of the trust property to obtain letters without paying court-fee; and if during his lifetime the deceased was a trustee of that property, it cannot, so far as I can see, make any differ-



ence that after his death the applicant for letters of administration had herself a beneficial interest in the property, provided that all she is asking for is letters of administration and she is not asking for possession.

R.K.

*Appeal allowed.*

[Case No. 40.]

**A. I. R. (33) 1946 Bombay 167**

CHAGLA J.

*Hafizulla Latiff Saha—Applicant*

v.

*Wakf Committee, Kolaba—Opponent.*

Civil Revn. Appln. No. 368 of 1944, Decided on 6th March 1945, from decision of Asst. Judge, Thana, in Misc. Appeal No. 2 of 1943.

Court-fees Act (1870), S. 7 (iv) (c) and Sch. 2, Art. 17 (iii)—Suit for two declarations, second consequential on first — S. 7 (iv) (c) applies and not Sch. 2, Art. 17 (iii).

In order that a suit should fall within S. 7 (iv) (c) the consequential relief prayed for by the plaintiff need not necessarily be a relief other than a declaratory relief. Hence, a suit for a declaration that certain darga and other properties belonging to the darga are not wakf within the meaning of the Mussalman Wakf Act of 1923 and hence are not liable to registration under the Bombay Amendment Act 18 [XVIII] of 1935, falls under S. 7, sub-cl. (iv) (c) and not Sch. 2, Art. 17 (iii) because the second declaration is not an independent declaration but merely one which is consequential upon the first. [P 167 C 2; P 168 C 1]

*K. N. Dharap—*for Applicant.

*Y. V. Dixit—*for Opponent.

**Order.** — This application raises the question of the pecuniary jurisdiction of the learned Second Class Subordinate Judge's Court at Panvel. The plaintiff filed the suit for a declaration that certain darga and other properties belonging to the darga were not wakf within the meaning of the Mussalman Wakf Act of 1923 and were not liable to registration under the Bombay Amendment Act of 1935. The learned Subordinate Judge held that the Court had no jurisdiction to try the suit as it exceeded the pecuniary jurisdiction of the Court. He held that the value of the properties exceeded Rs. 8,530. From that decision of the learned Subordinate Judge an appeal was preferred to the learned Assistant Judge of Thana who confirmed that decision. It is from the order of the learned Assistant Judge that this revisional application is preferred.

The main question that falls to be determined in order to ascertain whether the trial Court had pecuniary jurisdiction to try the suit or not is whether this suit falls under S. 7 (iv) (c), Court-fees Act, 1870, or whether it falls under Art. 17 (iii) of Sch. 2 to that Act. The view that the lower appel-

late Court took was that this was a suit to obtain a declaratory decree where no consequential relief was prayed and, therefore, it fell under Art. 17, sub-cl. (iii), and S. 8, Suits Valuation Act, 1887, did not apply. The contention, on the other hand, of Mr. Dharap for the petitioner is that the suit falls under S. 7 (iv) (c), Court-fees Act, and is a suit which asked for a declaratory decree and also a consequential relief following upon the declaration. It is clear to my mind that what the plaintiff wants in this suit is first and foremost a declaration that the properties are not wakf within the meaning of the Mussalman Wakf Act of 1923. If he gets a declaration from the Court, he wants further a declaration that the properties are not liable to registration under the Bombay Amendment Act of 1935. Now it is to be noted that the plaintiff can only get the second declaration provided he gets the first; or, in other words, the second declaration is consequential upon the first. It has been argued by Mr. Dixit on behalf of the opponent that in order that a suit should fall within S. 7 (iv) (c), Court-fees Act, the consequential relief prayed for by the plaintiff must be a relief other than a declaratory relief. In this case, according to Mr. Dixit, the most that can be said is that the plaintiff has asked for two declarations in which case, if the decree is passed, it would still be a declaratory decree without any consequential relief. I fail to see why the expression "consequential relief" in S. 7 (iv) (c) of the Act should be read as consequential relief other than a declaration. It is importing into the section words which do not find a place there. All that S. 7 (iv) (c) requires is that the plaintiff must sue for a declaratory decree; and if it is open to him to get any consequential relief following upon the declaration then, if he asks for such a relief, the suit falls within that sub-clause. Now in this case, as I have pointed out, the plaintiff has asked for a declaration that the properties are not wakf. The only relief consequential upon that declaration which he could ask in this suit was a further declaration that the properties are not liable to registration under the Bombay Amendment Act of 1935. In doing so to my mind he has complied with the provisions of S. 7 (iv) (c), Court-fees Act. My attention has been drawn by Mr. Dharap to a decision of the Calcutta High Court in 44 Cal. 352.<sup>1</sup> In that case the plain-

1. (17) 4 A. I. R. 1917 Cal. 77 : 44 Cal. 352 : 40 I. C. 96, Midnapur Zemindary Co. Ltd. v. Secy. of State.



tiffs prayed for a declaration (a) that they were occupancy ryots and (b) that the entry in the record-of-rights showing them as tenure-holders was a nullity; and the Court held that the suit fell under S. 7, sub-cl. (iv) (c), Court-fees Act, inasmuch as the second declaration was a consequential relief within the meaning of that sub-clause. The facts of that case are very similar to the facts I am considering in this revisional application. There too the main declaration sought was that the plaintiffs were occupancy ryots. On that declaration being given by the Court, the other declaration that the entry in the record-of-rights showing them as tenure-holders was a nullity would follow as a consequence. Undoubtedly the matter would be different if the plaintiff in a suit asked for two independent declarations. Then obviously the suit would not fall under S. 7, sub-cl. (iv) (c), Court-fees Act. But when in a suit the plaintiff asks for two declarations and the second declaration is not an independent declaration but merely one which is consequential upon the first, to my mind it is a suit to obtain a declaratory relief where consequential relief is prayed for. The order of the lower appellate Court was, therefore, wrong and must be set aside. The suit will go back to the learned Subordinate Judge to proceed with on merits. The opponent must pay the costs of this application and the costs before the lower appellate Court. Rule made absolute.

R.K.

*Rule made absolute.*

[Case No. 41.]

**A. I. R. (33) 1946 Bombay 168**

LOKUR AND BAVDEKAR JJ.

*Pirojsha Bhicaji — Appellant*

v.

*Dadabhai Kersasji and others —**Respondents.*Civil Appns. Nos. 230 of 1941 and 1164 of 1940,  
Decided on 7th March 1945.Civil P. C. (1908), O. 45, R. 8 (b) and O. 48,  
R. 1 (1) — Notice to respondent under R. 8 (b)  
— No process fees are required.

The notice required to be given under O. 45, R. 8 (b) is not a process, and, it is also not issued on behalf of either party, but it is a mere intimation given by the Court to the respondent that the appeal has been admitted. Hence, no fee is to be levied on the notice to be given to the respondent under O. 45, R. 8 (b). [P 168 C 2]

*Pochaji Jamshedji — for Appellant.*

*N. N. Majumdar and D. V. Patel — for Respondents Nos. 1; and 3, 5, 6, 11, 12, 13 and 18, respectively.*

**Lokur J.**—In this case security has been furnished and deposit has been made as

directed. The appeal has been declared as admitted under O. 45, R. 8 (a), Civil P. C., 1908. Notice of the admission of the appeal has to be given to the respondents under O. 45, R. 8 (b), Civil P. C., and a question has been raised as to whether process fees have to be paid by the appellant for the said notice. It is urged on behalf of the appellant that it has been the practice of this Court not to levy process fees on such notices. We have ascertained from the office that the practice has not been always uniform. In some instances fees were levied on such notices; but in a majority of the cases no process fees were levied. Under O. 48, R. 1, sub-r. (1), every process issued under the Code shall be served at the expense of the party on whose behalf it is issued, unless the Court otherwise directs. In the first place, the notice required to be given under O. 45, R. 8 (b), is not a process, and, secondly, it is not issued on behalf of either party, but it is a mere intimation given by the Court to the respondents that the appeal has been admitted. The notice required to be given under O. 45, R. 8, sub-r. (2), is to call upon the opposite party to show cause why a certificate should not be granted; but the notice under O. 45, R. 8 (b), does not call upon the respondents either to appear or to oppose any prayer made by the appellant. According to Wharton's Law Lexicon, 14th Edn., a process requires the defendant to appear on a certain date. It is a call of authority or an admonition to appear in Court. But where the opposite party is not required to appear in Court, and the notice amounts to a mere intimation, it cannot be regarded as a process. Thus, for instance, under O. 20, R. 1, the Court, after the case has been heard, is required to pronounce judgment in open Court, either at once or on some future day, of which due 'notice' is to be given to the parties or their pleaders. Although the word 'notice' appears in the rule, it does not amount to 'process,' but only an intimation, and hence does not require any process fee to be paid by either party. Rule 98 on page 24 of the Rules of the Bombay High Court, Appellate Side, sets out the table of fees to be levied for serving and executing processes issued by the High Court in its appellate jurisdiction. That table has no application to notices, which do not amount to processes, but are merely an intimation to the parties. The difference between the notice required to be given under O. 45, R. 8 (2), and O. 45, R. 8 (b), can be easily seen from the forms of the two notices under the two rules as given in App. G of the Code.



The former notice is a process, while the latter is a mere intimation. We, therefore, hold that no fee is to be levied on the notice to be given to the respondents under O. 45, R. 8, Civil P. C.

R.K.

*Order accordingly.*

[Case No. 42.]

**A. I. R. (33) 1946 Bombay 169**

MACKLIN AND RAJADHYAKSHA JJ.

*Alimohamed Jumardikhan—Appellant*  
v.

*Shankar Tukaram Pote and others —*  
*Respondents.*

First Appeal No. 4 of 1944, Decided on 1st March 1945, from decision of Addl. Commissioner for Workmen's Compensation, Bombay, in Appln. No. 763/B 35 of 1943.

(a) Workmen's Compensation Act (1923), S. 30 — Findings of fact by Commissioner — High Court when can interfere.

The High Court is not entitled to interfere with the findings of fact arrived at by the Commissioner for Workmen's Compensation except on a substantial question of law, and that includes a finding of fact which is not based upon evidence.

[P 169 C 2]

(b) Workmen's Compensation Act (1923), S. 10 — "Notice of accident" explained.

The words "notice of the accident" appearing in S. 10 do not mean "notice of the details of the accident." A wide and unnecessary extension to the word "accident" which might defeat the claim to compensation ought not to be lightly given.

[P 170 C 1]

(c) Workmen's Compensation Act (1923), S. 2 (1) (n) — Workman—Lorry picking bricks from field—Labourer engaged for work, riding lorry while going to field — Labourer is workman.

The words "employed for the purpose of" and the words "employed in" do not mean exactly the same thing. Where a labourer is riding a lorry which is being driven to a brick field for the purpose of picking up bricks, his travelling to the brick field is within the scope of his employment. Such labourer is a workman within the meaning of the Act.

[P 170 C 2]

(d) Workmen's Compensation Act (1923), S. 5 (c) — Daily labourer—Compensation to—Calculation of monthly wages how to be made explained.

Where a labourer is employed only for a day, the compensation to be awarded can be calculated on the basis of the average daily wages multiplied by thirty and then dividing by the number of days of continuous employment. [P 170 C 2; P 171 C 1]

*K. P. Karnik — for Appellant.*

*P. S. Bakhale — for Respondents.*

**Macklin J.** — This is an appeal against a decision of the Additional Commissioner for Workmen's Compensation. He has awarded Rs. 810 on account of an accident caused to a daily labourer who was travelling in her employer's motor lorry for loading

and unloading the lorry with bricks. The accident occurred on 25th June 1943, and death took place three days later; but notice of the accident was not given by the representatives of the injured woman until 22nd July, and failure to give adequate notice is one of the grounds of this appeal by the employer. This Court is not entitled to interfere with the findings of fact arrived at by the Commissioner for Workmen's Compensation except on a substantial question of law, and, that would of course include a finding of fact which was not based upon evidence; and it has been argued in this appeal that the Commissioner was wrong in his finding that the injured woman was employed by the employer. There is, however, evidence in that respect though it is not particularly good evidence. The evidence of the driver of the lorry is that she was engaged on the road by the employer's *mukadam*, who himself was in the lorry at the time; and though there is the evidence of another occupant of the lorry to the effect that the employment was by the driver, and though the muster roll (as is not unnatural) does not contain any mention of this woman having been employed that day, there is undoubtedly evidence on which it was possible for the Commissioner to come to his finding, and it is, therefore, not open to us to interfere. We take it that she was in fact in the employ of her employer at the time of the accident.

The next point argued is that the claim cannot be sustained in view of the want of adequate notice. Section 10 of the Act prescribes that notice of the accident should be given as soon as practicable after the occurrence of the accident. But it also provides that failure to give proper notice will not bar a claim if the employer had knowledge of the accident from some other source at or about the time when it occurred. It is stated in the course of the judgment before us that the employer admitted the receipt of a telephone message from somebody unknown on the day of the accident. We have been unable to find any such admission in the evidence in the case or in any written *purshis* to that effect; but the notes of arguments are before us, and it is evident that the employer's learned counsel admitted in the course of the arguments that his client had received a telephone message. That would undoubtedly put the employer on enquiry, and in our view that is all that is necessary to enable the employee to escape the consequences of failing to give notice. But I do not propose to go deeply into this



matter. It is clear from the judgment that in the early stages of the case the question of want of notice was not pressed. In fact no issue was raised on the point, and that is why there is no evidence on the point. The matter was pressed only at the close of the evidence. We think that the learned Commissioner was justified in acting on the admission of counsel and finding that the employer had in fact notice from other sources.

It is argued that the words "notice of the accident" appearing in S. 10 must mean "notice of the details of the accident." But we see no justification for reading into the section words which are not there; and (though this point does not seem to have been definitely decided) I may refer to the case in (1925) 2 K. B. 473,<sup>1</sup> and in particular to the remarks of Atkin J. towards the end of the judgment, where approval is given to an earlier dictum that the question of notice ought not to be measured in very nice scales and it is said that a wide and unnecessary extension to the word "accident" which might defeat the claim to compensation ought not to be lightly given. It is next argued that the deceased was not a workman within the meaning of the Act even on the facts found. "Workman" is defined in S. 2 (1) (n), and it includes a person who is employed on monthly wages not exceeding Rs. 300 in any such capacity as is specified in Sch. II. There is the authority of this High Court in 39 Bom. L. R. 1230<sup>2</sup> to show that monthly wages not exceeding Rs. 300 do not restrict the definition of workman to people who are in fact employed on monthly wages, thereby excluding people on daily wages. An addition was made to Sch. II by Government Notification No. 7685, dated 1st March 1938, so as to include persons employed for the purpose of loading or unloading any mechanically propelled vehicle or in the handling or transport of goods which have been loaded into any mechanically propelled vehicle. On the authority of a case decided by a Bench of this High Court in 31 Bom. L. R. 1304,<sup>3</sup> it has been argued that the words "employed for the purpose of" and the words "employed in" mean exactly the same thing, so that an accident

which occurred while the employee was on the way to work could not be the subject of a claim to compensation, it not having occurred while the employee was employed in the actual work. That case, however, could have been decided more appropriately on a different ground altogether, namely, that the person who suffered the accident was at the time of the accident acting altogether outside the scope of his employment and not merely acting in something that was incidental to his employment but was not the actual employment. In the present case it could hardly be accepted that the lorry, which as we know was being driven to a brick field for the purpose of picking up bricks, should be expected to wait at the brick field while the person injured walked; and we take it therefore that her travelling to the brick field was within the scope of her employment. There is a later case of this High Court to which I have already referred, 39 Bom. L. R. 1230,<sup>2</sup> in which a man was drowned after the work had come to an end and was yet held to be a workman within the meaning of the Act. We consider ourselves free to follow the latter of these two decisions. In our view the injured woman was not only killed in the course of her employment but was also a workman within the meaning of the Act.

Lastly, it is argued that the calculation of wages is wrong. Compensation is based upon monthly wages, and this woman was employed only for a day. The learned Additional Commissioner has followed S. 5 (b), which admittedly applies to the case; and on the basis of that section he has estimated the average wages of a workman employed on similar work in the same locality, basing his calculations upon the present employer's own muster rolls. He finds that the average daily wages would be fourteen annas, and he has multiplied that sum by thirty for the purpose of finding monthly wages. It is argued that this method of calculation takes no account of Sundays, on which the employee would not be earning money, but also takes no account of bank holidays or days of absence or sickness; and it is suggested that we should send the case back for finding the average amount spent in every month by an employer in the locality having regard to these possibilities of deductions. But we note that S. 5 (c) (though not applying to the particular case with which we have to deal) calculates monthly wages by multiplying the total wages earned by thirty and dividing by the number of days of con-

1. (1925) 2 K.B. 473 : 95 L.J.K.B. 316 : 133 L. T. 664, *Fenton v. Owners of Ship Kelvin*.

2. ('38) 25 A.I.R. 1938 Bom. 110 : I. L. R. (1938) Bom. 44 : 173 I. C. 545 : 39 Bom. L. R. 1230, *Ellerman's City and Hall Lines v. Thomas*.

3. ('30) 17 A.I.R. 1930 Bom. 44:54 Bom. 114:123 I. C. 495 : 31 Bom. L. R. 1304, *Parsu v. Bombay Port Trust*.



tinuous employment; and this method certainly does not take into account any days of absence on account of holidays or sickness. There is no reason to suppose that the calculations of the learned Additional Commissioner are in any way wrong. The result is that the appeal fails on all points and is dismissed with costs.

R.K.

*Appeal dismissed.*[ *Case No. 43.* ]**A. I. R. (33) 1946 Bombay 171**

DIVATIA AND RAJADHYAKSHA JJ.

*Nanamiyan Umarbhai — Appellant*

v.

*Land Acquisition Officer—Respondent.*

First Appeal No. 80 of 1941, Decided on 28th February 1945, from decision of Joint Judge, Ahmedabad, in Compensation case No. 60 of 1939.

Land Acquisition Act (1894), S. 23 (i) (iv)—“Damage” explained—Brick-kiln worked without permission from Collector under S. 48, Bombay Land Revenue Code—Damages cannot be claimed.

The word “damage” in S. 23 (1) (iv) must be construed as damage in carrying on a lawful business in a lawful manner, and if the earnings of such a business are injuriously affected by reason of the acquisition, then the claimant would be entitled to compensation in respect thereof.

[P 173 C 1]

Where the claimant has not obtained the permission of the Collector under S. 48, Bombay Land Revenue Code, for using the land for non-agricultural purposes, damages flowing from the stoppage of the business of a brick-kiln cannot be claimed.

[P 173 C 1]

*I. I. Chundrigar and K. T. Pathak —*

for Appellant.

*B. G. Rao, Government Pleader —*

for Respondent.

**Rajadhyaksha J.** — This is an appeal against an order made by the Joint Judge of Ahmedabad in a reference made under S. 18, Land Acquisition Act, 1894, against the award of the Special Land Acquisition Officer, Ahmedabad, in respect of Survey Nos. 178 and 180 which were notified for acquisition in September 1935. Survey Nos. 178 and 180 together measured five acres and thirty six gunthas and were purchased by the present appellant-claimant on 17th May 1934, for Rs. 3,500. Out of these five acres and thirty-six gunthas, five acres and eighteen gunthas were notified for acquisition for the purpose of constructing an aerodrome at Ahmedabad leaving an area of eighteen gunthas out of the said two survey numbers. The Land Acquisition Officer made an award at the rate of Rs. 320 per acre and allowed Rs. 180 for the mango trees standing thereon. Against that order the appellant-claimant asked for a reference to the Dis-

trict Court, and the learned Joint Judge who heard the reference valued the land at Rs. 593 per acre. This was precisely the price which the claimant had paid when he purchased the land on 17th May 1934. The learned Joint Judge allowed Rs. 50 as the fuel value of the mango trees and rejected the appellant's claim for severance and for damages for loss of trade profits. The learned Judge was of opinion that there was no damage on account of severance as the remaining eighteen gunthas of land were contiguous to the adjoining Survey No. 181 which also belonged to the claimant. The lands under acquisition were used for brick-making purposes and the adjoining survey No. 181 was also used for the same purpose. The learned Judge thought that no case was made out for giving any compensation for damages on account of severance. The learned Judge further thought that there was no case made out for granting damages for loss of trade profits. Although the survey numbers in question were used for brick-making purposes, the learned Judge considered that the brick-making was stopped in April 1937, two months before the possession of the land was taken, not on account of the impending acquisition but because the claimant had stopped his business, as he did not consider it profitable enough to go on with it. In his view the claimant had stopped business voluntarily in April 1937, and was not, therefore, entitled to any damages for injurious affection to his earnings under S. 23 (1) (iv), Land Acquisition Act. Being of this opinion, he granted no compensation for loss of trade profits. In case he was wrong in this view of his, he considered that the claimant was entitled to Rs. 1000 for loss of trade profits for four months on the basis that the claimant was making a profit of on an average Rs. 2900 per year. In his opinion, this period of four months was sufficient to permit the claimant to start his business elsewhere. The learned Judge further considered that the claimant would have been entitled to Rs. 1000 on account of the structures on the acquired lands in case the Court came to the conclusion that his business was stopped as a result of the acquisition. Being, however, of the opinion that the business had not come to an end because of acquisition, he rejected *in toto* the appellant's claim for loss of trade profits. In the end the learned Judge increased the Special Land Acquisition Officer's award from Rs. 2212 10-0 to Rs. 3773-14-0 mainly for the reason that he valued the



land as a brick-field at Rs. 593 per acre instead of at Rs. 320 per acre. Against that order the claimant has filed this appeal.

The only point that has been urged by the learned counsel for the appellant is that the learned Judge was wrong in granting no compensation for the loss of trade profits. The claim is based on S. 23 (1) (iv), Land Acquisition Act, which lays down that "the Court shall take into consideration the damage, if any, sustained by the person interested at the time of the Collector's taking possession of the land by reason of the acquisition injuriously affecting his earnings."

And the question, therefore, for consideration is whether the claimant's earnings were affected by reason of the acquisition of the properties at the time the Collector took possession of the lands in June 1937. The learned Judge of the lower Court seems to have come to the conclusion that the claimant stopped his business voluntarily in April 1937, as it was not sufficiently profitable. In our opinion, this conclusion of the learned Judge is not correct, and we must hold that the business came to an end by reason of the acquisition of the property at the time the Collector took possession of the lands in June 1937. The claimant himself has stated in his evidence, Ex. 170, that his brick-making kiln was stopped owing to the acquisition, and there is no serious cross-examination by the respondent on this point. The learned Judge has in Para. 28 of the judgment dealt with the question of the adaptability of the lands round about this locality for the purpose of brick-making. But that paragraph only contains a general discussion of the suitability of the lands in this locality generally for the purpose of brick-making. But it cannot be gainsaid that the two lands under acquisition as also survey No. 181 of the claimant which adjoins those lands were being used for the purpose of brick-making, and the real point to be considered is whether the brick-making business in these two survey numbers came to an end by reason of the acquisition. The learned Joint Judge has referred to the fact that one Odhavji who had a brick-kiln in survey No. 132 stopped his business in 1932 and sold the land in 1935, and from this example the learned Judge concludes that brick-making business was not profitable and hence the claimant also must have brought his business to an end in April 1937. In our opinion, this instance on which the learned Judge relies is by no means conclusive. Odhavji had purchased the land for Rs. 1201 in 1929. He carried on the brick-making business for three years

and presumably when the capacity of that land for brick-making was exhausted, he sold the land in 1935 to one Kuberdas because he realised Rs. 5500 on account of its potentiality for building purposes. From this example we cannot conclude that the claimant ceased to use the land under acquisition for brick-making business in April 1937, because he considered that it was no longer a profitable business. The more serious argument, however, in support of the learned Judge's view is that the claimant himself stopped business of brick-making in April 1937, even in Survey No. 181 which was not notified for acquisition. And the learned Government Pleader had attempted to support the conclusion of the lower Court by saying that this action of the claimant himself in closing his business in Survey No. 181 in April 1937, showed that the claimant considered that it was no longer profitable to go on with it. We do not think that the submission of the learned Government Pleader is correct. It is true that the claimant ceased to do business of brick-making in Survey No. 181 which adjoins the lands under acquisition in April 1937. But this may be due to several reasons. It is possible that Survey No. 181 in which the claimant had started a brick-kiln in 1934 may have been exhausted by April 1937. It may also be that having found that practically the whole of Survey Nos. 178 and 180 were being acquired, he may not have thought it worthwhile to continue business in the remaining Survey No. 181. There is evidence to show that Survey No. 181 with only 18 gunthas remaining out of Survey Nos. 178 and 180 could have provided earth for brick-making for only one year more. And, lastly, there is the fact that the adjoining lands were being purchased by Kuberdas on account of their building potentiality. We cannot, therefore, say that if the lands under acquisition had not been acquired, the claimant's business of brick-making could not have gone on. The claimant seems to have stopped making *kaccha* bricks in the lands under acquisition in April 1937, in anticipation of their being taken possession of by Government, a notification for which actually appeared only three or four weeks thereafter. Moreover, there is a definite finding of the learned Judge that on an average the claimant was making a profit of Rs. 2900 per year out of his Hansol kiln from the lands under acquisition. And, lastly, there is the fact that in the award the learned Land Acquisition Officer has stated that when he went to inspect the lands in July



and August of 1937, the newly burnt bricks were being carted by the claimant in motor lorries. We are, therefore, of opinion that it must be held that the claimant's earnings in Survey Nos. 178 and 180 were injuriously affected by reason of the acquisition at the time when the Collector took possession of the lands in June 1937.

That being so, the question arises whether the claimant is entitled to any compensation. Under ordinary circumstances the claimant would have been entitled to compensation in view of the conclusion to which we have come. But, in this particular case, there is the further complication that the claimant had not acquired permission of the Collector for using the land for non-agricultural purposes. So in a strict sense the business was not being legally carried on. In our opinion, the word "damage" in S. 23 (1) (iv) must be construed as damage in carrying on a lawful business in a lawful manner, and if the earnings of such a business are injuriously affected by reason of the acquisition, then the claimant would be entitled to compensation in respect thereof. The claimant admits that he had not obtained the permission of the Collector under S. 48, Bombay Land Revenue Code, for using the land for non-agricultural purposes, and under S. 66, Bombay Land Revenue Code, the claimant was not only liable to be fined but was also liable to be evicted at any time when the Collector chose to do so. It cannot, therefore, be said that if there was no acquisition and if the possession of the lands had not been taken in June 1937, the claimant would have been entitled to carry on his business and earn profits therefrom. It is quite conceivable that he may have been evicted at any time by the Collector. It can be said, therefore, that the business which the claimant was carrying on was not a lawful business, and in our opinion the damage resulting from the stoppage of such business is not the damage contemplated in S. 23 (1) (iv), Land Acquisition Act. In this connexion we would refer to R. 4 of the rules framed under S. 2, English Acquisition of Land Act, 1919. That rule is in these terms :

"Where the value of the land has increased by reason of the use thereof or any premises thereon in a manner which could be restrained by any Court or is contrary to law or is detrimental to the health of any inmates of the premises or to the public health, the amount of that increase shall not be taken into account."

As pointed out by Om Prakash at p. 275 of his book on "Compulsory Acquisition of Land in British India," the object of this

rule is to remove from the consideration of the arbitrator any increased value owing to the premises being used for purposes not permitted by law. He observes :

"For example the premises might be used for the purpose of business, whereas the covenants in the lease limited its user to private purposes only. In such case the Court could grant an injunction restraining such user. Again, the premises might be used as a brothel, and a larger rental might be paid to the landlord by reason of such user. Compensation based on such increased rental might possibly be claimed by the person or persons interested in the premises, but the above rule would render such a claim unarguable."

We consider that the reasoning on which R. 4 of the rules framed under S. 2, English Acquisition of Land Act, 1919, is based, should be applied in construing the word "damage" as used in S. 23 (1) (iv), Land Acquisition Act. The learned counsel for the appellant argued that as the Collector had allowed the use of the land for brick-making purposes for two years, he might have allowed its continued user for that purpose if the lands under acquisition had not been taken possession of. We cannot assume that the Collector was aware of the unlawful user of the land by the claimant, nor can we presume that the Collector would after becoming aware of this unlawful use have granted permission for the continued use of the land for brick-making purpose. The fact remains that the land was being used for brick-making purposes unauthorizedly and that the claimant had rendered himself liable to be evicted at any time by the Collector. Whether the Collector would have evicted the claimant or not is a matter of pure speculation. In any case the business which the claimant was carrying on was not in accordance with law, and we cannot hold that the damage resulting from the stoppage of such a business is a "damage" within the meaning of S. 23 (1) (iv), Land Acquisition Act.

We are, therefore, of opinion that the claimant is not entitled to any compensation under this head. This was the only point argued in appeal. In our opinion the appeal fails. As the point on which the appeal fails was not taken in the lower Court, we direct that the parties will bear their own costs of the appeal.

R.K.

*Appeal dismissed.*



[Case No. 44.]

**A. I. R. (33) 1946 Bombay 174****DIVATIA AND LOKUR JJ.***Hirabai Gendalal — Appellant*

v.

*Bhagirath Ramchandra & Co. —**Respondent.*

First Appeal No. 299 of 1939, Decided on 6th October 1944, against decision of First Class Sub-Judge, Jalgaon, in special suit No. 301 of 1936.

(a) Civil P. C. (1908), O. 3, Rr. 4 and 5 — Advocate (O. S.) presenting plaint in mofussil — Vakalatnama must be filed.

An advocate enrolled on the Original Side of the High Court is required to file a document authorising him to act on behalf of his client in a Court in the mofussil : The decision in ('40) 27 A.I.R. 1940 Bom. 272 held obiter and dissented from.

[P 175 C 1; P 177 C 2]

(b) Civil P. C. (1908), S. 99 — Presentation of plaint — Person not properly authorised — Defect is mere irregularity — Decree obtained cannot be set aside merely on ground of that irregularity.

Failure to comply with the provisions regarding presentation of a plaint is a mere irregularity, so that if the person presenting it is not properly authorised to do so, the presentation would be irregular, but does not oust the jurisdiction of the Court. In such a case the Court would have a discretion to permit the irregularity to be cured, and if the plaintiff has acted in good faith and without gross negligence, the Court would allow it to be cured. The suit must then be deemed to have been filed when it was first instituted, and under S. 99, the decree passed in favour of the plaintiff will not be reversed in appeal on the ground of the said irregularity : *Case law referred.* [P 179 C 2]

(c) Partnership Act (1932), Ss. 4, 6, Explanation (2)—Participation of profits—Whether partnership is constituted depends on intention of parties.

Although the right to participate in the profits of a business is a strong test of a partnership, yet whether that relationship does or does not exist must depend on the real intention and contract of the parties. The true test is whether such a participation of profits constitutes the relationship of principal and agent between the person taking the profits and those actually carrying on the business. The mere fact that in the agreement a person is described as 'a sleeping partner' cannot alter the real nature of the transaction: ('27) 14 A.I.R. 1927 Bom. 187, *Rel. on.* [P 180 C 1]

(d) Letters Patent (Bombay), Cl. 37 — Cl. 37 does not empower High Court to make rules with respect to Subordinate Courts.

Clause 37 of the Letters Patent does not empower the High Court to make rules and orders for the purpose of regulating proceedings in civil cases in the Courts subordinate to it. For that purpose the High Court must resort to S. 122 of the Civil P. C. or S. 224 (1) (b), Government of India Act, 1935. [P 177 C 2]

(e) Interest — Period prior to suit — When interest can be granted, explained.

Interest for a period prior to the date of the suit can be awarded, if there is an agreement for the

payment of interest at a fixed rate, or it is payable by the usage of trade having the force of law, or under the provision of any substantive law entitling the plaintiff to recover interest: ('38) 25 A.I.R. 1938 P. C. 67, *Foll.* [P 181 C 2]

*J. C. Shah and N. C. Shah* — for Appellant.

*H. D. Banaji, G. S. Gupte and M. W. Pradhan* — for Respondent.

*B. G. Rao, Government Pleader* — for the Government of Bombay.

*M. J. Mehta* — for Bar Council.

**Lokur J.** — The suit out of which this appeal arises was filed by the Mamlatdar, taluka Jalgaon, representing the Court of Wards, on behalf of Messrs. Bhagirath Ramchandra & Co., of which the present owner and vahiwardar is Shivnarayan Bhagirath Shet. In 1927 the plaintiff company was appointed the managing agents of the Bhagirath Spinning, Weaving and Manufacturing Co., Ltd., Jalgaon, hereinafter referred to in this judgment as the Mills company. The Mills company having fallen into financial difficulties, a scheme for its reconstruction was submitted to and sanctioned by the High Court on 11th January 1932. In accordance with that scheme, the plaintiff company surrendered its managing agency to the defendant company for a period of fifteen years on condition that it should be paid a quarter of the commission earned by the defendant company from the managing agency. The Mills company went into liquidation in February 1935 and during that interval the defendant company is said to have earned a commission of Rs. 39,953-5-4. This suit was filed by the plaintiff to recover Rs. 11,584 due for a quarter of the commission and interest thereon. The defendant company resisted the claim on various grounds, but none of them was found tenable and the plaintiff was given a decree for the full amount claimed.

The first contention of the defendant company is that the suit is not properly instituted and that the lower Court should have refused to proceed with it. The plaint was duly signed by the Mamlatdar as representing the Court of Wards and was presented in Court by his counsel Mr. V. N. Patil, Bar-at-Law, who is enrolled as an advocate (O.S.) of this High Court, but he did not file a vakalatnama or any document signed by the Mamlatdar appointing him to act for him in Court, as required by O. 3, R. 4 (2), Civil P. C., 1908. It is, therefore, contended that there was no proper presentation of the plaint to the Court as required by O. 4, R. 1, of the Code. The question whether an advocate (O.S.) can act



on behalf of his client in a Court in the mofussil without a vakalatnama is not free from doubt, and, in view of the importance of the question notices were issued to Government, to the Bar Council and to the Bar Association to enable them to have their say in the matter. The Government Pleader urges on behalf of Government that a vakalatnama is necessary, while Mr. Mehta urges on behalf of the Bar Council that an advocate (O.S.) can appear, act or plead on behalf of his client both in the High Court and in the mofussil Courts without filing a vakalatnama. But he claims this privilege only for advocates (O.S.) and not for advocates (A.S.). The lower Court held that Mr. Patil, though an advocate (O.S.), could not present the plaint without filing the plaintiff's vakalatnama, but as he believed in good faith that no vakalatnama was required, the defect was allowed to be cured by its subsequent production, on the analogy of the principle contained in S. 99, Civil P. C., and in the ruling in 54 ALL. 57.<sup>1</sup>

The question whether an advocate (O.S.), that is to say an advocate enrolled on the Original Side of the High Court, is required to file a document authorising him to act on behalf of his client in a Court in the mofussil was considered by a Division Bench of this Court in I.L.R. (1940) Bom. 510<sup>2</sup> and Beaumont C. J. and Sen J. expressed the opinion that he is not so required. That opinion, however, is obiter as the question did not directly arise in that case. There an advocate (O.S.) was engaged by a party only for the purpose of pleading for him in the Court of the Small Cause Judge at Thana, and though he had put in a memorandum signed by himself in accordance with O. 3, R. 4 (5), the learned Judge refused to accept it and allow the advocate to argue the case. On his application to this Court it was held that the memorandum was sufficient and the advocate could not be required to file a vakalatnama for the mere purpose of pleading. This was sufficient for the disposal of that case, but as the wider question regarding the privileges of an advocate (O.S.) appearing in a mofussil Court had been argued, Beaumont C. J. thought it proper to express his opinion on the point. The question has now directly arisen in the present case, and after hearing it fully argued

on behalf of all the interested parties, we have, with the utmost respect, to differ from the view expressed by Beaumont C. J. Although the decision is that of a Division Bench, as the question did not arise directly in that case and as the opinion expressed there is obiter, we have not thought it necessary to refer this case to a larger Bench.

Order 4, R. 1 (1), Civil P. C., requires that every suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in this behalf. Under O. 3, R. 1, such presentation must be made by the party in person, or by his recognized agent, or by a pleader acting on his behalf. Order 3, R. 4 (1), provides that no pleader shall act for any person in any Court, unless he has been appointed for the purpose by such person by a document in writing by such person or by his recognised agent or by some other person duly authorised by or under a power of attorney to make such appointment. The word "pleader," according to its definition in S. 2 (15) of the Code, includes an advocate, a vakil and an attorney of a High Court. Thus it is used in a much wider sense than its ordinary signification, and advocates enrolled on the Original Side of the High Court, that is to say, advocates (O. S.), also are included in it, and under O. 3, R. 4 (1), they too cannot act for any person in any Court unless appointed by him by a document in writing. But O. 3, R. 1, does recognise exceptions where it is "otherwise expressly provided by any law for the time being in force," and such an exception is to be found in R. 40 in Chap. 2, Part 1, Bombay High Court Rules (on the Original Side), 1936. It says:

"No Advocate (O. S.) shall be required to present any document empowering him to act in any appeal or proceeding, civil or criminal."

In I. L. R. 1940 Bom. 510<sup>2</sup> Beaumont C. J. held that this rule was intended to apply to all Courts in the Presidency, and not to the High Court alone. The plain words of the rule show that it is not meant to be confined to the advocates (O. S.) appearing in the High Court. As pointed out by Beaumont C. J., Rule 45 in the same chapter expressly refers to "all Courts in the Bombay Presidency." But that rule refers only to the precedence amongst advocates enrolled by the High Court, and stands on a different footing. No other rule purports to deal with the procedure to be followed in the mofussil Courts. The rule appears in the book which is described as "Rules and Forms of the High Court of Judicature at Bombay on the

1. (31) 18 A.I.R. 1931 All. 507 : 54 All. 57 : 134 I.C. 26 (S.B.), Wali Muhammad Khan v. Ishaq Ali Khan.

2. (40) 27 A.I.R. 1940 Bom. 272 : I.L.R. (1940) Bom. 510 : 190 I.C. 95, Ambedas Kashibhai v. Vadilal Chaganlal.



Original Side in its several jurisdictions," and they are, therefore, *prima facie*, intended only to apply to that side of the High Court, though some of the rules like Rr. 46 and 47 deal with advocates (A. S.). Part 1 in this book deals with "legal practitioners," and as the same subject is dealt with also in Part 2 of the Rules of the High Court of Bombay, Appellate Side, 1936, some of the rules in the two books necessarily overlap each other. It is, therefore, safer to interpret these rules by referring to the powers of the High Court to make them.

The High Court possesses wide powers to frame rules for both the sides of the High Court and all the Courts subordinate to it. Rules relating to pleaders can be made by the High Court under ss. 122 and 129, Civil P. C., S. 224, Government of India Act, 1935, cls. 9, 10 and 37, Letters Patent, the Bar Councils Act and the Bombay Pleaders Act. Section 122, Civil P. C., empowers the High Courts to make rules regulating their own procedure and the procedure of the civil Courts subject to their superintendence, and by such rules to amend, alter or add to all or any of the rules in Sch. 1 of the Code. This is a new rule inserted in the Code of 1908. Under the former Code, the High Court had no power to alter the provisions of the Code, however urgent such alteration might be in view of the peculiar local conditions. To remedy this defect, the Code was divided into sections and rules, and the High Courts were empowered to alter the rules to adopt them to local conditions. But as observed in A. I. R. 1942 LAH. 201,<sup>3</sup> this delegated power of legislation conferred on the High Courts is limited to annulling, altering or adding to the rules in Sch. 1 of the Code. It cannot be suggested that R. 40 in Part 1 of the Rules of the High Court (on the original side), 1936, with which we are concerned, and which virtually alters O. 3, R. 4, sub-rr. (1) and (2), is made under S. 122. That rule was framed before the Code of 1908 was enacted. Prior to 1926, O. 3, R. 4, had a sub-r. (3), which provided that no advocate of any High Court established under the Indian High Courts Act, 1861, or of any Chief Court and no advocate of any other High Court who was a barrister was required to present any document empowering him to act. But that sub-rule was deleted when the present R. 4 was substituted for the old one by Act XXII of 1926. Hence

3. ('42) 29 A. I. R. 1942 Lah. 201; I. L. R. (1943) Lah. 569; 201 I. C. 667, Kishan Singh v. Bachan Singh.

the present R. 4 makes no exception in the case of advocates (O. S.), and sub-rr. (1) and (2) apply to them equally. The said R. 40 is an independent rule and does not purport to have been made under S. 122 for altering those sub-rules. As observed in A. I. R. 1921 Pat. 509<sup>4</sup> the rules under S. 122, in order to have the effect of varying the rules in Sch. 1 of the Code, must first have been considered and submitted by a rule committee appointed under S. 123, and S. 124 says that before making any rules under S. 122 the High Court shall take such report into consideration. No such procedure was followed when the Rules of the Bombay High Court (O. S.) were made, and the said Rule 40 cannot be treated as made under S. 122, Civil P. C.

Section 129 empowers a chartered High Court to make rules to regulate its own procedure in the exercise of its original civil jurisdiction, and if R. 40 is made under that section, it does not dispense with the necessity of the production of a vakalatnama by an advocate (O. S.) in the mofussil Courts. Section 224, Government of India Act, 1935, (which corresponds to S. 15, High Courts Act, 1861, and S. 107, Government of India Act, 1915), confers upon every High Court superintendence over all Courts subject to its appellate jurisdiction, and empowers it to make and issue general rules and prescribes form for regulating the practice and procedure of such Courts, provided that they shall not be inconsistent with the provisions of any law for the time being in force. Hence R. 40 of the Rules of the Bombay High Court (O. S.), 1936, could not have been framed under the Government of India Act as it is inconsistent with O. 3, R. 4, sub-rr. (1) and (2), Civil P. C. There is no provision in the Bar Councils Act, 1926, enabling the High Court or the Bar Council to make rules in this behalf, and the Bombay Pleaders Act does not relate to advocates, either O. S. or A. S. Clauses 9 and 10 of the Letters Patent deal with the powers of the High Court to admit advocates, vakils and attorneys and authorise them to appear for the suitors of the High Court and also to make rules with regard to their qualifications and admission as well as their removal or suspension. Both these clauses refer only to "suitors of the High Court," and have nothing to do with mofussil Courts.

After eliminating all these provisions, we are left only with clause 37 of the Letters

4. ('21) 8 A. I. R. 1921 Pat. 509; 74 I. C. 330, Ramdeo Singh v. Mukhan Singh.



Patent, and it is in fact conceded before us that the rules of the High Court (both O. S. and A. S.) have been made under it. That clause empowers the High Court, from time to time, "to make rules and orders for the purpose of regulating all proceedings in civil cases which may be brought before the said High Court, including proceedings in its Admiralty, Vice Admiralty, Testamentary and Matrimonial Jurisdictions, respectively." The proviso to the clause says that in making such rules and orders the High Court shall always be guided as far as possible by the provisions of the Code of Civil Procedure. This restriction on the powers of the High Court is only directory and not mandatory, so that it can, if necessary, make rules inconsistent with the rules in Sch. 1, Civil P. C. : see 57 Cal. 676<sup>5</sup> at p. 677, 58 Cal. 510<sup>6</sup> at p. 518 and 59 Cal. 370.<sup>7</sup> Hence although O. 3, R. 4, sub-rr. (1) and (2), Civil P. C., be not themselves altered under the provisions of S. 122, yet they have been validly superseded by R. 40 of the Rules of the Bombay High Court (O. S.) framed under cl. 37, Letters Patent. But the words in that clause "in civil cases which may be brought before the said High Court" do not make it altogether clear whether they refer to the original jurisdiction only of the High Court or also to its appellate jurisdiction, and whether they extend also to proceedings in cases coming before the civil Courts in mofussil. The opinion prevailing in the Calcutta High Court appears to be that the power under cl. 37 is restricted to the making of rules for operation on the Original Side of the High Court only (Ormond's Rules of the High Court of Judicature at Fort William in Bengal, 1914, Edn. 4, Introduction, p. 88). There the words "may be brought" are interpreted to mean "may be originally instituted," and not to include cases brought up before the High Court from subordinate Courts. I do not think it right to restrict the rule-making powers of the High Court to such an extent. The word "bring" is capable of meaning "file," whether as an original case or as an appeal or an application in revision. A case "may be brought" before the High Court either in its original jurisdiction, if it is an original case,

or in its appellate jurisdiction if it is an appeal or an application in revision. It may be pointed out that there are some cases like transfer applications, which are originally brought before the High Court in its appellate jurisdiction. Mr. Mehta, the learned counsel for the Bar Council, goes further and contends that even cases filed in the mofussil Courts are included, since they too "may be brought," that is to say, "are capable of being brought" before the High Court either in appeal or for revision. But it is not that case itself which comes before the High Court, but what is "brought," that is to say "filed," in the High Court is an appeal or revision application concerning that case. "Bringing" such an appeal or revision application before the High Court is different from bringing the case itself before the High Court. There is, therefore, no doubt that cl. 37, Letters Patent, does not empower the High Court to make rules and orders for the purpose of regulating proceedings in civil cases in the Courts subordinate to it. For that purpose the High Court must resort to S. 122, Civil P. C., or S. 224 (1) (b), Government of India Act, 1935. Hence if it is intended that advocates (O. S.) should be allowed to act on behalf of parties in Courts other than the High Court, O. 3, R. 4, must be suitably altered under S. 122, since no rule inconsistent with it can be made by the High Court under S. 224, Government of India Act, 1935. It follows, therefore, that in this case the presentation of the plaint by Mr. Patil without a vakalatnama of the plaintiff was not proper.

The reason of the rule is obvious. Rule 41 of the Rules of the Bombay High Court (O. S.) requires that advocates (O. S.) appearing and pleading for suitors on any side of the High Court and in the Insolvency Court must be instructed by an attorney or (on the appellate side of the High Court) by an advocate (except when appearing or pleading for an insolvent in the Insolvency Court or for a prisoner, in the criminal Court). Thus, there is either an attorney or an advocate (A. S.) before the Court to represent the party and he can be held responsible for the conduct of the case. But there is no rule prohibiting an advocate (O. S.) from appearing in the mofussil Court without being instructed by a pleader or an advocate (A. S.). To remove this lacuna R. 8A has been recently made by the High Court requiring those who apply to be admitted as an advocate (O. S.) to give an undertaking that, if admitted, they would not appear or plead

5. (30) 17 A. I. R. 1930 Cal. 685 : 57 Cal. 676 : 129 I.C. 181, Umeshchandra Banerji v. Kunjalal Biswas.

6. (31) 18 A. I. R. 1931 Cal. 688 : 58 Cal. 510 : 133 I. C. 587, Ashutosh Basu v. Sudhangshubhusan Mukherji.

7. (32) 19 A. I. R. 1932 Cal. 1 : 59 Cal. 370 : 135 I. C. 789, Rajkumar Pal v. Janabali Mia.



in any Court subordinate to the High Court unless instructed by an attorney or an advocate (A. S.) or a pleader as the case may be. But this rule does not apply to persons who have been called to the bar or have passed the advocates (O. S.) examination before 1st October 1943, so that in their case at least, the difficulty pointed out above still exists. Hence if O. 3, R. 4, is to be amended, so as to exempt advocates (O. S.) from being required to put in vakalatnamas in Courts subordinate to the High Court, they should be required not to appear or plead unless instructed by an attorney, an advocate (A. S.) or a pleader.

It may also be pointed out that there is a distinction between "acting," "appearing" and "pleading." Order 3, R. 4, sub-rr. (1) and (2), require a vakalatnama only from a pleader who wants to "act" for a party. If he wants only "to plead" for him, a memorandum of appearance under sub-r. (5) would be enough. It is a well-recognised rule of etiquette that an advocate (O. S.) does not "act" for a party in the High Court; that is to say he does not himself do ministerial acts like presenting a plaint or a memorandum of appeal. He is always instructed by an attorney or an advocate (A. S.), who does that work. Hence both in R. 41 and in the new R. 8A of the Rules of the Bombay High Court (O. S.), the words "appear" and "plead" only are used. But it has now come to notice that in the mofussil Courts advocates (O. S.), even "act" for parties. Hence at least R. 8A requires to be amended by the addition of the word "act" before the words "appear or plead."

There is not the slightest doubt that when Mr. Patil presented the plaint in the lower Court, he believed in good faith that he could act for the plaintiff without his vakalatnama, and he has stated so on oath. In I. L. R. 1940 Bom. 510<sup>2</sup> judicial notice was taken of the fact that R. 40 in Part I of the High Court (O. S.) Rules had always been construed as intended to apply to all Courts in the Presidency and that advocates (O. S.) were never in practice required to file any document authorising them to appear in a mofussil Court. In this case another duly authorised pleader appeared for the plaintiff at a later stage and put in Mr. Patil's vakalatnama duly signed by the plaintiff. The presentation of the plaint by Mr. Patil without a vakalatnama has caused no prejudice to the defendant, and has not affected the merits of the case or the jurisdiction of the Court. If the omission is only an error,

defect or irregularity in the proceeding then according to the provisions of S. 99, Civil P. C., the decree is not liable to be reversed in appeal. Mr. Shah for the appellant contends that the omission is not such an error, defect or irregularity as is contemplated by S. 99, but is an illegality which vitiated all subsequent proceedings, that the plaint must be deemed to have been presented only when the vakalatnama was produced and that as by that time the claim was time-barred, the omission does affect the merits of the case. He referred us to the recent decision in 46 Bom. L. R. 350.<sup>8</sup> There the plaint in a minor's suit was signed and verified by, and the vakalatnama of the pleader who presented the plaint to the Court was also signed by a person who held a general power-of-attorney from the minor plaintiff's next friend on her own account. It was held that as the attorney had no authority to present the plaint or sign it, it was not a valid plaint and the suit was not validly commenced and that the defect could not be cured by amendment of the plaint. The facts of that case are easily distinguishable. There the plaint itself was signed and verified by an unauthorised person and Beaumont C. J. (sitting alone) held that it was not a valid plaint. In the present case there was no defect in the plaint, but it was presented by a person who had no written authority from the plaintiff to do so. Moreover, with all respect, the view taken by Beaumont C. J. is contrary to that taken by a Division Bench of this Court in 47 Bom. 227,<sup>9</sup> in which the plaint was signed and verified by the plaintiff's mukhtyar, who had only a special power-of-attorney and not a general power-of-attorney as required by the High Court rule amending O. 3, R. 2, cl. (a), Civil P. C., and it was held that as it was an error, defect or irregularity in the proceedings in the suit not affecting the merits of the case or the jurisdiction of the Court, it was covered by S. 99 of the Code. This decision was followed in 92 Bom. L. R. 1178,<sup>10</sup> and Baker J. got a similar defect cured in the appellate Court by allowing the plaintiff to amend the plaint by signing it himself. In 34 Bom. L. R. 628<sup>11</sup> Mirza J.

8. ('44) 31 A.I.R. 1944 Bom. 201 : I.L.R. (1944) Bom. 66 : 214 I. C. 298 : 46 Bom. L. R. 350, *Chunilal Bhagwanji v. Kanmal Lalchand*.

9. ('23) 10 A. I. R. 1923 Bom 44 : 47 Bom. 227 : 76 I. C. 34, *Ganapati Nana v. Jivanabai*.

10. ('30) 17 A.I.R. 1930 Bom. 511 : 128 I. C. 609 : 32 Bom. L. R. 1178, *Ephrayim v. Turner, Morrison & Co.*

11. ('32) 19 A.I.R. 1932 Bom. 367 : 138 I.C. 797 : 34 Bom. L. R. 628, *Nanjibhai v. Popatlal*.



allowed a similar amendment even after the plaintiff's claim was time-barred, on the ground that the defect was only "a technical irregularity."

Another case, which is relied upon by Mr. Shah, is that in I.L.R. (1937) Mad. 320.<sup>12</sup> In that case a darkhast was presented by a pleader without any documentary authority in his favour from the decree-holder, and it was held that the pleader having no capacity or power to act, the application had no effect, as it had not been made in accordance with law. The question which actually arose in that case was whether a darkhast so presented was a step in aid of execution and could save the succeeding darkhast from the bar of limitation. The defect in the darkhast was never cured by a subsequent amendment, and there was no occasion to consider whether S. 99, Civil P. C., was applicable as there was no appeal against the order passed on that defective darkhast. That case, therefore, is of no avail to the appellant. On the other hand in 63 Cal. 733,<sup>13</sup> where a darkhast was filed without a vakalatnama and the defect was with the leave of the Court, subsequently removed by the production of a vakalatnama, the darkhast application was held to have been duly presented.

In 40 Mad. 743<sup>14</sup> where the plaint was signed, verified and presented by one purporting to act as the next friend of the plaintiff who was by a bona fide mistake described as a minor, though he was really of age, the mistake was permitted to be corrected and the plaintiff was allowed to sign the plaint himself, and the plaint was regarded as duly filed on the day on which it was originally presented. The same view was taken by a Special Bench of the Allahabad High Court in 54 ALL. 57<sup>1</sup> by the Calcutta High Court in 21 Cal. 866<sup>15</sup> and by the Lahore High Court in A. I. R. 1926 Lah. 82<sup>16</sup> where the defect was allowed to be remedied after the plaintiff's claim was time-barred. There are some cases like A. I. R. 1941 Oudh 169<sup>17</sup> where a different view was taken, but the preponderance of judicial opinion, with

12. ('37) 24 A.I.R. 1937 Mad. 239 : I.L.R. (1937) Mad. 320 : 165 I. C. 659, Anange Bhima Deo v. Modono Mohono Deo.

13. ('36) 63 Cal. 733, Jagadeesh Chandra Dhabal Deb v. Satya Kinkar Shahana.

14. ('18) 5 A.I.R. 1918 Mad. 916 : 40 Mad. 743 : 41 I. C. 510, Shanmuga v. Narayana Ayyar.

15. ('94) 21 Cal. 866, Taqui Jan v. Obaidulla.

16. ('26) 13 A. I. R. 1926 Lah. 82 : 89 I. C. 363, Amritsaria v. Gamun.

17. ('41) 28 A.I.R. 1941 Oudh 169 : 191 I.C. 821, All India Barai Mahasabha v. Jangi Lal.

which we fully agree, establishes that failure to comply with the provisions regarding presentation of a plaint is a mere irregularity, so that if the person presenting it is not properly authorised to do so, the presentation would be irregular, but does not oust the jurisdiction of the Court. In such a case the Court would have a discretion to permit the irregularity to be cured, and if the plaintiff has acted in good faith and without gross negligence, the Court would allow it to be cured. The suit must then be deemed to have been filed when it was first instituted, and under S. 99, Civil P. C., the decree passed in favour of the plaintiff will not be reversed in appeal on the ground of the said irregularity. On merits, it is contended that the plaintiff company cannot maintain this suit as it is a partner of the defendant company and the partnership is not registered as required by S. 69, Partnership Act, 1932. The question whether a transaction amounts to a partnership or not must be decided on the terms of the agreement itself and all the relevant facts. Under S. 4 of the Act, "partnership" is defined as the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. Then S. 6 provides that in determining whether a group of persons is or is not a firm, or whether a person is or is not a partner in a firm, regard shall be had to the real relation between the partners, as shown by all relevant facts taken together. The agreement in the present case is Ex. 64. Its terms are that the plaintiff company should transfer its managing agency of the Mills company to the defendant company for fifteen years, that during that period the defendant company should enjoy all the rights possessed by the plaintiff company as the managing agents of the Mills company, receive for its commission twelve per cent. of the net profits made by the Mills company or Rs. 15,000 a year, whichever is more, and pay to the plaintiff company a four annas share in the commission so earned. With regard to this share in the commission, the agreement says "it is to be paid to the plaintiff company in the capacity of a sleeping partner." Mr. Shah relies upon this description in the agreement itself and upon the terms set out above, as proving the partnership between the plaintiff and the defendant. As pointed out by Beaumont C. J. in I. L. R. 1939 Bom. 616<sup>18</sup> the words

18. ('39) 26 A. I. R. 1939 Bom. 410 : I. L. R. (1939) Bom. 616 : 184 I. C. 397, Chimanram Motilal v. Jayantilal Chhaganlal.



"acting for all" were inserted in the definition of "partnership" to emphasise that partners are agents and not merely principals. The plaintiff company was to get a share in the agency commission on account of its ownership of the managing agency, which was temporarily transferred to the defendant company and was to be restored to the plaintiff company at the end of fifteen years. Explanation 2 to S. 6 of the Act says:

"The receipt by a person of a share of the profits of a business or of a payment contingent upon the earning of profits does not itself make him a partner with the persons carrying on the business, and in particular the receipt of such share or payment . . . by a previous-owner or part-owner of the business, as consideration for the sale (or transfer) of the good-will or share thereof does not of itself make the receiver a partner with the persons carrying on the business."

Thus although the right to participate in the profits of a business is a strong test of a partnership, yet whether that relationship does or does not exist must depend on the real intention and contract of the parties. The true test is whether such a participation of profits constitutes the relationship of principal and agent between the person taking the profits and those actually carrying on the business. In the present case there is nothing in the agreement to suggest that the defendant company was to carry on the business of the Mills company on behalf of itself and the plaintiff company. The responsibility of the management of the business was completely taken over by the defendant company. Surajmal, who was examined on behalf of the defendant company clearly admitted that the plaintiff company was not authorised to do any business of the Mills company on behalf of the defendant company. Thus one of the essential elements of partnership is lacking in the present case. The mere fact that in the agreement, itself the plaintiff company was described as "a sleeping partner" cannot alter the real nature of the transaction. As observed by Marten C. J. in 51 Bom. 342<sup>10</sup> p. 346 :

"... a mere statement that the parties are to be partners will not necessarily constitute them partners in law . . . although two persons may hold themselves out to be partners and be liable to third parties accordingly, yet it does not necessarily follow that they would be partners *inter se*."

On the terms of the agreement there was no partnership between the plaintiff company and the defendant company, and the

description of the former as "a sleeping partner" was a misnomer. Hence the appellant's contention that the suit is barred under S. 69, sub-s. (2), Partnership Act, 1932, must fail. It is next contended that the plaintiff company is not entitled to enforce the agreement as it did not fulfil two of the obligations imposed upon it by the terms of the agreement, namely the transfer of 501 shares of the Mills company to the defendant company, and the election of Hiralal Patani and Ratanlal Patani as directors of the Mills company.

It is admitted that only 255 shares were transferred to the persons named by the defendant company and the remaining 246 shares agreed to be transferred were not transferred by the plaintiff company. But that omission was not due to any default of the plaintiff company. The purpose of the transfer, as stated in the agreement itself, was to enable the defendant company to have five of its nominees elected on its behalf as directors of the Mills company. The minimum qualification of a director being that he should hold 51 shares of the Mills company, the defendant company had 255 shares transferred to its five nominees, 51 to each of them. No more shares were required to serve the purpose of the transfer. Shivnarayan, the owner and manager of the plaintiff company, says that those five nominees were duly elected as directors. After all, the shares were to be re-transferred to the plaintiff company after 15 years, and hence there was no desire on the part of the defendant company to pay for the remaining 246 shares and get them transferred. Shivnarayan says that the defendant never demanded the transfer of those shares and Surajmal for the defendant company admits that the plaintiff was never unwilling to transfer them. The plaintiff company cannot, therefore, be accused of having committed a breach of the condition regarding the transfer of 501 shares.

Regarding the election of Hiralal Patani and Ratanlal Patani, cl. (4) of the agreement says that Shivnarayan should try his utmost to get them elected as directors at the general meeting or the extraordinary meeting, and arrange to get them elected so that they would permanently remain directors for 15 years under the scheme, that such election should take place within eight months, and that otherwise the plaintiff would not be entitled to get a fourth share in the agency commission. The Board of Directors did elect both Hiralal and Ratanlal as direc-

19. ('27) 14 A. I. R. 1927 Bom. 187 : 51 Bom. 342 : 100 I. C. 1025, Raghunandan Nanu v. Hormasjee Bezonjee.



tors, and their election had to be placed for confirmation before the general meeting. This was the duty of Gendalal, the proprietor of the defendant company, but he did not do so. Shivnarayan says that there were general meetings held, but the subject of making Ratanlal and Hiralal permanent directors was not considered. Gendalal himself did not enter the witness-box, and his son Surajmal says:

"It was possible to appoint permanent directors according to rules . . . The plaintiff applied to the Board of Directors that Hiralal and Ratanlal should be elected permanent directors. They were not elected as the application was postponed to another meeting. The matter came up before the Board's meeting twice or thrice; and I voted in favour of the election of Hiralal and Ratanlal. The plaintiff also voted in their favour."

Thus the plaintiff company did everything in its power to get them elected as permanent directors, but the defendant company seems to have purposely frustrated its efforts in order to be able to enforce the penal clause in the agreement and refuse to pay the stipulated one-fourth share in the agency commission. We, therefore, hold that the plaintiff company is not proved to have failed to carry out any of the terms of the agreement. It is alleged in the plaint that the defendant company received from the Mills company Rs. 8,083-5-4 in December 1932, Rs. 15,000 in December 1933, Rs. 15,000 in December 1934, and Rs. 1,875 in February 1935, when the Mills company went into liquidation. The plaintiff has claimed a quarter of these four amounts, with interest thereon at twelve per cent. per annum. The lower Court has decreed this claim in full. The defendant company has admitted the receipt of the first three amounts but denied having received Rs. 1875 in February 1935. Although this denial was specifically made in the written statement and in the purshis, Ex. 57, and an issue was framed throwing on the plaintiff the burden of proving the receipt of Rs. 1875 by the defendant company, the plaintiff led no evidence on the point, and Shivnarayan did not say a word about it in his evidence. On the other hand, Surajmal stated on oath that Rs. 1875 had not been received in January or February 1935. In his purshis, Ex. 58, the plaintiff's pleader stated that he did not want to lead any evidence on that point, but wanted the defendant company to show its accounts. It appears from Ex. 61 that the defendant was asked to produce accounts and on the next date of hearing the plaintiff's pleader asked for an adjournment in order to inspect the defendant's

accounts. His request was granted but no further steps were thereafter taken to put in any extract from the accounts nor was Surajmal cross-examined when he stated that Rs. 1875 had not been received. The plaintiff's claim in respect of his amount must, therefore, be disallowed. The plaintiff's one-fourth share in the amounts admittedly comes to Rs. 9520-13-3.

Lastly, it is urged that the plaintiff company is not entitled to interest on its share in the amounts received by the defendant company. As held by the Privy Council in 65 I. A. 66,<sup>20</sup> interest for a period prior to the date of the suit may be awarded, if there is an agreement for the payment of interest at a fixed rate, or it is payable by the usage of trade having the force of law, or under the provision of any substantive law entitling the plaintiff to recover interest, as for instance, S. 80, Negotiable Instruments Act. There is in the present case neither usage nor any contract express or implied to justify the award of interest, nor is interest payable by virtue of any law governing the case. The amount claimed not being a sum certain, interest cannot be claimed under the provisions of the Interest Act, 1839. As observed by Beaumont C. J. in 46 Bom. L. R. 408,<sup>21</sup> in a case which does not fall within the Interest Act, 1839, interest cannot be allowed by way of damages. It is urged for the plaintiff that interest should be awarded at least from 7th August 1935, when a notice of the claim was given to the defendant. Though it is mentioned in the plaint that a notice was given to the defendant on that day, neither the notice nor its copy has been placed on record, and it cannot be known whether interest was claimed in it. In these circumstances interest will be allowed at six per cent. per annum from the date of suit only. The appeal is partially allowed, and in modification of the decree of the lower Court, it is ordered that the plaintiff company do recover from the defendant company Rs. 9520-13-3 with interest thereon at six per cent. per annum from the date of suit till realisation, and its proportionate costs in both the Courts. We are grateful to Mr. M. J. Mehta, the Secretary of the Bar Council, for the assistance he gave us by his useful arguments.

20. ('38) 25 A. I. R. 1938 P. C. 67 : I. L. R. (1938) 2 Cal. 72 : 32 S. L. R. 374 : 65 I. A. 66 : 173 I. C. 15 (P. C.), Bengal Nagpur Ry. Co. v. Ruttonji Ramji.

21. ('44) 31 A. I. R. 1944 Bom. 233 : I. L. R. (1944) Bom. 134 : 220 I. C. 61 : 46 Bom. L. R. 408, Ahmedabad Municipality v. Vadilal.



**Divatia J.** — I concur and desire to add a few observations on the point of defective presentation of the plaint. In absence of any provision of law to the contrary, the matter is governed by O. 3, R. 4 (1), Civil P. C., which requires every pleader, including an advocate, to file a document of his appointment as such by his client. But the plaintiff's case is that R. 40 in Chap. 2 Part I about legal practitioners in the Rules and Forms of the Bombay High Court on the Original Side is such a provision of the law to the contrary. It says that an advocate (O. S.) shall not be required to present any document empowering him to act in any appeal or proceeding, civil or criminal. The question then is whether it supersedes R. 4 (1) of O. 3. So far as concerns the alteration of the rule for procedure in Subordinate Courts, the relevant provision is S. 122, Civil P. C., under which the alteration can be made subject to the sanction of the Government under S. 126 and after complying with the procedure laid down in Ss. 123 and 124. There is nothing to show that R. 40 was enacted in this manner and it has been conceded before us that it was not so enacted. If the rule was framed under S. 129, it does not help the plaintiff because it applies only to procedure on the Original Side of the High Court.

The only other provision in the Civil Procedure Code is in S. 119 which preserves any other power of a Chartered High Court to make rules concerning advocates, vakils and attorneys. Such power relating to Subordinate Courts is given in the High Courts Act, Government of India Act and in the Letters Patent. Section 15, High Courts Act, is similar to S. 224, Government of India Act, 1935, (same as S. 107, Government of India Act, 1915) under which rules can be framed for regulating practice and procedure of the Subordinate Courts after obtaining previous sanction of the Governor-in-Council. There is nothing to show that such previous sanction was obtained for R. 40. The provisions about rules in the Letters Patent are Cls. 9, 10 and 37. Clauses 9 and 10 relate to admission of advocates and their appearance for suitors in the High Court. Clause 37 empowers the High Court to frame rules for regulating all proceedings in civil cases which may be brought before the said High Court. These proceedings are obviously those which may be instituted in the High Court and do not include proceedings filed in the Subordinate Courts. The words "including proceedings in its Admiralty, Vice-Admiralty,

Intestate and Matrimonial jurisdiction, respectively," after the words "which may be brought before the said High Court" support the view that the proceedings are those which are originally instituted in the High Court and not brought in appeal or revision. If it had been the intention to include therein proceedings started in Subordinate Courts, it would have been expressed in clear language such as "and proceedings of the Civil Courts subject to their superintendence." In my opinion, therefore, cl. 37, Letters Patent, applies only to proceedings instituted in the High Courts and not in Subordinate Courts. As a result R. 40 must be deemed to have been framed under Cl. 37 and does not apply to procedure in the mofussil Courts.

Under the old Rule 4 of O. 3, as it was before 1926, no advocate of a Chartered High Court was required to present any document empowering him to act. That was also the provision of S. 39 of the Code of 1882. After 1926, the Civil Procedure Code required every pleader (which term includes an advocate) to file a vakalatnama to empower him to act. Under R. 40 in Chap. 2 of Part I relating to legal practitioners in the compilation "Rules and Forms of the Bombay High Court (on the Original Side) in its several jurisdictions" of 1936 no advocate (O. S.) is required to present any document empowering him to act in any appeal or proceeding, civil or criminal. This rule is the same as R. 34 in the similar compilation of 1901. No rule to that effect appears before 1901. One material point of difference between the two compilations of 1901 and 1936 is that while the former was about the Rules and Forms of the Bombay High Court in its several jurisdictions, the latter was a compilation of the Rules and Forms of the High Court in its several jurisdictions on the Original Side. The former is published under the signature of the Prothonotary as well as the Registrar of the Appellate Side, and the latter is published only under the signature of the Prothonotary. The reason is that a separate compilation of the Rules of the Appellate Side of the High Court was published in 1909. In that compilation there is Part 2 relating to legal practitioners. In the last compilation of 1936 there are several rules which are common to the original and appellate sides, e. g., Rr. 41 and 44 to 50 in the chapter on legal practitioners in the Rules for the Original Side are the same as Rr. 5 to 12 of the Part relating to legal practitioners in the Appellate Side Rules. It is significant that R. 40, with which we



are concerned, is not reproduced in the Appellate Side Rules. If that rule was meant to apply to advocates appearing on both sides of the High Court, it would have been reproduced in the Appellate Side Rules also but its absence there shows that R 40 was meant only for the original side. In any case, it does not apply to Subordinate Courts. Therefore, so far as they are concerned, the provisions of the Civil Procedure Code would apply to them and all pleaders, including advocates, who can act, have to file a vakalatnama.

It was therefore necessary for the plaintiff's counsel, Mr. Patil, to file his vakalatnama along with the plaint. However, such a presentation without a vakalatnama does not make all subsequent proceedings invalid, and as it has not caused any prejudice to the defendant, the defect cannot, in my opinion, affect the merits of the case at this stage.

R.K. • *Decree modified.*

[Case No. 45.]

**A. I. R. (33) 1946 Bombay 183**

LOKUR J.

*Emperor*

v.

*Bhagwandas Tulsidas (No. 1)*

*and others — Accused.*

Criminal Case No. 26 of 1945, Decided on 9th August 1945.

Criminal P. C. (1898), S. 226—Charge against accused persons for abetting each other — Charge can be altered to abetment of third accused.

Where accused A and B are committed to the High Court on a charge under Ss. 323 and 109, Penal Code, for voluntarily causing hurt to C and aiding and abetting each other in doing so, the clerk of the Crown, under S. 226, is competent to alter the charge to one under Ss. 302 and 109, Penal Code, for aiding and abetting third accused: ('24) 11 A. I. R. 1924 Cal. 625, *Rel. on.*

[P 183 C 2]

Cr. P. C. —

('41) Chitale, S. 226, N. 2, Pt. 6.

('41) Mitra, S. 226 page 793, N. 732

C. K. Daphtary, *Advocate-General* and R. B. Mehta instructed by N. K. Petigara, *Public Prosecutor* — for the Crown.

I. S. Haji, A.S. Kably; and B.D. Boovarivalla for Accused Nos. 1 and 2; and 4, respectively.

**Judgment.** — Accused 2 is committed to this Court on a charge under s. 302, Penal Code, for the murder of one Dharamsey, and accused 1 and 4 on a charge under ss. 323 and 109, Penal Code, for voluntarily causing hurt to the said Dharamsey and aiding and abetting each other in doing so. In this Court the learned Clerk of the Crown altered the latter charge, and charged

accused 1 and 4 under Ss. 302 and 109, Penal Code, for aiding and abetting accused 2 in the murder of the said Dharamsey. Mr. Haji, the learned counsel for accused 1 and 2, objects to this alteration as being outside the scope of S. 226, Criminal P. C. That section provides :

"When any person is committed for trial without a charge, or with an imperfect or erroneous charge, the Court, or, in the case of a High Court, the Clerk of the Crown, may frame a charge or add to or otherwise alter the charge, as the case may be, having regard to the rules contained in this Code as to the form of charges."

Mr. Haji contends that the charge framed by the committing Magistrate against accused 1 and 4 had referred only to the abetment of each other, and not to the abetment of accused 2, and that the addition of an altogether new charge is beyond the powers of the Clerk of the Crown. My attention was called to the ruling in 8 Bom. 200.<sup>1</sup> In that case one Appa was tried for the murder of one Ragdu, or in the alternative for the abetment of Ragdu's murder by Raghu. Raghu was tendered pardon and examined as a witness. In the course of the trial, on the application of counsel for the prosecution before the verdict was recorded, a charge was added of abetment of Ragdu's murder by some person or persons unknown and such an addition of a new charge to the original charge was held to be wrong. But that addition was made under S. 227 of the Code, and as pointed out in A. I. R. 1924 Cal. 625<sup>2</sup> even under that section, that ruling has been rendered obsolete by the definition of "charge" in S. 4 (1) (c), which was inserted for the first time in the Code of Criminal Procedure, 1898. Even in 8 Bom. 200<sup>1</sup> Sargent C. J. observed (p. 209) :

"It was urged that S. 226, taking 'charge' in its specific sense would only give this power when the prisoner was committed without a charge at all. But it is to be remembered that the words 'at all,' which are found in the above sections in both of the Acts of 1872 and 1875, are omitted in S. 226 of this Act; and the words 'without a charge' in S. 226 of the Act of 1882 will properly apply, not only to the case in which there is 'no charge at all,' but also to the case in which there is 'no charge' in respect of such offence as the Sessions Judge or clerk of the Crown may think the prisoner ought to be tried for."

This shows that the Clerk of the Crown has power under S. 226 not only to alter a charge but also to add one more count of charge on which he finds on evidence that the accused ought to be tried, even though it

1. ('84) 8 Bom. 200, *Queen-Empress v. Appa Subbana Mendre.*

2. ('24) 11 A. I. R. 1924 Cal. 625 : 83 I. C. 485, *Hassenullah Sheik v. Emperor.*



may be distinct from the charge framed by the committing Magistrate. Mr. Haji referred me to the ruling of Chagla J. in I.L.R. 1942 Bom. 534.<sup>3</sup> In that case the Clerk of the Crown had dropped one of the charges framed by the committing Magistrate, on the ground that it was not sustainable on the evidence. This was certainly beyond the competence of the Clerk of the Crown, as the proper course in such a case was for the Court to make an entry under S. 273 (1), Criminal P. C., that the charge was clearly unsustainable. Chagla J. observed (p. 540):

"I wish to make it clear that S. 226 gives the widest possible powers to the Clerk of the Crown to revise and re-draft charges with reference to any offence in respect of which the committing Magistrate has framed a charge. But when the Magistrate comes to the conclusion that an offence has been committed and frames a charge accordingly, it is not open to the Clerk of the Crown to withdraw that charge on the ground that there is no evidence to go to the jury and, therefore, the charge would fail. That is a judicial act which can only be performed by the Court."

Thus this ruling does not support Mr. Haji's contention. In A.I.R. 1924 Cal. 625<sup>2</sup> the accused were committed for trial for the murder of one Moulavi Mahjazal Huq and for hurt caused to one Kaimulla by one of the accused. The Sessions Judge added a charge for the murder of Kaimulla, and it was held that he had power to do so. It is on all fours with the present case, and I hold that the alteration in the charge made by the Clerk of the Crown is within the powers conferred upon him by S. 226, Criminal P. C.

V.B.

*Order accordingly.*

3. ('42) 29 A.I.R. 1942 Bom. 212 : I. L. R. 1942 Bom. 534 : 201 I. C. 735, Emperor v. Husseinalli.

[Case No. 46.]

**A. I. R. (33) 1946 Bombay 184****LOKUR J.***Emperor***v.***Bhagwandas Tulsidas (No. 2)**and others — Accused.*

Criminal Case No. 26 of 1945, Decided on 20th August 1945.

**Evidence Act (1872), S. 42—Coroner's inquisition does not relate to matters of public nature — Nor is it judgment — It is inadmissible in evidence.**

The cause of an unnatural death of any person at which the Coroner's inquest is aimed is not a matter of a public nature, though one of the objects of holding such a public inquiry is to satisfy the public conscience that an unnatural death was not hushed up. The inquisition is not a decision, but a *prima facie* opinion and stands on no higher

footing than an order of commitment to the Sessions. It is not a judgment, much less a judgment *inter partes*. It cannot be admitted in evidence as an opinion since it represents the opinion of laymen, often arrived at even before the police investigation is complete. Hence the Coroner's inquisition is not relevant under any of the provisions of the Evidence Act and is, therefore, inadmissible in evidence. [P 185 C 1,2]

*C. K. Daphtary, Advocate-General and R. B. Mehta instructed by N. K. Petigara, Public Prosecutor—for the Crown.*

*I. S. Haji and A. S. Kabley; and B. D. Boovariwalla — for Accused Nos. 1, 2 ; and 4,*

respectively.

**Judgment.**—The accused are being tried for the murder of one Dharamsey, and Mr. Haji, the learned counsel for two of the accused, wants to tender in evidence the Coroner's inquisition based on the verdict of the jury at the inquest. The learned committing Magistrate admitted it in spite of the objection urged on behalf of the prosecution. He held it to be relevant under S. 42, Evidence Act, as a judgment *in rem*, relating to a matter of a public nature, relying upon the following observation in para. 1767 on p. 1111 of Taylor on Evidence (12th Edn.)

"The general admissibility of *inquisitions* rests upon the ground that they contain the result of inquiries made under competent authority concerning matters in which the public is interested."

This may apply to *inquisitions* like "the survey and report made by a surveyor in discharge of a duty imposed upon him by statute," as held in (1899) 1 Ch. 241.<sup>1</sup> The learned Magistrate has also referred to Taylor's remark in para. 1674 (on p. 1051) that:

"*Inquisitions in lunacy, inquisitions post mortem* or other *inquisitions*, which though regarded as judgments *in rem*, so far as to be admissible in evidence of the facts determined against all mankind, are considered as not conclusive evidence."

In the passage which precedes this remark, the learned author says (p. 1050):

"... a judgment *in rem* furnishes *conclusive* proof of the facts adjudicated, as well against *strangers* as against parties, but this rule does not extend to criminal convictions, which are subject to the same rules of evidence as ordinary judgments *inter partes*."

In this country, the question of relevancy is to be decided in accordance with the provisions of the Evidence Act. As pointed out by the Privy Council in 7 I. A. 63,<sup>2</sup> S. 2, Evidence Act, has repealed all rules of evidence not contained in any Statute or Regulations, and the party tendering a document in evidence must show that it is admissible under some provision of the Evidence

1. (1899) 1 Ch. 241 : 68 L. J. Ch. 175 : 79 L. T. 578, Evans v. Merthyr Tydfil, Urban Council.

2. ('80) 5 Cal. 744 : 7 I. A. 63 : 4 Sar. 93 (P. C.), Rani Lekraj Kuar v. Baboo Mahpal Singh.



Act. Section 42, on which the learned Magistrate relies, declares the relevancy of a judgment which relates to matters of a public nature, such as the existence of a public right of way over a land. A Coroner's inquest is aimed at inquiring into the cause of the death of any person, which he has reason to believe to have been caused "by accident, homicide, suicide or suddenly by means unknown." The cause of such an unnatural death is not a matter of a public nature, though one of the objects of holding such a public inquiry is to satisfy the public conscience that an unnatural death was not hushed up. If the cause of death be homicide, the suspect is not always a party to the inquiry. The inquest can be, and often is, held in the absence of the suspect though according to S. 8, Coroner's Act, 1871, it is deemed a judicial proceeding within the meaning of S. 193, Penal Code. If the verdict is that the death was the result of a criminal act, then under S. 25, the Coroner is to send at once a copy of the inquisition to the Commissioner of Police, and under S. 26 he may even issue a warrant for the apprehension of the suspect and send him to a Magistrate. The purpose of the inquest is then at an end. The inquisition is not a decision, but a *prima facie* opinion and stands on no higher footing than an order of commitment to the Sessions. It is not a judgment much less a judgment *inter partes*. As observed by Beaumont C. J. in 35 Bom. L.R. 1020<sup>3</sup> (page 1021):

"... the inquiry before the Coroner, although it may be a judicial proceeding, is not a proceeding between the prosecutor and the accused. The proceedings before the Coroner are merely an inquiry into the circumstances leading to the death of the person whose death is under inquiry, and it is impossible to say that the Crown is a party to those proceedings, even if it can be said that the accused is a party on the ground that he was during those proceedings a suspect."

I respectfully think that even the accused cannot be said to be a party to the proceedings, as in many cases the suspect is not present at the inquest. It is a general inquiry for further action by the police if necessary. Hence the inquisition is not a judgment, nor can it be admitted as an opinion, since it represents the opinion of laymen, often arrived at even before the police investigation is complete. In this case the police refused to accept the verdict of the Coroner's jury that Dharamsey was stabbed by Kaku, and sent a charge-sheet against these three accused and Mulji. If the verdict of the Coroner's jury be adverse to the

accused, it would certainly prejudice the accused if the inquisition be admitted and brought to the notice of the jury as a piece of relevant evidence. Hence the Coroner's inquisition is not relevant under any of the provisions of the Evidence Act, and is, therefore, inadmissible in evidence.

V.B.

*Order accordingly.*

[Case No. 47.]

**A. I. R. (33) 1946 Bombay 185**

KANIA AND CHAGLA JJ.

*Commissioner of Income-tax, Bombay*  
v.

*Western India Life Insurance Co., Ltd.*

Income-tax Reference No. 26 of 1944, Decided on 26th March 1945.

(a) Income-tax Act (1922), S. 4 (1), Proviso 3 and S. 4 (1) (b) (i) and (ii)—Assessee resident of British India — Interest on foreign securities not brought in British India is not taxable.

Where an assessee, ordinarily residing in British India, has foreign securities with a foreign Bank and the interest from such securities is not brought in British India, the income falls under S. 4 (1) (b) (ii) and is governed by proviso (3) to S. 4 (1).

[P 185 C 2 ; P 186 C 1 ; P 187 C 1]

(b) Income-tax Act (1922), S. 4 (1) (b) — Scheme of cl. (b) stated.

The division of income in respect of a resident in British India into what accrues in British India and what accrues outside British India, and then to carve out a portion from what has accrued outside British India and make it fall under S. 4 (1) (b) (i) on the ground that it is deemed to have accrued to him in British India, is improper. The scheme is to find out first whether in respect of such assessee the income has accrued to him in British India ; if not, in respect of an item for which he is sought to be charged, to find out whether it is deemed to accrue to him in British India. If, on the other hand, the income is shown clearly to have accrued to him without British India, the question of the item having deemed to accrue to him in British India does not arise. [P 186 C 2]

(c) Income-tax Act (1922), S. 42 (1) — Interpretation of.

By making the whole of para. 1 of S. 42, as one, and connecting the two parts by the word 'and,' the Legislature has clearly indicated that it was making provision for the assessment of a non-resident only by that paragraph. Giving the words used in S. 42 their natural meaning, it seems that the whole of the first part of that section applies to non-residents and is not intended to define the expression "deemed to accrue or arise within British India" in respect of a person ordinarily resident in British India. [P 186 C 2 ; P 187 C 1]

*M. C. Setalvad* — for Commissioner.

*K. N. Dharap* — for Assessee.

**Kania J.**—This reference is made under S. 66 (1) by the Income-tax Appellate Tribunal in respect of the respondent assessee, at the instance of the Commissioner. The admitted facts are that the Insurance Company, which is doing life insurance business and held to be resident in British India, has certain securities with the Midland Bank,

3. (33) 20 A.I.R. 1933 Bom. 479 : 146 I. C. 544 : 35 Bom. L.R. 1020, *Emperor v. Mahomed Yusuf*.



London. The interest on these securities has been recovered but not brought into British India. The assessee claimed that under proviso 3 to S. 4 (1) it was entitled to an exemption of Rs. 4500 in respect of this foreign income. The taxing authorities contended that the proviso did not apply. The Income-tax Tribunal rejected the contention of the taxing authorities. The following question is submitted for the Court's opinion:

"Whether in the circumstances of the case it has been rightly held that the Western India Life Insurance Company Limited, which is a company resident in British India, is entitled to a deduction of Rs. 4500 under Proviso 3 to S. 4, Income-tax Act?"

On behalf of the Commissioner, it is contended before us that the scheme of S. 4 is first to divide the income in respect of a resident in British India into two parts: (1) income which accrues to him in British India; and (2) income which accrues to him without British India. The next stage is to find out whether, out of the income which is found to have accrued to him outside British India there exists any income which can be described as deemed to accrue or arise to him within British India by reason of S. 42, Income-tax Act. It was contended that before the amendment of the section in 1939 the opening words of S. 42 were: "In the case of any person residing out of British India . . . ." It was contended that by the alteration in the structure of the section the first part of the amended S. 42 applies to residents and non-residents. Therefore, if the income in question is covered by the words of the first part of S. 42, it shall be deemed to be income accruing or arising within British India and, therefore, it will be taken out of the operation of S. 4 (1) (b) (ii) of the Act. It was strongly urged that there were no words in the first part of S. 42 to show that it applied only to non-residents.

In my opinion, this contention is unsound. Section 4 (1) (b) deals with the income of a resident in British India. Sub-clause (i) deals with his income, which has accrued or arisen in British India or is deemed to accrue or arise to him in British India. Sub-clause (ii), which is an independent clause, covers all his income which has accrued or arisen to him without British India. Sub-clause (iii) deals with income which has accrued or arisen to him without British India, within a certain period, but is brought into or received in British India by him in the accounting year. Sub-section (c) is again material to be noticed. It deals with the case of a non-resident and provides that the

income which has accrued or arisen or is deemed to have accrued or arisen to him in British India during such year shall be included in his assessment. It must be noticed that while the expression "deemed to accrue or arise" is found in S. 4 (1) (b) (i) and S. 4 (1) (c), it does not find a place in S. 4 (1) (b) (ii). It should again be noticed that while amending S. 42 the Legislature has still retained the marginal note "Non-residents" against that section. In my opinion the division of income in respect of a resident in British India into what accrues in British India and what accrues outside British India, and then to carve out a portion from what has accrued outside British India and make it fall under S. 4 (1) (b) (i) on the ground that it is deemed to have accrued to him in British India, is improper. The scheme is to find out first whether in respect of such assessee the income has accrued to him in British India; if not, in respect of an item for which he is sought to be charged, to find out whether it is deemed to accrue to him in British India. If, on the other hand, the income is shown clearly to have accrued to him without British India, the question of the item having deemed to accrue to him in British India does not arise.

Apart from that, in my opinion, S. 42 does not apply to this case at all. If the contention of the Commissioner was correct, the section would have been divided into two parts: the first part covering the case of a resident and a non-resident and the second part providing the machinery by which the income, which was deemed to have accrued to the non-resident assessee could be brought to assessment. By making the whole of para. 1 as one, and connecting the two parts of that paragraph by the word "and," the Legislature has clearly indicated that it was making provision for the assessment of a non-resident only by that paragraph. I have already pointed out that in S. 4 (1) (c) taxation of that part of a non-resident's income, which is deemed to have arisen in British India, is contemplated. Again, the various expressions used in the first part of that paragraph of S. 42 appear inappropriate when considered in connection with a resident assessee. The income, in the contingencies mentioned there, ordinarily would arise or accrue in British India, and except by stretching one's imagination one cannot conceive of cases when those circumstances apply in respect of a resident in British India. Giving the words used in S. 42 their



natural meaning, it seems to me that the whole of the first part of S. 42 applies to non-residents and is not intended to define the expression "deemed to accrue or arise within British India" in respect of a person ordinarily resident in British India. If the intention of the Legislature was to define the expression "deemed to have accrued in British India" in respect of all persons, this should have been done in the definition in S. 2 and not under Chap. V, which deals with special cases only. The very fact that S. 42 is put under this Chapter, in my opinion, negatives the contention that this expression is defined for all assesseees. It is not disputed that the third proviso to S. 4 (1) would apply if the income is considered as falling under S. 4 (1) (b) (ii), and not under S. 4 (1) (b) (i). In my opinion, therefore, the view of the Tribunal was correct and the answer to the question must be in the affirmative. The Commissioner to pay the costs of the reference.

**Chagla J.** — I agree. The total income of a person resident in British India includes income which accrues or arises or is deemed to accrue or arise in British India and income which accrues or arises without British India during the previous year and such total income is liable to tax. In the case of a non-resident it is only the income which accrues or arises or is deemed to accrue or arise to him in British India that is liable to tax. It was, therefore, necessary for the Legislature to define clearly what was the income of a non-resident which arose or accrued to him in British India which was liable to tax, and to my mind that is clear when one looks to the whole scheme of the Act because S. 42 comes under Chap. V of the Act which is headed "Liability in Special Cases," and S. 42 deals with the special cases of non-residents whose income is deemed to be income arising or accruing in British India. I also think that the language used in S. 42 is extremely inapt if the Legislature intended that language to apply not only to non-residents but to residents. I, therefore, agree with my learned brother Kania that the question raised in this reference should be answered as he has suggested.

R.K./V.S.

*Reference answered.*

[Case No. 48.]

**A. I. R. (33) 1946 Bombay 187**

**DIVATIA AND SEN JJ.**

*Sadaksharappa Kabbur and others —*  
*Appellants*

v.

*Karlingawa Karadi and others —*  
*Respondents.*

Second Appeals Nos. 664 and 665 of 1942, Decided on 22nd January 1945, from decision of Dist. Judge, Dharwar, in Appeal No. 317 of 1940.

(a) Limitation Act (1908), Art. 182 (5)—Applicability—Essentials for, stated.

In order that cl. (5) of Art. 182 may apply there must be three things : first, an application made in accordance with law; secondly, the application must be made to the proper Court; and, thirdly, it must be either for execution or to take some step-in-aid of execution. The words "to take some step-in-aid of execution" cannot be read independently of the word "application": 37 Bom. 559 and ('21) 8 A.I.R. 1921 Bom. 33, *Ref.* [P 188 C 2]

(b) Limitation Act (1908), Art. 182 (5)—Suit under O. 21, R. 63 is not application within Art. 182 (5).

The word "application" in Art. 182 does not include a suit filed under O. 21, R. 63. Hence a plaint or suit filed under O. 21, R. 63 cannot be treated as an application within the meaning of Art. 182 : 17 Cal. 268; ('42) 29 A.I.R. 1942 Mad. 5 and ('38) 25 A.I.R. 1938 Nag. 534, *Foll.*; ('30) 17 A.I.R. 1930 Oudh 468 and ('36) 23 A. I. R. 1936 Oudh 248, *Dissent.*; ('28) 15 A. I. R. 1928 Mad. 1201 and ('39) 26 A.I.R. 1939 Pat. 138, *Disting.* [P 189 C 1]

(c) Limitation Act (1908), Art. 182 (5)—Suit under O. 21, R. 63 cannot be deemed to be filed in "proper Court" (*Semble*).

The Court in which a suit under O. 21, R. 63 is filed cannot be deemed to be the proper Court within the meaning of Art. 182, because the circumstance that a suit of this nature happens to be filed in the Court in which the execution proceedings are going on must be purely accidental and cannot, therefore, be held to amount to compliance with the requirement of law. [P 189 C 1, 2]

*S. B. Jathar* — for Appellants.

**Sen J.**—The appellants in both these appeals are assignees of the decree-holder of two decrees obtained against two judgment-debtors, the dates of the decrees being 14th August 1930 and 4th August 1928. The questions involved in both the appeals are the same. I shall take the facts in S. A. No. 665 of 1942. In that case the decree was passed on 14th August 1930. Darkhast No. 323 of 1933 was the first darkhast filed on 11th April 1933, to execute it. On a third party objecting and claiming interest in the property sought to be proceeded against the darkhast was dismissed on 20th February 1936. The present darkhast, being the second darkhast, was filed on 9th June 1939, that is, more than three years after the last dar-



khast was disposed of. The appellants sought to bring it within time relying on a suit, namely, suit No. 75 of 1936, which was filed by them under the provisions of O. 21, R. 63, Civil P. C., for a declaration that the property was liable to be sold as belonging to the judgment-debtor, although it had been alienated to the person who objected in the earlier darkhast, the alienation being bad under S. 53, T. P. Act, 1882. The decree-holder succeeded in this suit and thereafter filed the present darkhast. The only question arising in this appeal is whether the present darkhast is in time. The answer to that question depends upon the construction to be placed on cl. (5) of Art. 182 of Sch. I to the Limitation Act, which gives a period of three years from the date of the final order passed on "an application made in accordance with law to the proper Court for execution, or to take some step-in-aid of execution of the decree or order."

Both the Courts below have held against the appellants, holding that the suit of 1936 cannot be regarded as an application to take some step-in-aid of execution within the meaning of Art. 182, cl. (5). The lower appellate Court has further held that the Court in which the suit was filed cannot be regarded as the proper Court within the meaning of the said article. The appellants relied on two Oudh cases, A. I. R. 1930 Oudh 468<sup>1</sup> and A. I. R. 1936 Oudh 248,<sup>2</sup> as well as on 23 Bom. L. R. 107.<sup>3</sup> The lower appellate Court has held that the Bombay decision is inapplicable and preferred to follow the rulings of the High Courts of Madras, Calcutta and Nagpur in A. I. R. 1942 Mad. 5,<sup>4</sup> 17 Cal. 268<sup>5</sup> and I. L. R. (1940) Nag. 334<sup>6</sup> which decided, first, that the plaint in a declaratory suit like the one which is relied on in this appeal cannot be regarded as a step-in-aid of execution within Art. 182 (5), Limitation Act, and, secondly, that the Court in which the suit under O. 21, Rule 63, is filed cannot be regarded as the proper Court within the meaning of the said article. The decision in the two Oudh cases is to the effect that in

such a case the suit can be regarded as an application to take a step-in-aid of execution.

In order that cl. (5) of Art. 182 of Sch. I to the Limitation Act may apply there must be three things: first, an application made in accordance with law; secondly, the application must be made to the proper Court; and, thirdly, it must be either for execution or to take some step-in-aid of execution. To take the last point first, there can be no doubt, as pointed out in 15 Bom. L. R. 557,<sup>7</sup> that the application in accordance with law to the proper Court must be one which asks that Court to do one of two things, namely, to execute the decree or to take some step-in-aid of execution. The words of the clause in question cannot be read, as Mr. Jathar at one stage of his argument attempted to read them, so that the words "to take some step in aid of execution" should be read independently of the word "application." As against the decision of the Oudh Court there is a unanimity in the decisions of the other High Courts which I have mentioned (Madras, Calcutta and Nagpur) that a suit of the description we are concerned with here cannot be regarded as a step-in-aid of execution. Before dealing with the said decisions, I may mention the two Bombay decisions cited before us: 23 Bom. L. R. 107<sup>3</sup> and 15 Bom. L. R. 557.<sup>7</sup> In the first of those cases an application was made in the execution proceedings for time to enable the decree-holder to ascertain the share of the judgment-debtor in the property put up for sale, and it was held that such an application was within the terms of cl. (5) of Art. 182. Shah J. remarked that the expression "step-in-aid of execution of the decree" ought to be construed liberally. But in that case the application was made to the proper Court, viz., the executing Court, and it was a proper application made for a purpose necessary for the execution of the decree, for the decree-holder was unable to proceed with his darkhast unless he had ascertained what share the judgment-debtor had in the property sought to be brought to sale. In 15 Bom. L. R. 557<sup>7</sup> an application was made by the decree-holder to obtain a succession certificate and it was held that such an application might be regarded as a mere preparation or preliminary to execution but not as a step-in-aid of execution. The Court also took the view that the Court before which such an application was made could not be said to be the proper Court within the meaning

1. ('30) 17 A.I.R. 1930 Oudh 468 : 6 Luck. 234 : 128 I. C. 728, Hasan Shah v. Md. Amir.

2. ('36) 23 A.I.R. 1936 Oudh 248 : 11 Luck. 716 : 160 I. C. 465, Rudra Narain v. Maharaja of Kapurthala.

3. ('21) 8 A.I.R. 1921 Bom. 33 : 60 I. C. 916 : 23 Bom. L. R. 107, Vishvanath v. Narsu.

4. ('42) 29 A. I. R. 1942 Mad. 5 : 200 I. C. 815, Ramasubbayya v. Thimmiah.

5. ('90) 17 Cal. 268, Raghunandun Pershad v. Bhugoo Lall.

6. ('38) 25 A.I.R. 1938 Nag. 534 : I. L. R. (1940) Nag. 334 : 180 I. C. 903, Rajaram v. Paiku.

7. ('13) 37 Bom. 559 : 20 I. C. 252 : 15 Bom. L. R. 557, Murgappa v. Baswantrao.



of the clause in question, though in that case the application was actually made to the Court in which the execution was proceeding. The words "proper Court" are defined in Explan. 2 to Art. 182 as meaning "the Court whose duty it is to execute the decree or order." Batchelor J. remarked, "It appears to us that it could not have been the intention of the Legislature that such a question as this should be decided on a mere accident of that sort."

The main ground on which the Madras High Court in A. I. R. 1942 Mad. 5<sup>4</sup> has held that the plaint in the declaratory suit cannot be regarded as a step-in-aid is the provision in S. 2 (10), Limitation Act, that unless there is anything repugnant to the subject or context "suit" does not include an appeal or application. As pointed out in 17 Cal. 268,<sup>5</sup> the Limitation Act draws a clear distinction between suits and applications, so that it is not possible to hold that the word "application" in Art. 182 includes a suit filed under O. 21, R. 63. It was pointed out in A.I.R. 1942 Mad. 5<sup>4</sup> that this definition was apparently overlooked by the learned Judges of the Oudh Court in the decisions relied on by the appellants. The said provision in S. 2 (10) is very clear, and it is a provision in the Limitation Act itself. It is, therefore, difficult to hold that the expression "application" can be held to include a suit, though the decree-holder may, no doubt, in conceivable circumstances, have first to file a suit in order to be able to proceed further with the execution of the decree. In our opinion, the decision of the Madras, Calcutta and Nagpur High Courts that a plaint or suit filed under O. 21, R. 63, cannot be treated as an application within the meaning of Art. 182, is, with respect, to be preferred to the Oudh decisions on which Mr. Jathar has relied. Mr. Jathar has drawn our attention to a Madras case and a Patna case in which for certain purposes it was held that a suit filed under O. 21, R. 63, was a continuation of the previous proceedings. But in neither of those cases, 52 Mad. 465<sup>8</sup> and 17 Pat. 588,<sup>9</sup> was the point with which we are concerned in issue, and the said decision had no connection with any question arising under the Limitation Act. In view of the above conclusion, it is not really necessary for us to go to the second point, as to whether the

Court in which the suit was filed in this case can be deemed to be the proper Court within the meaning of Art. 182. But, on that point also, the decisions of the High Courts of Calcutta, Madras and Nagpur seem to us to be clearly right, because the circumstance that a suit of this nature happens to be filed in the Court in which the execution proceedings are going on must be purely accidental and cannot, therefore, be held to amount to compliance with the requirement of law. The appeals, therefore, fail and are dismissed.

**Divatia J.**—I appreciate that the view we have taken will cause hardship to the decree-holder, who has got to file a suit under O. 21, R. 63, to set aside an adverse order under R. 60. If he succeeds in taking a decree in his favour more than three years after the darkhast is dismissed on the ground that the judgment-debtor had no interest in that property, the second darkhast to proceed against the property will be prima facie time barred as the filing of the suit is not a step-in-aid of execution. He cannot, properly speaking, file his darkhast until it is decided that the objector has no interest in the property. But for the purpose of limitation he must either keep the first darkhast alive or put his second darkhast on file within three years from the dismissal of the first darkhast and then wait for what happens to his suit if it is not decided by that time. This is the result of the definition of "suit" in S. 2 (10), Limitation Act, by which it is not meant to include an appeal or application. It is for the Legislature to consider whether the decree-holder should be driven to file a darkhast at a time when he cannot proceed against the property. However, according to the law as it stands, there can, in my opinion, be no other decision than the one we have arrived at following not only the language of the law but also the authorities on this point. I agree, therefore, that the appeals should be dismissed.

R.K.

*Appeals dismissed.*

[Case No. 49.]

**A. I. R. (33) 1946 Bombay 189**

LOKUR J.

*Emperor*

v.

*Mahadeo Dewoo and others — Accused.*

Sessions Case No. 12 of 1945 (3rd Criminal Sessions 1945), Decided on 9th August 1945.

(a) **Bombay City Police Act (4 [IV] of 1902), S. 63 (1) — S. 63 (1) does not exclude oral evi-**

8. ('28) 15 A.I.R. 1928 Mad. 1201 : 52 Mad. 465 : 116 I. C. 827, Raja of Ramnad v. Subramaniam Chettiar.

9. ('39) 26 A. I. R. 1939 Pat. 138 : 17 Pat. 588 : 180 I. C. 983, Mt. Bas Kuer v. Gaya Municipality.



dence of statements made before police in investigation whether recorded or not — Oral statements recorded in panchanama before police are admissible for corroboration — Evidence Act (1872), S. 157—Criminal P. C. (1898), Section 162.

Under S. 63 (1), Bombay City Police Act, though the documents containing statements of witnesses made before the police in the course of investigation cannot be tendered in evidence on behalf of the prosecution, yet S. 63 (1) does not exclude oral evidence of the statements, whether recorded or not. Thus, the oral statements of the witnesses recorded in the *panchanama* in the presence of the police at an identification parade in the course of investigation under S. 63 (1) are admissible to corroborate the statements of those witnesses at the trial under S. 157, Evidence Act : ('30) 17 A. I. R. 1930 Bom. 158; 35 Mad. 247 (F. B.); 35 Mad 397 (F. B.); 36 Cal 281 ; ('14) 1 A. I. R. 1914 Bom 263 ('42) 29 A. I. R. 1942 Bom. 71, *Ref.* [P 191 C 1]

**Criminal P. C. —**

('41) Chitale, S. 162, Note 7, Pt. 10.

('41) Mitra, S. 162, Page 494 'In the course of an investigation under this Chapter.'

(b) Evidence Act (1872), S. 159 — Inadmissible document can be used for refreshing memory.

Section 159 does not require that the writing or document used for refreshing memory should itself be admissible in evidence : 11 Bom. 657, *Rel. on.*

[P 191 C 2]

*C. K. Daphtary, Advocate-General and B. M. Mistry, instructed by N. K. Pettigara, Public Prosecutor — for the Crown.*

*A. C. Beynon, H. R. Pardiwalla and Kazi Nasiruddin and A. A. Peerbhoy — for Accused (Nos. 2 and 7; 3, 5 and 6; and 4, respectively).*

**Judgment.**—In this case six persons are being tried for rioting and murder of Shankar Sakham and Narayan in prosecution of their common object. Narayan's dying declaration was recorded by a Magistrate in which he mentioned one of the accused as his assailant. Several eye-witnesses who were present at the scene of offence have been examined for the prosecution and they have stated which of the accused were seen by them taking part in the rioting. At the identification parade Narayan recognised his assailant and said to the panchas in the presence of the police what he had done to him. Similarly, at other identification parades held by the police, the eye-witnesses identified some of the accused and said what they had seen them doing. The learned counsel for the prosecution tenders those panchanamas in evidence and wants to prove the statements made by Narayan and other witnesses at the identification parades. The learned counsel for the accused objects to the statements being proved as they were made to the police in the course of investigation. It is contended that under the pro-

viso to S. 63 (1), Bombay City Police Act, 1902, such statements can be used only by the accused with the permission of the Court for the purpose of impeaching the credit of the witnesses who made them. Prosecution, however, wants to use those statements for corroborating the statements made by the witnesses in this Court.

As regards Narayan's statement at the identification parade, it is obviously admissible as his dying declaration under S. 32 (1), Evidence Act, 1872, since S. 63 (2), Bombay City Police Act, 1902, excludes such dying declaration from the prohibition contained in sub-s. (1). Hence, Narayan's statement at the identification parade regarding the cause of his death is admissible although made in the presence of the police. As regards the statements of other witnesses, the cases decided under S. 162, Criminal P. C., after it was amended in 1923 have no application since this case is governed by S. 63, Bombay City Police Act, 1902, which is still in the same form as S. 162, Criminal P. C., which was amended in 1923. Section 63 (1), Bombay City Police Act, 1902, says :

"No statement made by any person to a Police officer in the course of an investigation under this Act shall, if taken down in writing, be signed by the person making it nor shall such writing be used as evidence."

Under the similarly worded S. 162, Criminal P. C., before its amendment there was some controversy as to whether the statements recorded by the police under that section could be used to corroborate the statements given by those witnesses at the trial under S. 157, Evidence Act. The section only made the written document inadmissible and did not limit the operation of S. 157, Evidence Act. Had it been intended to exclude even the oral statements from being used under S. 157, Evidence Act, the language used would have been different. This was considered at great length by the Madras High Court (by a Full Bench of three Judges) in 35 Mad. 247<sup>1</sup> and (by a Full Bench of five Judges) in 35 Mad. 397<sup>2</sup> and it was held unanimously that although the written record of statements made to the police in the course of an investigation could not be used as evidence, S. 162 did not exclude oral evidence of the statements, whether they had been taken down in writing or not. The same view was taken by the Calcutta High

1. ('12) 35 Mad. 247 : 14 I. C. 849 (F. B.), *Emperor v. Nilakanta.*

2. ('12) 35 Mad. 397 : 14 I. C. 896 (F. B.), *Muthukumaraswami Pillai v. Emperor.*



Court in 36 Cal. 281.<sup>3</sup> This High Court too adopted the same view in 39 Bom. 58<sup>4</sup> and held that S. 162, Criminal P. C., did not override the general provisions of the Evidence Act as to oral evidence of such statements to corroborate the evidence of a witness. In consequence of those decisions S. 162, Criminal P. C., was amended by the amending Act of 1923, prohibiting the use of even oral testimony of a statement made by a witness before the police in the course of investigation. But S. 63 (1), Bombay City Police Act, 1902, has not been amended and its wording is still the same as the wording of S. 162, Criminal P. C., before it was amended.

Hence, the principle laid down in the rulings cited by me govern similar cases arising in the City of Bombay. It, therefore, follows that although under S. 63 (1), Bombay City Police Act, 1902, the documents containing statements of witnesses made before the police in the course of investigation cannot be tendered in evidence on behalf of the prosecution, yet the oral statements of witnesses recorded in the panchanama in the presence of the police at an identification parade in the course of investigation are admissible in evidence to corroborate the statements of those witnesses at the trial under S. 157, Evidence Act. This was the view taken by Kemp J. in 54 Bom. 528<sup>5</sup> and I respectfully agree with it. Mr. Pardiwala, the learned counsel for some of the accused, relies upon the ruling in I.L.R. (1942) Bom. 384<sup>6</sup> and contends that even under S. 63, Bombay City Police Act, 1902, it was held there by a Full Bench that the right to make use of the statements of witnesses recorded by the police was a privilege conferred on the defence only. In that case certain witnesses, who were called by the prosecution, did not corroborate the complainant on certain material points and the counsel for the defence did not cross-examine them on their police statements. But the learned Judge himself called for the police statements, and put to the witnesses questions founded on those statements in spite of the protest of the learned counsel

for the defence. The object of putting those questions to the witnesses was to show that they had made before the police statements which accorded with those made by the complainant. Thus, the learned Judge wanted to contradict the statements made by the witnesses at the trial for the benefit of the prosecution and the Full Bench held that it was an error in law for the Judge to himself call for the statements and to put questions to the witnesses founded on the statements for such a purpose. The question whether such statements could be used by the prosecution to corroborate the statements made by the witnesses at the trial did not arise in that case, and the authority of the decision of Kemp J. in 54 Bom. 528<sup>5</sup> is not shaken by it.

It is further urged by Mr. Pardiwala that if a panchanama containing such a statement is not admissible in evidence, the panch witness cannot make use of the panchanama even for the purpose of refreshing his memory. But S. 159, Evidence Act, says that when a witness is under examination he may refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory and that he may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct. The section does not require that the writing which is used to refresh his memory should itself be admissible in evidence. Here, although the panchanama of identification was written by a police-officer, it was immediately read over to the panch and admitted by him to be correct. Hence, the panch can make use of that document to refresh his memory. In 11 Bom. 657<sup>7</sup> it was held that although a statement reduced to writing by a police-officer in the course of an investigation could not be used as evidence under S. 162, Criminal P. C., yet the police-officer, by whom it was reduced to writing, might use it to refresh his memory under S. 159, Evidence Act, and might be cross-examined upon it by the party against whom the testimony aided by it was given.

I, therefore, allow the counsel for the prosecution to ask the panch witness to refresh his memory by referring to the pan-

7. ('87) 11 Bom. 657, *Queen-Empress v. Sitaram Vithal*.

3. ('09) 36 Cal. 281 : 1 I. C. 970, *Fanindra Nath Banerjee v. Emperor*.

4. ('14) 1 A. I. R. 1914 Bom. 263 : 39 Bom. 58 : 26 I. C. 138, *Emperor v. Hanmaraddi*.

5. ('30) 17 A.I.R. 1930 Bom. 158 : 54 Bom. 528 : 126 I. C. 333, *Emperor v. Wahiduddin Hamiuddin* (No. 2).

6. ('42) 29 A.I.R. 1942 Bom. 71 : I. L. R. (1942) Bom. 384:199 I.C. 202 (FB), *Emperor v. Kasamali Mirzalli*.



chanama and state what the witnesses said at the time of the identification, only so far as that statement corroborates what the witnesses have stated in this Court.

V.W./V.B. *Order accordingly.*

[Case No. 50.]

**A. I. R. (33) 1946 Bombay 192**

KANIA AG. C. J. AND GAJENDRA-GADKAR J.

*Vishnu Gopal Mahant — Appellant*  
v.

*Vishvanath Narayan and others*  
— Respondents.

Second Appeal No. 118 of 1942, Decided on 13th August 1945, from decision of Civil Judge (Senior Division) with A. P., Belgaum, in Appeal No. 389 1940.

Limitation Act (1908), Arts. 120 and 144 — Suit for possession—Decree against manager of joint family—Particular joint property sold in enforcement of decree—Auction-purchaser's suit for possession is governed by Art. 144 and not by Art. 120.

A suit for possession by an auction-purchaser of a particular joint family property described with boundaries in his sale certificate, sold in enforcement of a decree obtained by a creditor against the manager of the family, is governed not by Art. 120 but by Art. 144 : ('39) 26 A. I. R. 1939 Bom. 322, *Disting.* [P 192 C 2]

Limitation Act —

('42) Chitale, Art. 120, N. 38 and Arts. 142 & 144, N. 45.

('38) Rustomji, Art. 120, Page 1048 "Partition, suit for" and Arts. 142 and 144, Page 1478 "Cosharers: Other cases."

*D. R. Manerikar* — for Appellant.

*K. B. Sukthankar* for *K. N. Dharap*  
— for Respondents.

**Kania Ag. C. J.** — This is a second appeal from the judgment of the Civil Judge (Senior Division) with A. P., Belgaum. The material facts are these: The plaintiff alleged that one Satteppa and defendant 1 were members of Shri Mahadeo Co-operative Credit Society of Yeksamba. Satteppa took a loan from the society for which defendant 1 stood surety. As the debt was not repaid, the society obtained an award decree against Satteppa and defendant 1. In enforcement of that decree, certain lands of defendant 1 were attached and sold through the revenue authorities. The area so sold was one acre and twenty gunthas. The boundaries of that area are set out in the certificate for sale issued to the plaintiff, who purchased the same at the auction with the necessary permission. The plaintiff got symbolical possession but not actual possession, which remained with the defendants.

The present suit was filed to obtain physical possession of the property from the defendants. Defendant 1 filed a written statement in which he contended that the sale was illegal, that the claim for possession was barred under Art. 120, Limitation Act, 1908, and that until another plot of land which was purchased was brought into hotchpot, no decree should be passed in favour of the plaintiff. Defendant 2 in his written statement contended that he was not bound by the sale, that he had separated from defendant 1 many years ago and that the debt was *avyawaharika* and not binding upon him. It appears that defendant 2's contention that the debt was *avyawaharika* was not pressed and no issue was raised on that point. The contention of defendant 2 that there was a partition between him and defendant 1 was negatived by the trial Court. The trial Court passed a decree in favour of the plaintiff for possession, mesne profits and costs. On appeal the only point argued was of limitation. Relying on 41 Bom. L. R. 631,<sup>1</sup> the lower appellate Court held that the claim was time-barred and dismissed the suit. The plaintiff has filed an appeal against that decree.

This being a second appeal we are only concerned with the question of limitation, on facts held to be proved by the lower Courts. As in the lower appellate Court only the point of limitation was argued, it must be accepted that the respondents had accepted all the findings of fact of the trial Court. On these findings it is clear that the suit was filed by the society against Satteppa and defendant 1 to recover a certain debt due to the society. A decree was passed, and in enforcement of that decree a particular plot of land of defendant 1 was sold and purchased by the plaintiff. In the sale certificate the exact boundaries are specified. The present suit was by the auction-purchaser to obtain from the defendants possession. The contentions that defendant 1 and defendant 2 had been separated before the sale and that the debt was *avyawaharika* having failed, the position is that an outside creditor had obtained a decree against defendant 1, who was the manager of the joint family consisting of himself and his minor son. In enforcement of that decree the joint family property was sold and the auction-purchaser had filed this suit to recover possession. It is clear

1. ('39) 26 A.I.R. 1939 Bom. 322 : 184 I. C. 23 : 41 Bom. L. R. 631, *Bai Shewantibai v. Janardhan R. Warick*.



that on these facts Art. 120 does not apply to such a suit and Art. 144 will be applicable. The lower appellate Court relied on 41 Bom. L. R. 631,<sup>1</sup> but it has failed to notice the material distinction in the case. In that litigation there was a voluntary sale by a member of a joint family of his undivided interest in the joint family estate. The purchaser filed a suit to enforce his right. It is clear that in such a case it may be argued that as the vendor had no right to state that he had a particular share in a particular asset of the joint family, the purchaser acquired no higher right and, therefore, different considerations as to the law of limitation may apply. The present suit, as I have pointed out, is not to enforce a private sale of an undivided interest of a coparcener in a specific joint family asset, but is a suit by an auction-purchaser of a particular joint family property described with boundaries in his sale certificate sold in enforcement of a decree obtained by a creditor against *inter alia* the manager of the family. We, therefore, think that 41 Bom. L. R. 631<sup>1</sup> has no application to the facts found here. The decree of the lower appellate Court is set aside and the decree of the trial Court restored with costs throughout.

V.R./D.H.

*Appeal allowed.*

[Case No. 51.]

**A. I. R. (33) 1946 Bombay 193**

LOKUR J.

*Pandappa Mahalingappa — Appellant*

v.

*Shivalingappa Murteppa and others*  
— Respondents.

Second Appeal No. 192 of 1940, Decided on 13th August 1943, from decision of Dist. Judge, Bijapur, in Appeal No. 130 of 1938.

(a) Civil P. C. (1908), Ss. 100 and 101 — Second appeal — Finding of fact — Question of adoption.

The concurrent finding of both the lower Courts that certain person is not proved to be another person's legally adopted son cannot be assailed in second appeal.

[P 195 C 1]

C. P. C. —

('44) Chitaley, S. 100, N. 54, Pts. 1 and 2.

('41) Mulla, S. 100, Page 366, "No second . . . fact."

(b) Evidence Act (1872), S. 157 — Admission relating to fact made by person in one suit is relevant to corroborate his statement in subsequent suit.

Although an admission relating to certain fact made by a person in a deposition in one suit does not carry any substantial evidentiary value in another suit, it is relevant under S. 157 to corroborate his statement in a subsequent suit.

[P 195 C 2]

(c) Appeal — Evidence — Discretion of trial Court in admitting secondary evidence — No interference.

The discretion exercised by the trial Court in admitting secondary evidence on the ground that the original is lost should not be interfered with in appeal : 19 Cal. 438 (P.C.) and 28 Bom. 94, *Rel. on.*

[P 196 C 1]

C. P. C. —

('44) Chitaley, S. 100, N. 16, Pt. 18.

(d) Appeal — Evidence — Second appeal — Question of relevancy of evidence is question of law and can be raised at any stage — Question of proof is question of procedure and can be waived.

Where evidence is admitted in the trial Court without any objection to its reception, and the evidence is admissible and relevant, then no objection will be allowed to be taken to its reception at any stage of the litigation on the ground of improper proof. But if the evidence is irrelevant or inadmissible, as for instance, owing to want of registration, omission to take objection to its reception does not make it admissible, and the objection may be raised even in appeal for the first time. The question of relevancy is a question of law, and can be raised at any stage, but the question of proof is a question of procedure, and is capable of being waived : 19 All. 76 (P.C.) and ('22) 9 A.I.R. 1922 Pat. 122, *Rel. on.*

[P 196 C 1, 2]

C. P. C. —

('44) Chitaley, S. 100, N. 34, Pt. 1.

('41) Mulla, S. 100, Page 374, "Pleas . . . appeal."

(e) Appeal — Question of law — Presumption under S. 90, Evidence Act, whether can be raised is question of law.

Whether the presumption in favour of the genuineness of a document under S. 90, Evidence Act, can be raised or not is a question of law, and it can, therefore, be urged at any stage of the litigation.

[P 196 C 2]

C. P. C. —

('44) Chitaley, S. 100, N. 32.

(f) Evidence Act (1872), Ss. 65 and 90 — Registered mortgage-deed more than thirty years old lost — Certified copy can be admitted in evidence.

It is true that when a certified copy is allowed to be produced under S. 65, no presumption can be drawn under S. 90 as to the genuineness or execution of the original and the Court should not admit a document merely on the ground that it is a certified copy of a document more than thirty years old and should call for proof of the execution of the document. But when the document is registered, such proof is to be found in the certified copy itself. The deed being registered, the certified copy bears the necessary endorsements of the Sub-Registrar before whom the executant acknowledged the execution and was duly identified. Sections 58, 59 and 60, Registration Act, provide that the facts mentioned in the endorsements may be proved by those endorsements, provided the provisions of S. 60 have been complied with.

[P 196 C 2; P 197 C 1]

Hence, where a registered mortgage-deed more than thirty years old is lost, the certified copy produced under S. 65 is admissible in evidence : ('35) 22 A. I. R. 1935 P. C. 132, *Expl.*; ('31) 18 A.I.R. 1931 Bom. 105, *Rel. on.*

[P 197 C 1]

(g) Evidence — Burden of proof — Suit to recover watan land by person claiming nearest



heir of last proprietor — He must show there is no one else nearer.

Where in a suit to recover watan lands on the death of the last proprietor, the plaintiff claims that he is the nearest heir of the last proprietor, he must show that there is no one else nearer. That burden is discharged by the admission of the defendant that the last proprietor had no nearer heir. [P 198 C 2]

(h) Limitation Act (1908), S. 28 and Art. 144 — Adverse possession of one trespasser can be tacked on to adverse possession of another only when latter derives his liability to be sued from former — Adverse possession of widow succeeded by adverse possession of person not shown to be her adopted son — Former adverse possession cannot be tacked on to latter adverse possession.

One trespasser cannot add to his own possession the previous independent possession of another trespasser. The adverse possession of previous trespasser can be tacked on to the adverse possession of the subsequent trespasser only when the latter derives his liability to be sued from or through the former. [P 199 C 1, 2]

Where, therefore, the adverse possession of a widow is succeeded by adverse possession of another person who is not shown to be her adopted son, the adverse possession of the widow cannot be tacked on to the adverse possession of such person as he has not derived his liability to be sued through the widow and must, therefore, be deemed to be an independent trespasser. [P 199 C 1, 2]

Limitation Act —

('42) Chitaley, Art. 142, N. 92, Pts. 1 and 2.

(i) Adverse possession — Adverse possession by Hindu widow — Presumption is that she acquires only widow's estate.

When the possession of a Hindu widow is adverse, it has to be decided what was her *animus possidendi*: Did she assert an absolute title in herself or did she claim to hold as the heiress of any person? The latter would be the ordinary presumption and those who claim for her anything more than a widow's limited interest must prove since when she began to assert absolute title in herself. The test is always to be found in the origin of the widow's possession. When she enters on land under a title as heir, which is necessarily a limited title under the Hindu law, very cogent evidence is necessary to show that she afterwards asserted a title as absolute owner. It makes no difference whether the widow claims to be in wrongful possession as the widow of her husband or as the heir of her son. In both the cases she acquires only a widow's estate by her wrongful possession. [P 199 C 2]

(j) Limitation Act (1908), S. 28 and Art. 144 — Adverse possession of widow cannot be tacked on to adverse possession of another claiming absolute title.

In order that the adverse possession of the previous trespasser can be tacked on to the adverse possession of the subsequent trespasser, the possession of the former must be of the same kind as that of the latter. A widow by adverse possession acquires only a widow's estate after twelve years. Hence, her adverse possession cannot be tacked on to the adverse possession of another person who claims to be in possession as absolute owner. [P 200 C 1]

Limitation Act —

('42) Chitaley, Art. 142, N. 92, Pt. 6a.

*J. C. Shah, S. R. Parulekar, H. F. Mudiraddi and R. N. Gundil* — for Appellant.

*R. A. Jahagirdar* — for Respondents.

**Judgment.**—This appeal arises out of a suit for possession of two-thirds of five patilki watan lands of Devapur which were held by one Mahalingappa Gadigeppa Naik till his death and after him by his widow Gaurawa and her adopted son Basappa. Mahalingappa died about the year 1903 and the lands were entered in the revenue records in the name of his widow Gaurawa. Her adopted son Basappa died unmarried in 1919. Gaurawa, whose name had already been entered in the Record of Rights in 1904, continued to be in possession of the watan lands and in February 1921 she leased them out to Hanmant Venkatesh and Hanmant Balkrishna for a period of twenty years. On 24th June 1921, she executed a deed of adoption in favour of defendant 1 Pandappa, purporting to have taken him in adoption on 9th April 1921. In 1922 one Bhagawa filed a suit against Gaurawa, through her next friend, claiming possession of the lands in suit on the ground that she was the widow of Basappa. The dispute was referred to arbitration and an award was passed recognising Bhagawa as Basappa's widow and allowing maintenance to Gaurawa. A decree was passed in terms of the award, but before that decree was passed, the two lessees, Hanmant Venkatesh and Hanmant Balkrishna, filed a suit against both Gaurawa and Bhagawa for a declaration that Gaurawa was the lawful heir of Basappa and not Bhagawa and that they were entitled to be in possession of the lands as Gaurawa's tenants for a period of twenty years from the date of the lease. It was held in that suit that Bhagawa was not the widow of Basappa and that Gaurawa was Basappa's heir after his death. That suit was decided on 13th November 1923. After that decision Bhagawa disappeared from the scene, although she had obtained an award decree in her favour, and the lands continued to be in the enjoyment of Gaurawa through her tenants. Defendant 1, Pandappa, though he claims to have been adopted in 1921, did not take any steps to take possession of the lands till 1929. On 10th June 1929, he gave an intimation to the village officers of Devapur that his name should be entered against the lands in the Record of Rights as he had been taken in adoption by Mahalingappa's widow Gaurawa. Gaurawa first opposed his request and contended that she had not taken him in adoption, but eventually she



admitted having adopted him and his name was substituted in the Record of Rights on 19th October 1929. It is not clear from the record whether thereafter the tenants paid rent to Gaurawa or to defendant 1. Gaurawa died in 1933 and then, by some arrangement with the tenants, defendant 1 took actual possession of the lands. The six plaintiffs and defendants 2, 3 and 4 claim to be the great-great-grandsons of Mahalingappa's great-grandfather's brother Kalasaraddi. The plaintiffs, therefore, filed this suit to recover their two-thirds share in the watan lands of Mahalingappa, alleging that they were reversioners after Gaurawa's death and that defendant 1 was not her legally adopted son. Defendants 2, 3 and 4, who would in that case be entitled to the remaining one-third, did not appear in the suit but defendant 1 contended that the plaintiffs were not in any way related to Mahalingappa or Basappa, that they belonged to Tiganibidari family, while Mahalingappa and Basappa belonged to the Naik family, that he was the validly adopted son of Gaurawa and as such entitled to the property in suit, and that even if his adoption be not proved, he had acquired a title to that property by the continuous adverse possession of Gaurawa and himself.

Both the Courts below have held that defendant 1's adoption by Gaurawa is not proved and that the plaintiffs and defendants 2, 3 and 4 are entitled to the lands in suit as the nearest reversioners after Gaurawa's death. They have further held that defendant 1's adverse possession commenced only in 1929 and he cannot tack his adverse possession to that of Gaurawa. The trial Court further held that Gaurawa's possession was that of a Hindu widow, and even if she was in adverse possession, he could acquire only a widow's estate in the property in her possession. The plaintiffs' claim was, therefore, decreed by the trial Court and the decree was confirmed in appeal. The concurrent finding of both the Courts below that defendant 1 is not proved to be Gaurawa's legally adopted son cannot be assailed in second appeal. But it is urged that the plaintiffs and defendants 2, 3 and 4 are not proved to be the agnates of Mahalingappa and even if they are proved to be the agnates, it is not proved that their common ancestor was a watandar of the same watan. It is also urged that defendant 1's adverse possession can be tacked to the adverse possession of Gaurawa and, therefore, the suit, which is brought more than twelve years after Gaurawa's possession became

adverse on the death of Basappa, is not tenable. Both the Courts have held that the plaintiffs and defendants 2, 3 and 4 are the nearest agnates of Mahalingappa and Basappa. That is *prima facie* a finding of fact and is binding in second appeal. But Mr. Shah contends that the finding is based on evidence which is legally inadmissible and, therefore, cannot be sustained.

The trial Court has relied upon four documents among others and all those four are challenged as not legally admissible in evidence. They are Exs. 50, 48, 68 and 69. Exhibit 50 is the deposition of plaintiff 1 in the tenants' suit of 1922. He stated in that suit that he was a near bhauband of Basappa's adoptive father Mahalingappa. After all it was an admission made by the plaintiff himself, and although it may not carry any substantial evidentiary value, it is relevant under S. 157, Evidence Act, to corroborate his statement in this suit. But I do not think that the trial Court was right in relying upon the judgment in that suit (Ex. 48) to which neither the plaintiffs nor the defendants were parties. Exhibit 69 is an agreement executed by Mahalingappa's father Gadigeppa and plaintiff 1's father Murteppa in favour of one Govindappa Joshi in 1863. In that agreement they referred to a certain land which was held as an inam by both of them but it does not appear that the land referred to was any of the lands in suit. The document was admitted in evidence as being more than 30 years old, and it is contended that there is no evidence to show that it was produced from proper custody, and that being executed in favour of Govindappa Joshi, it is not explained how it came into the possession of the plaintiffs who produced it. On the other hand, it is pointed out that there is a provision in the agreement that it should be returned to the executants after the period of the agreement, viz., one year. It may, therefore, be presumed that at the end of the year the document was returned to the executants, and as it is produced by one of the executant's heirs, it has come from proper custody. After all it does not carry the plaintiffs' case further and is not referred to in the judgment of the learned District Judge. Hence, the finding recorded by the learned District Judge cannot be said to have been vitiated by the admission of these three documents by the trial Court as he has not relied upon any of them.

Exhibit 68 is a certified copy of a registered mortgage-deed passed by Murteppa,



the father of plaintiffs 1 and 2, in favour of one Ramgouda Krishnappa mortgaging his lands to him for Rupees 800 in 1878. The certified copy was produced at an early stage along with Ex. 25, but there was no evidence to prove that the original of the mortgage-deed had been lost. The plaintiffs, therefore, made an application, Ex. 66, requesting that permission should be given to them to lead evidence on that point. The application was opposed, but that trial Court allowed the plaintiffs to lead evidence on that point. Plaintiff 1 was then examined and he made a statement on oath that the original of the mortgage-deed was lost. The trial Court then allowed secondary evidence of the mortgage-deed to go on record.

As held in 19 I. A. 79<sup>1</sup> and 5 Bom. L. R. 708<sup>2</sup> the discretion exercised by the trial Court in admitting secondary evidence on the ground that the original is lost should not be interfered with in appeal. But it is urged that the certified copy should not have been exhibited without proof of its execution. From the application (Ex. 66) and the roznama it appears that the trial Court exhibited it under S. 90, Evidence Act, on the ground that it was more than 30 years old. In the lower appellate Court the admissibility of the document does not appear to have been challenged. It is urged that as held in 44 Bom. 192<sup>3</sup> the erroneous omission before the lower Courts to object to the admission of evidence does not make that evidence relevant. The principle of that ruling, however, applies only where the document is *per se* irrelevant or inadmissible and no objection was taken to its admissibility: 8 Pat. 783.<sup>4</sup> Where evidence is admitted in the trial Court without any objection to its reception, and the evidence is admissible and relevant, then no objection will be allowed to be taken to its reception at any stage of the litigation on the ground of improper proof. But if the evidence is irrelevant or inadmissible, as for instance, owing to want of registration, omission to take objection to its reception does not make it admissible, and the objection may be raised even in appeal for the first time: 23

I. A. 106.<sup>5</sup> As observed by Das J. in A. I. R. 1922 Pat. 122<sup>6</sup>

"the question of relevancy is a question of law, and can be raised at any stage, but the question of proof is a question of procedure, and is capable of being waived."

In this case the secondary evidence of the mortgage-deed was held to be admissible as the original was lost. What is now urged is that the execution should have been proved and this objection was not raised either in the trial Court or in the lower appellate Court. It is, however, true that no evidence was adduced to prove the execution of the original of Ex. 68 as the trial Court was prepared to raise the presumption in favour of the genuineness of the document under S. 90, Evidence Act. Whether such a presumption can be raised or not is a question of law, and it can, therefore, be urged at any stage of the litigation. It is now well settled by the ruling of the Privy Council in 37 Bom. L. R. 805<sup>7</sup> that the statutory presumption under S. 90, Evidence Act, cannot be made in respect of a document merely on production of its copy under S. 65 of the Act. Their Lordships observed (p. 811):

"Section 90 clearly requires the production to the Court of the particular document, in regard to which the Court may make the statutory presumption. If the document produced is a copy, admitted under S. 65 as secondary evidence, and it is produced from proper custody, and is over 30 years old, then the signatures authenticating the copy may be presumed to be genuine."

In A.I.R. 1934 Nag. 67<sup>8</sup> it has been held that the presumption was equally applicable to copies as to the originals when the copy was proved to be a true copy of the original, but that view was expressly overruled by the Privy Council. In 38 Bom. L. R. 593<sup>9</sup> at p. 602 it is held that when a certified copy is allowed to be produced under S. 65, Evidence Act, no presumption can be drawn under S. 90 as to the genuineness or execution of the original. It may, therefore, be said that the trial Court should not have admitted Ex. 68 merely on the ground that it was a certified copy of a mortgage-deed more than 30 years old and should have called for proof of the execution of the document. But such proof is to be found in the certified

1. ('92) 19 Cal. 438 : 19 I. A. 79 : 6 Sar. 177 (P. C.), Srimati Rani Hurripria v. Rukmini Debi.

2. ('03) 28 Bom. 94 : 5 Bom. L. R. 708, Ningawa v. Ramappa.

3. ('20) 7 A. I. R. 1920 Bom. 244 : 44 Bom. 192 : 55 I. C. 316, Narhari Hari v. Ambabai.

4. ('29) 16 A. I. R. 1929 Pat. 739 : 8 Pat. 783 : 121 I. C. 334, Shamsunder Kuer v. Ramkhelawan Sah.

5. ('97) 19 All. 76 : 23 I. A. 106 : 7 Sar. 73 (P. C.), Miller v. Babu Mahadeo Das.

6. ('22) 9 A. I. R. 1922 Pat. 122 : 63 I. C. 625, Kalikanand v. Shiva Nandan.

7. ('35) 22 A. I. R. 1935 P. C. 132 : 57 All. 494 : 62 I. A. 180 : 156 I. C. 864 : 37 Bom. L. R. 805 (P. C.), Basant Singh v. Brijraj Saran Singh.

8. ('34) 21 A.I.R. 1934 Nag. 67 : 30 N. L. R. 155 : 148 I. C. 561, Gopinath Maharaj v. Moti Chiwa.

9. ('36) 23 A.I.R. 1936 Bom. 301 : 164 I. C. 703 : 38 Bom. L. R. 593, Basangouda v. Basalingappa.



copy itself. The deed being registered, the certified copy bears the necessary endorsements of the Sub-Registrar before whom the executant acknowledged the execution and was duly identified. As held in 9 Bom. L. R. 401<sup>10</sup> Ss. 58, 59 and 60, Registration Act, provide that the facts mentioned in the endorsement may be proved by those endorsements, provided the provisions of S. 60 have been complied with. The facts in 55 Bom. 103<sup>11</sup> were quite akin to the facts of this case. There also the certified copy of a deed of adoption was admitted in evidence merely on the ground that the original was lost and that it was more than thirty years old. The first appellate Court held that as the execution of the deed had not been proved it should not have been exhibited. Then in second appeal Baker J. observed (p. 107) :

"As to the proof, the document in this particular instance has been registered and bears the necessary endorsements by the Sub-Registrar before whom the executant was identified by the kulkarni of the village. The effect of registration has been considered by this Court in 9 Bom. L. R. 401<sup>10</sup> where it was held that Ss. 58, 59 and 60, Registration Act provide that the facts mentioned in the endorsement may be proved by those endorsements, provided the provisions of S. 60 have been complied with. The endorsement of the Sub-Registrar in the present case shows that Ramji the executant admitted execution of the document and gave his thumb impression and that he was identified before the Sub-Registrar by Keshav Hari Talati who was known to the Sub-Registrar. In these circumstances the view of the first Court that the copy of the adoption deed is admissible in evidence and that it is sufficiently proved appears to be correct."

By parity of reasoning the certified copy of the mortgage-deed in this case also is admissible in evidence, as it bears the requisite endorsement of the Sub-Registrar regarding the admission of its execution by the executant. It is true that the decision of the Privy Council is subsequent to the case in 55 Bom. 103.<sup>11</sup> But there is no conflict between them. The document which the Privy Council was dealing with had not been registered, and all that the ruling lays down is that there can be no presumption under S. 90, Evidence Act, when only a certified copy of a document is produced and, therefore, the execution of the original has to be proved, whereas the ruling in 55 Bom. 103<sup>11</sup> lays down that such proof can be afforded by the Sub-Registrar's endorsement appearing on the certified copy. It is true that in 16

Luck. 778<sup>12</sup> a certified copy of a mortgage-deed which had been registered was tendered in evidence under S. 65, Evidence Act, and although secondary evidence was held to be admissible and the document was more than thirty years old, the certified copy was not admitted for want of proof of the execution of the original. It does not appear to have been urged in that case that the necessary proof was supplied by the Sub-Registrar's endorsement, as in 55 Bom. 103.<sup>11</sup> It is suggested that the mere admission of execution by the executant before the Sub-Registrar is not sufficient to prove that the mortgage-deed was duly attested by two witnesses, and execution includes proper attestation also. But the mortgage-deed was executed in 1878 before the Transfer of Property Act was enacted and at that time mortgage-deeds did not require to be compulsorily attested by two witnesses. I, therefore, hold that Ex. 68 was rightly admitted in evidence.

No other evidence relied upon by the learned District Judge is challenged as inadmissible and hence his finding of fact that the plaintiffs and defendants 2, 3 and 4 are the nearest heirs of Basappa and Mahalingappa cannot be challenged in second appeal. Moreover, even on merits the finding is justified. Among the lands mortgaged under the original of Ex. 68 are portions of Survey Nos. 66, 67 and 82 which correspond to the present Revision Survey Nos. 85, 86, 87, 88 and 89. The lands in suit are also portions of these very lands. The mortgagor Murteppa, the father of plaintiffs 1 and 2, in describing these lands says that they were allotted to his share as bhauband under the khatedar Gadigeppa *bin* Kenchappa, the father of Mahalingappa. That statement was made at a time when there was no dispute regarding the relationship between the two branches of the family. Exhibits 44 and 45 show that portions of Revision Survey Nos. 87 and 89 are in the possession of plaintiff 4 and defendant 2 and Exs. 25 and 26, which are extracts from the Record of Rights for 1922-23, show that portions of the other two lands are also held by them. It was argued in the lower Courts that the surname of the plaintiffs is Tiganibidari, while that of Mahalingappa and Basappa is Naik. But in Exs. 44 and 45 and also in the mortgage-deed (Ex. 68) the surname of the plaintiffs' branch was given as Naik. It appears that

10. ('07) 9 Bom. L. R. 401, Thama v. Govind.

11. ('31) 18 A. I. R. 1931 Bom. 105 : 55 Bom. 103 : 128 I. C. 901, Vishwanath Ramji v. Rahibai.

12. ('41) 23 A. I. R. 1941 Oudh. 433 : 16 Luck. 778:194 I. C. 855, Amjad Husain v. Mt. Raisunnisa.



the plaintiffs' family has some lands at Tiganibidari and one of them was in the occupation of the Patil of the village. Hence perhaps they may have come to be known as Tiganibidari. But there is no doubt that their family surname is Naik, the same as the surname of Mahalingappa's branch.

The plaintiffs have produced a pedigree along with the plaint showing how they are related to Mahalingappa's branch. Of course, the plaintiff cannot be expected to have personal knowledge of his ancestors or the ancestors of Mahalingappa. But he and his witness Ramchandra have sworn that the plaintiffs are the bhaubands of Mahalingappa. In view of all this evidence the Courts below have rightly found that the two branches are descended from a common ancestor. It is further contended that it is not enough if the plaintiffs and Mahalingappa are proved to have a common ancestor, but it must be also proved that the watan was acquired before the family branched off. In other words, it must be proved that the common ancestor was a watandar of the same watan and that the watan was acquired either by him or by his ancestor. This point was not specifically raised in the lower Courts and was not the subject of an issue. But the learned District Judge has definitely stated that the fact that the plaintiffs admittedly held portions of the same patilki watan lands since the time of their ancestors clearly shows that they belonged to the same patilki watan family as Mahalingappa. That also is a finding of fact. Defendant 1 has offered an explanation of the possession of the patilki watan lands by the plaintiffs' branch of the family. In para. 5 of his deposition he says that Mahalingappa brought Kallappa and Murteppa from Tiganibidari as there were factions at Devapur and gave them some lands and allowed them to stay at Devapur for his safety. There is no evidence to bear out this version and it has been disbelieved by both the Courts below. If the plaintiffs were strangers to the watan, they would not be allowed to remain in possession of watan property, and in the mortgage-deed, Ex. 69, it is stated that it had been allotted to the share of the plaintiffs' branch at a partition. This itself shows that the plaintiffs' branch is also a watandar family and the watan must have been acquired by the common ancestor or by an ancestor of his.

Basappa, who had been adopted by Gaurawa, died unmarried about the year 1919, and under S. 2, Bombay Act, 5 [V] of 1886, his

mother Gaurawa was not entitled to succeed to his watan property as his heir in preference to the plaintiffs, who are the nearest agnates in the watan family. It is argued that the plaintiffs have not proved that they are the nearest agnates, since they have not alleged nor led any evidence to show that there are no nearer agnates of Mahalingappa and Basappa. But defendant 1 has himself stated in his deposition that Mahalingappa had no bhaubands and it is not suggested at the trial that there is anyone who is nearer in relationship to Mahalingappa than the plaintiffs and defendants 2, 3 and 4. It is true that as held in 23 ALL. 72<sup>13</sup> and 12 M. I. A. 448<sup>14</sup> the plaintiffs who claim to be the nearest heirs of Mahalingappa and Basappa ought to show that there is no one else nearer, but that burden is discharged by the admission of the defendant himself, and they were, therefore, the heirs of Basappa to his watan property in preference to his mother Gaurawa.

The plaintiffs did not, however, then put forward their claim and allowed Gaurawa to remain in possession. She leased out the lands for twenty years in February 1921, and then passed a deed of adoption in favour of defendant 1 in June 1921. But she continued in possession through her tenants till 1929 when defendant 1 got his name entered in the Record of Rights and took actual possession of the lands after Gaurawa's death in 1933. Assuming that when the revenue authorities entered defendant 1's name in the Record of Rights in October 1929, the lands in suit went into the possession of defendant 1, his adverse possession commenced only then and this suit was filed on 31st March 1937. It is obvious that Gaurawa's possession was also wrongful since the death of her adopted son Basappa in 1919. But she too was in possession only for ten years till 1929. It is urged that as defendant 1 claims through Gaurawa as her adopted son, her adverse possession for ten years should be tacked on to his adverse possession for eight years and thus by this adverse possession for eighteen years his title was completed and the plaintiffs cannot evict him. Both the Courts below have held that as defendant 1's adoption is held not proved, he cannot be said to be claiming through Gaurawa and, therefore, the adverse possession of Gaurawa cannot be tacked on to his

13. (01) 23 All. 72 : 27 I. A. 183 : 7 Sar. 752 (P. C.), Surjan Singh v. Sardar Singh.

14. (67-69) 12 M. I. A. 448 : 1 Beng. L. R. 44 : 2 Sar. 382 : 2 Suther 160 (P. C.), Girdhari Lall Roy v. The Bengal Government.



adverse possession. It appears from the entry in the Record of Rights that Gaurawa first objected to allow defendant 1's name to be entered as the occupant of the lands in suit and she denied having taken him in adoption. But, subsequently, she gave her consent and defendant 1's name was entered against the lands as the occupant, though the tenants were in actual occupation under Gaurawa's lease. Mr. Shah for defendant 1 argues that as Gaurawa herself willingly allowed defendant 1 to take possession of the land, her adverse possession and defendant 1's adverse possession were continuous and can, therefore, be tacked on to each other. He relies upon the passage in Paras. 1014 and 1016 at p. 745 of Halsbury's Laws of England (Hailsham edition), Vol. 20, to the following effect:

"A person who is in possession of land without title has, while he continues in possession, and before the statutory period has elapsed, a transmissible interest in the property, but an interest which is liable at any moment to be defeated by the entry of the rightful owner; and if such person is succeeded in possession by one claiming through him who holds till the expiration of the statutory period, such a successor has then as good a right to the possession as if he himself had occupied for the whole period."

\* \* \* \*

If a series of trespassers, adverse to one another and to the rightful owner, take and keep possession of land continuously in succession for various periods, each less than, but exceeding on the whole, twelve years, the rightful owner is barred."

There can be no doubt that if the possession of one trespasser can be regarded as a continuation of the trespass of the previous occupant through whom he claims, then the adverse possession of the one can be tacked on to that of the other, and if the total period exceeds twelve years, then that possession ripens into full ownership under S. 28 and Art. 144 of Sch. 1 to the Limitation Act. Article 144 provides a period of limitation of twelve years for a suit for possession of immovable property and the period begins to run when the possession of the defendant becomes adverse to the plaintiff. "Defendant" is defined in S. 2 (4) as including "any person from or through whom a defendant derives his liability to be sued." It follows, therefore, that if defendant 1 does not derive his liability to be sued from or through Gaurawa, then her adverse possession cannot enure for his benefit. The mere fact that he claims through her is not enough. The expression used in S. 2 (4), Limitation Act, is that the defendant must have derived his liability to be sued through the person

in possession before him, and since defendant 1 is held not to be the adopted son of Gaurawa, it cannot be said that he has derived his liability to be sued from or through her and he must be deemed to be an independent trespasser. As observed in A. I. R. 1926 Oudh 313<sup>15</sup> at p. 314, one trespasser cannot add to his own possession the previous independent possession of another trespasser. When the possession passes from the first to the second trespasser, there is a constructive restoration, even if a momentary restoration, of the true title to possession.

Moreover, the adverse possession of Gaurawa was not of the same kind as that of defendant 1. Gaurawa rightly or wrongly thought that after the death of Basappa his watan property devolved upon her, evidently being ignorant of the provisions of Bombay Act, 5 [V] of 1886. The plaintiffs, who should have really succeeded to the watan property of Basappa, seem to have also been equally ignorant and never put forward their claim. They tacitly allowed Gaurawa to continue in possession after Basappa's death. After the death of her husband Mahalingappa in 1904, she got her name entered in the Record of Rights and the entry clearly shows that she claimed as her husband's heir. In other words, she then claimed only a widow's estate in the property. The same entry continued till 1929, although Basappa as her adopted son was entitled to have his name entered in the Record of Rights. Basappa died in 1919 and no change was effected in the entries in the Record of Rights. She never claimed that she held the lands as their absolute owner after Basappa's death. It is well settled that when the possession of a Hindu woman is adverse, it has to be decided what was her *animus possidendi*:—Did she assert an absolute title in herself or did she claim to hold as the heiress of any person? The latter would be the ordinary presumption and those who claim for her anything more than a widow's limited interest must prove since when she began to assert absolute title in herself. The test is always to be found in the origin of the widow's possession. When she enters on land under a title as heir, which is necessarily a limited title under the Hindu law, very cogent evidence is necessary to show that she afterwards asserted a title as absolute owner. This has been clearly laid down by the Privy Council in

15. (26) 13 A.I.R. 1926 Oudh 313 : 29 O. C. 131; 92 I. C. 825, Sukhdeo v. Mt. Ram Dulari.



26 Bom.L.R. 1117.<sup>16</sup> Their Lordships observed (p. 1120) :

"It was argued that the widows could only possess for themselves; that the last widow Devi would then acquire a personal title; and that the respondents and not the plaintiff were the heirs of Devi. This is quite to misunderstand the nature of the widow's possession. The Hindu widow, as often pointed out, is not a life renter but has a widow's estate — that is to say, a widow's estate in her deceased husband's estate. If possessing as widow she possesses adversely to anyone as to certain parcels, she does not acquire the parcels as Stridhan but she makes them good to her husband's estate."

Mr. Shah contends that this would apply only if a woman claims to be in wrongful possession as the widow of her husband, but not if she claims to be in possession as the heir of her son. I do not see any reason to make such a difference. Even as the heir of her son she is entitled only to a widow's estate, and just as in the case of wrongful possession as the heir of her husband she can acquire only a widow's estate, so too, when she claims to be in adverse possession as the heir of her son, she can, after twelve years, claim to have acquired only a widow's estate and nothing more. By her wrongful possession the character of the watan is not changed, as held in 30 Bom. L.R. 867,<sup>17</sup> and if she had been in possession for twelve years wrongfully, the plaintiffs could not have ousted her during her lifetime. But her widow's estate would have to come to an end on her death and then they could have claimed the watan property as reversioners. Thus, the adverse possession of Gaurawa was such as would have conferred upon her a widow's estate after twelve years; whereas the adverse possession of defendant 1 since 1929 was such as would have conferred upon him an absolute title after twelve years. Hence these two, which are entirely different in character, cannot be tacked on to each other, and, as I have already said, since defendant 1 does not derive his title through Gaurawa, he cannot get the benefit of her adverse possession. The plaintiffs' claim is, therefore, not time-barred. The appeal is dismissed with costs.

D.S./D.H.

*Appeal dismissed.*

16. (24) 11 A. I. R. 1924 P. C. 121 : 5 Lah. 192: 51 I. A. 171 : 80 I. C. 788 : 26 Bom. L. R. 1117 (P. C.), Lajwanti v. Safa Chanda.

17. (28) 15 A.I.R. 1928 Bom. 333: 114 I. C. 390: 30 Bom. L. R. 867, Anna v. Gojra.

[Case No. 52.]

**A. I. R. (33) 1946 Bombay 200**

CHAGLA J.

*People's Own Provident and General Insurance Co. — Applicant*

v.

*Guracharya — Opponent.*

Civil Revn. Applns. Nos. 234, 233, 235 and 236 of 1944, Decided on 23rd February 1945, from order passed by Debt Adjustment Board, Indi.

Civil P. C. (1908), S. 115 — No revision lies from orders of Debt Adjustment Board.

The Debt Adjustment Board set up under the Bombay Agricultural Debtors' Relief Act, 1939, is not a Court Subordinate to the High Court in order to attract the application of S. 115. Hence, no revisional application lies from orders of the Debt Adjustment Board. [P 200 C 2]

*K. B. Sukthankar and S. G. Patwardhan — for Applicant.*

*N. M. Hungund — for Opponent.*

**Order.** — This is an application in revision from an order made by the Debt Adjustment Board. A preliminary objection is taken by Mr. Hungund on behalf of the opponent that the application is not competent. The Debt Adjustment Board was set up under the Bombay Agricultural Debtors' Relief Act, 1939, and the question that arises for determination is whether it is a Court subordinate to the High Court in order to attract the application of S. 115, Civil P. C., 1908. "Court" is defined under the Agricultural Debtors' Relief Act and according to that definition, "Court" is either a District Court or a Court of the First Class Subordinate Judge to which an appeal lies against the award of a Board under S. 9. Mr. Sukhtankar has argued that S. 9 of the Act permits appeals to the District Court from awards made by the Board. That might give revisional powers to the High Court when the District Court decides the appeal; but the mere fact that a statute provides an appeal to a Court from a particular body does not necessarily make that body a Court. Mr. Sukhtankar has also relied on S. 7 of the Act, which provides that the Board shall have the same powers as are vested in civil Courts under the Code of Civil Procedure. The very fact that the Legislature had to vest the Board with powers which a civil Court possesses goes to show that the Board is not a Court. The fact that similar powers which a civil Court possesses are given to this Board by the statute does not constitute it a Court. I, therefore, hold that no revisional application lies from orders of the Debt Adjustment Board, and this application is not competent. The rule must, therefore, be discharged with



costs. A similar point arises in Civil Revision Applications Nos. 233, 235 and 236 of 1944. The rules on those applications will also be discharged. No order as to costs.

R.K.

*Rules discharged.*

[*Case No. 53.*]

**A. I. R. (33) 1946 Bombay 201**

CHAGLA J.

*Hafasji Ibrahim and others*

— *Applicants*

v.

*Mangalgirji Mathuragirji*

— *Opponent.*

Civil Revn. Appln. No. 179 of 1944, Decided on 21st February 1945, from order of Asst. Collector, Godhra, in Revn. Appln. No. 9 of 1943.

Bombay Mamlatdars' Courts Act (2 [II] of 1906), Ss. 23 and 18 — Revision before Collector pending—Applicant dying—Revision does not abate — Legal representatives can be brought even after one month—Civil P. C. (1908), O. 22 does not apply.

Where an applicant to the revisional application to the Collector dies during the pendency of the revision under S. 23, his legal representatives can be brought on record even after one month from the death of the applicant. The provisions of O. 22, Civil P. C., do not apply to the revisional proceedings before the Collector : ('38) 25 A. I. R. 1938 Mad. 115, *Dissent.*; ('39) 26 A. I. R. 1939 Oudh 277, *Rel. on*; 17 Bom. 645 and 17 All. 106, *Ref.* [P 202 C 1]

*K. J. Khandalavala and K. T. Pathak*

— for Applicants.

*C. K. Shah* — for Opponent.

**Order.**—On 10th June 1942, a decree was passed in favour of the opponent against the petitioners by the Court of the Extra Avalkarkun at Godhra under S. 19, Mamlatdars' Courts Act, ordering the petitioners to hand over possession of the suit lands to the opponent. On 29th June 1942, the petitioners applied to the Collector of Broach and Panchmahals, Godhra, in revision under S. 23, Mamlatdars' Courts Act. On 7th October 1942, the original defendant died, and on 5th January 1943, the present petitioners applied to bring themselves on record as the heirs of the original defendant. On 26th November 1943, the Collector issued notice to the parties for the hearing of the revisional application. On 15th December 1943, the matter came before the Assistant Collector and he took the view that the revisional application had abated inasmuch as the petitioners had not applied to bring themselves on record within one month of the death of the original defendant, and on that ground he held that the application was barred and rejected it. It is from this order of the learned Assistant Collector that

this revisional application has been preferred. Now S. 18, sub-cl. (3), Mamlatdars' Courts Act, provides that in case of the death of any party while the suit is pending before him, if application is made within one month of such death, the Mamlatdar shall determine summarily who is the legal representative of the deceased party and shall enter on the record the name of such representative; and, if no such application is made, the suit shall abate. Section 23, sub-cl. (1), provides that there shall be no appeal from any order passed by a Mamlatdar under the Mamlatdar's Courts Act; but sub-cl. (2) of that section gives revisional powers to the Collector. There is no provision in the Act for bringing on record the heirs of the applicant in a revisional application in the event of the applicant dying nor is there any provision for the abatement of the revisional application on the death of the applicant. In 17 Bom. 645<sup>1</sup> *Fulton and Telang JJ.* held that under the provisions of the then Mamlatdars' Courts Act (3 [III] of 1876), if a party to a suit pending before the Mamlatdars' Court died the suit abated and the heirs of the deceased party could not intervene to proceed with the suit; and *Fulton J.* took the view that as the object of the Act was to provide speedy and temporary relief it was thought inexpedient to make any provision for the continuance of a suit on the death of one of the parties. After this decision was given, the Mamlatdars' Courts Act has been amended; and as I have just pointed out, sub-cl. (3) of S. 18 now provides for the continuance of the suit on the death of a party to the suit pending before the Mamlatdar's Court.

The question arises: what is to happen to a revisional application pending before a Collector when the applicant dies? Does it abate? Or is there any period of limitation prescribed for bringing the heirs on record in default of which it would abate? Or is there no limitation at all for the purpose of the heirs of the applicant continuing the revisional application? Mr. C. K. Shah for the opponent has relied on the Bombay decision to which I have just referred; but that dealt with proceedings in a suit pending before the Mamlatdar and it dealt with the law as it then existed and which has been radically amended now. In any case that was not a decision on the question which I have to determine in this application. To my mind the provisions of O. 22,

1. ('93) 17 Bom. 645, *Ganpatram Jebhai v. Ranchhod Haribhai.*



Civil P. C., cannot apply to the revisional proceedings before the Collector. Order 22 applies in terms to all suits and appeals. The question is whether by reason of S. 141 of the Code the procedure provided under O. 22 can be made applicable to these proceedings. Their Lordships of the Privy Council in 22 I. A. 44<sup>2</sup> have laid down that the proceedings spoken of in S. 141 of the Code refer only to original matters in the nature of suits such as proceedings in probates, guardianships, and so forth. Now it cannot possibly be said that a revisional application is an original matter in the nature of a suit and, therefore, to my mind O. 22 would not apply to the revisional application pending before the Collector. I find that a learned Judge of the Madras High Court in A. I. R. 1938 Mad. 115<sup>3</sup> has taken the view that O. 22, Rr. 3 and 4, are applicable to proceedings under S. 115, Civil P. C., and an order passed by the High Court on a petition under S. 115 in ignorance of the fact of death of the petitioner more than 90 days previously is one made without jurisdiction and is a nullity. In that case the learned Judge took the view that O. 22, R. 3, applied to revisional proceedings under S. 115 of the Code and he also took the view that Art. 176, Limitation Act, applied. With respect to the learned Judge, he does not seem to have considered the decision of the Privy Council to which I have referred, nor did he consider whether revisional proceedings under S. 115 can be called an original matter in the nature of a suit. In any case it is difficult to see how Art. 176, Limitation Act, would apply, because Art. 176 refers to the legal representative of a deceased plaintiff or of a deceased appellant; and, in a revisional application, you neither have a plaintiff nor an appellant but only an applicant or a petitioner. To my mind it seems that the better view is the view taken by the Lucknow Court in 15 Luck. 26.<sup>4</sup> Radha Krishna Srivastava J. took the view there that O. 22, Civil P. C., does not apply to an application for substitution of the name of a legal representative in place of a deceased party in a revision application; and he further held that there was no rule of limitation governing an application for substitution of parties

in a revision application. The learned Judge further points out that the revising Court would require a representative of the deceased applicant or opponent in order to decide the matter and, therefore, the Court would require a legal representative to be brought on record under S. 151, Civil P. C. The learned Judge further took the view that assuming any article of the Limitation Act applied at all, it would not be Art. 177 but Art. 181 which is the residuary article as far as applications are concerned.

The learned Assistant Collector took the view—and rightly—that there was no specific provision under the Mamlatdars' Courts Act with regard to the abatement of pending revisional applications before the Collector. But he proceeded on a rather curious reasoning that because the period of one month was given in the case of a party to the suit dying for the heirs to be brought on record, therefore, a similar time-limit must be imposed in the case of a revisional application. You cannot surely bar litigants' applications or suits by analogy. The learned Assistant Collector then went on to say that as the application in this case was made nearly three months after the death of the original defendant, the application was time-barred and he would not hear the application on its merits and rejected the application. Now, in my opinion, the learned Assistant Collector was definitely wrong in coming to the conclusion that the limitation for the revisional application before him was one month, and he acted with material irregularity in refusing to exercise his jurisdiction to hear the revisional application pending before him on the ground that the application was barred by limitation. It was open to him to take the view that under all the circumstances of the case he would not exercise his inherent power under S. 151, Civil P. C., to bring the heirs of the applicant on record and that he would not proceed with the application, the applicant being dead. But that is not what he has done. He has refused to hear the application merely because, according to him, it is barred by limitation, which, in my opinion, clearly is not. It is to be noted that even if one accepts the view of the Madras High Court in A. I. R. 1938 Mad. 115<sup>3</sup> that revisional applications fell under Art. 176, Limitation Act, even so the applicant in this case was within time because his application was made within three months of the date of the death of the original defendant. I would, therefore, send back this matter to the Assistant Collector

2. (195) 17 All. 106 : 22 I. A. 44 : 6 Scr. 526 (P.C.), Thakur Pershad v. Shaikh Fakir-ulah.

3. (1938) 25 A.I.R. 1938 Mad. 115 : 176 I. C. 344, Baswanjanayulu v. Ranalingayya.

4. (1939) 26 A. I. R. 1939 Oudh 277 : 15 Luck. 26; 184 I. C. 61, Kazim Husain v. Pearey Lal.



to decide whether under the circumstances of the case he should in his discretion allow the petitioners to bring themselves on record as the legal representatives of the original applicant; and if he so decides, to hear the revisional application on merits. The rule will, therefore, be made absolute with costs.

R.K.

*Rule made absolute.*

[Case No 54]

**A. I. R. (33) 1946 Bombay 203**

STONE C. J. AND DIVATIA J.

*Bhikaji Yeswant — Plaintiff — Appellant*

v.

*Secretary of State and others —**Defendants — Respondents.*

Second Appeal No. 49 of 1936, Decided on 12th February 1945, against decision of Dist. Judge, Ratnagiri, in Appeal No. 36 of 1934.

(a) Bombay Khoti Settlement Act (1 [I] of 1880), S. 20 — Botkhat — Entries in — Civil Court cannot inquire whether rent recorded was correct.

The entry in the botkhat made in accordance with the Government Resolution cannot be challenged in a civil Court. Such entries are final and conclusive and the civil Court has, therefore, no jurisdiction to inquire into the question as to whether the amount of rent was correctly recorded or not. [P 203 C 2]

(b) Civil P. C. (1908), O. 1, R. 8 — Decision likely to affect large number — Rule 8 should be resorted to.

Where a decision would affect a large number of people and their tenancies, O. 1, R. 8 should be resorted to to avoid delay. [P 204 C 1]

*M. G. Chitale — for Appellant.*

*S. G. Patwardhan, Asst. Govt. Pleader; A. G. Desai; and T. N. Valavalkar — for Respondents Nos. 1; 2 to 10, 12, 13, 14, 16, 17 (1), 18, 19, 21, 24 to 30, 34 to 36, 38 and 39; and 40 to 42, 44, 45, 47 to 50, 52 and 53, respectively.*

**Divatia J.**— This is an appeal by the plaintiff, who is one of the khots of the village of Salaste in the Ratnagiri District. He sought for a declaration that the Government Resolution No. 1394/24 of 29th November 1929, and the entries made in the botkhat in accordance with that resolution are illegal and unjust. He prayed for the cancellation of the entries and a declaration that the occupancy tenants are liable to pay rent at two and a quarter times the assessment. The contending defendants were the occupancy tenants of the village and the remaining defendants sided with the plaintiff as they were all khots having a common interest. The main point in the case was whether the entry in the botkhat made in

accordance with the Government Resolution of 1929 can be challenged by the plaintiff in this suit. Both the lower Courts have held that under S. 20, Khoti Settlement Act, 1880, such entries are final and conclusive and that the civil Court has, therefore, no jurisdiction to enquire into the question as to whether the amount of rent was correctly recorded or not. The lower Courts have found upon the evidence that Mr. Madan, the Assistant Collector, in 1927 had fixed the rent of the occupancy tenants at two and a quarter times the assessment. No entry was made in the settlement register in terms of the order. Later on the Assistant Collector Mr. Willis also passed a decision by which the rent was to be increased at three times the assessment. But the finding of the lower appellate Court on that point is that that order of Mr. Willis was never carried into effect and that it was conceded on behalf of the plaintiff-appellant that Mr. Willis disposed of the tenants' petition for commutation for failure to reach a satisfactory conclusion. The learned appellate Judge further found that no entries were made in the settlement register or botkhat, as it is called, in accordance with the decision of Mr. Willis. He, therefore, held that by virtue of the provisions of Ss. 17 and 20 read together, the entry was conclusive and the suit was barred on that ground. That decision is sought to be challenged in this appeal on the ground that there are extracts in the botkhat containing the orders passed by Mr. Madan as well as Mr. Willis. But the answer to that contention is that these extracts are not entries in the botkhat. They are part of what might be called a roznama or the diary of the case, but the actual entries are contained in Ex. 40 (3) and they contain the entries made in 1929. It is these entries that are conclusive and not any prior decision, which might not have been put into effect. In my opinion, therefore, the appellant has failed to show that the decision of Mr. Willis is an entry by itself. Even assuming that an entry might have been made at one time in accordance with that decision, if it is subsequently changed, then the changed entry becomes final and conclusive under S. 20 of the Act. The decision of the lower Court that the entries cannot be challenged in a civil Court is correct. The appeal is dismissed with costs.

**Stone C. J.**—I agree. I desire to observe that in this case the judgment in the appellate Court below was given as long ago as 9th September 1935, so that for



over nine years and five months that decision, which affects a large number of people and their tenancies, could not be treated as conclusive. That is a very shocking state of affairs. It is a hardship on the public which this Court will do its best to alleviate. Now the reason for it is that over 50 persons were made defendants to this suit and the result of deaths and difficulties of service have in fact accounted in a large measure to the delay. This case, in my opinion, was clearly one in which the provisions of O. 1, R. 8, ought to have been resorted to. That rule says as follows :

"Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the Court, sue or be sued, or may defend, in such suit, on behalf of or for the benefit of all persons so interested."

Now the dispute in this case was as to whether Government were right in altering an assessment or whether what Government did was in effect *ultra vires*. It is quite clear in my opinion that the khots on the one hand and the tenants on the other could have been represented in these proceedings by a single representative and that application to the Court under O. 1, R. 8, ought to have been made.

**Divatia J.** — I express my concurrence with the view of the learned Chief Justice about the desirability of resorting to the provisions of O. 1 R. 8, Civil P. C., in cases of this type.

**Per Curiam.** — Appeal dismissed with costs of all parties.

R.K.

*Appeal dismissed.*

[Case No. 55.]

**A. I. R. (33) 1946 Bombay 204**

**DIVATIA AND SEN JJ.**

*Annapurnabai Gopal — Plaintiff — Appellant*

v.

*Government of Bombay—Defendant—Respondent.*

Second Appeal No. 9 of 1943, Decided on 24th January 1945, from decision of Asst. Judge, Nasik, in Appeal No. 94 of 1940.

**Bombay Irrigation Act (7 [VII] of 1879), S. 5** —Agrahar Dharmadaya Inam—Grant of village including water — River flowing along village — Government levying cess under S. 5 — Inamdar cannot claim from Government the cess—Grant, Inam.

A grant of a village by the Government to the inamdars together with jahagir, mokasa, sardeshmukhi, babatis and together with all taxes and cesses, all rules and regulations, the present and future cesses, waters, trees, stones, mines and buried treasures, etc., (but exclusive of the hakdar's and inamdar's dues), in inam as Agrahar Dharma-

daya does not include the full proprietary rights to the flowing water on the bed of the river flowing by the side of such village. The inamdars become the grantee of the village, and incidentally under the law, of half of the river bed adjoining the village, and in that capacity entitled to the reasonable use of the flowing water in the river. The inamdar cannot claim that the water rate levied by the Government belongs to him and not the Government: (1851) 6 Ex. 353 and ('32) 19 A.I.R. 1932 P. C. 46, *Ref.* [P 205 C 2; P 206 C 2; P 207 C 1]

*H. C. Coyajee, L. P. Pendse and A. G. Kotwal*  
— for Appellant.

*S. G. Patwardhan, Asst. Govt. Pleader* —  
— for Respondent.

**Divatia J.**—This appeal arises in a suit filed by the plaintiff-appellant for a declaration that she as the widow of one of the inamdars of the village of Pimpalgaon Garudeshwar had got the right to have all the income, from whatever source, recovered by the Government, and by virtue of that right she sued to recover certain taxes levied by the Government from a company, called A. B. Godrej & Co., for six years from 1932 to 1938. The plaintiff had filed this suit in a representative capacity on behalf of herself as well as all the other inamdars of that village, claiming under a common grant of the Peshwas in 1754. Her case in substance was that this village was granted to the plaintiff's ancestor as a hereditary jahagir inam, that the British Government continued the same in 1883 under a sanad by which on the payment of a fixed sum of about Rs. 93 all the rights which the inamdars enjoyed in the village were continued, that the village was situated on the bank of the river Godavari and that the water of the river was also granted under the sanad. In 1926 the Godrej Company purchased some lands in the village and put up a pump for drawing the flowing water of the river for use in their factory. The Government levied certain water charges from the company under the provisions of the Bombay Irrigation Act. The plaintiff's case was that under the sanad the right to the water was granted to the inamdars with the result that all cesses levied in the village belong to the inamdars and that although the water tax under the Irrigation Act was payable by the company to the Government and not to the inamdars, the latter had the right to recover it from the Government on the ground that the waters of the river in the village belong to them. The present suit, it appears, is a sequel to a previous litigation consisting of two suits. One of them, No. 319 of 1930, was filed by the present plaintiff against the Godrej Company for claiming the amount of the water tax and



for an injunction that the company should not pay the same to the Government. Thereafter, in 1931 the Godrej Company filed an interpleader suit against the plaintiff as well as the Government with a view to decide as to who was entitled to the water tax. It was ultimately held by this Court that the water tax was properly payable by the Godrej Company to the Government, but it was not necessary to decide any question between the plaintiff and the Government *inter se* in that litigation because the Government was not a party to the suit filed by the plaintiff. That point, therefore, was left open. It was for that reason that the present suit was filed in 1938 after the termination of that litigation. It may be noted that the plaintiff accepts in this suit the right of the Government to impose water rate on any terms it likes. All that she contends is that whatever amount is levied by the Government by way of water rate from the riparian owner must be paid to the inamdars if it is levied for the use of the water on the lands belonging to them.

The defence of the Government was, among other things such as want of proper notice under S. 80 and the suit being time-barred, that the jahagirdars were not the owners of the flowing waters of the river Godavari, which passed by one of the sides of the village of Pimpalgaon, and even assuming that the water belonged to them, the plaintiff had no right to levy any cess from the riparian owners using the same or to recover it from the Government. It was further urged that the right of the jahagirdars over the river water, even if it be assumed to exist before, was extinguished by the Government Resolution of 17th February 1913, by which S. 5, Bombay Irrigation Act, was made applicable to that part of the river Godavari which passed by the side of this village, that as a result of the notification the water rate was leviable by the Government and the inamdars had no right whatever either to levy any rate for themselves or to demand that the amount levied by the Government should be paid over to them.

The only material point so far as this appeal is concerned is whether the jahagirdars were the owners of the river water and as such entitled to the relief sought. The lower appellate Court decided that the plaintiff was not entitled to recover the water rate imposed by the Government under the Bombay Irrigation Act. It held that although the jahagirdars were the owners of

the river water, they were not entitled to the declaration sought because S. 5, Irrigation Act, was validly applied to the waters flowing in the river, and that thereafter the inamdars lost all the rights which they had in the water of the river. The answer to the question raised in this appeal really depends on the construction of the sanad granted to the plaintiff's ancestor. Mr. Coyajee on behalf of the plaintiff-appellant has exhaustively argued this appeal on the various grounds raised by him, viz., that the sanad makes a grant of the village including the river bed and the waters flowing on it, that the same has been continued by the British Government with the rights to levy all future cesses connected with it, and that the water rate falls under the class of cesses stated in the sanad. He has further contended that even assuming that a notification under S. 5, Irrigation Act, can be validly promulgated with regard to the portion of the river flowing by the side of this village, that does not necessarily mean that the inamdars are deprived of the rights to the water which they had under the sanad. It is also urged that the provisions about compensation in S. 31 and the subsequent sections apply only to such riparian owners as are not the owners of the lands in the village, but that they cannot apply to the inamdars to whom the village itself had been granted by the sanad. On the other hand, the provision about the levy of the water rate, instead of causing any harm to the inamdars, is beneficial to them because those water rates which are levied by the Government are for the benefit of the inamdars to whom they are to be paid.

In order to appreciate this point it is necessary to deal with the terms of the sanad. Under the operative part of the sanad it makes a grant to the inamdars of "the village of Mouje Pimpalgaon Garudeshwar together with jahagir, mokasa, sardeshmukhi, babatis and together with all taxes and cesses, all rules and regulations, the present and future cesses, waters, trees, stones, mines and buried treasures, etc. (but exclusive of the hakdar's and inamdar's dues), in inam as Agrahar Dharmadaya." If this sanad be construed as a grant not only of the river bed adjoining the village but also of the full proprietary rights to the flowing water on that bed, the question as to whether those rights had been and could be curtailed by the notification under S. 5 would survive, but if the sanad be construed as a grant of the village including the soil



but not including the flowing waters on the bed of the river passing by it, no other question would remain, because in that case the Government as the owner of the running water of the river would be fully entitled not only to levy but to retain all the water rates imposed under the Irrigation Act.

The river Godavari is not passing through this village but it is running by the side of it. There is no mention whatever of the river and any rights appertaining thereto in the sanad. All that is stated is that the village is granted together with waters, trees, etc. The word for water is *jala* (जल), and, in my opinion, it is impossible to construe this expression as including the flowing waters of the river passing by the side of this village. It only applies to wells, ponds and pools in the village. Even the bed of the river, over which the water is passing, is not mentioned in the sanad. It is only under the common law right that a person would get the ownership of the river bed, either half or whole, according as the lands are situated on one or both banks of the river. In this case the inamdars' lands are situated only on one side of the river. Even so, it cannot be said that under the common law the plaintiff inamdar was made the absolute proprietor of the flowing waters on the river-bed. The law as summarized in Coulson and Forbes on Waters, 5th Edn., pages 115 and 116 is as follows :

"The right to have a stream flow in its natural state without diminution or alteration, is an incident of property in the land through which it passes; but flowing water is *publici juris*, not in the sense that it is *bonum vacans*, to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only, that all may reasonably use it who have a right of access to it, and that none can have any property in the water itself except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only. But each proprietor has the right to the usufruct of the stream which flows through his land."

This statement of law is enunciated in (1851) 6 Ex. 353.<sup>1</sup> Their Lordships of the Privy Council have also discussed the law about riparian ownership in 55 Mad. 8<sup>2</sup> and have observed at p. 275 as follows :

"Running water at common law, though many people may have the right to take and use it, belongs in a river to no one. It passes on and successive people have rights in regard to it. So that literally no 'river' could belong to the Government unless it was a river which from the source to the

sea was within Government lands, or tidal and navigable so that it was always Government property."

The law as summarized in Halsbury's Laws of England, Hailsham Edition, Vol. II, at p. 351, is as follows :

"The grant of a watercourse does not mean the grant of the water itself. It may mean any one of three things, namely, a grant of the easement or the right to the running of water, or a grant of the channel-pipe or drain which contains the water or a grant of the land over which the water flows. The meaning in the case of each particular grant is to be drawn from the context, and if there is no context from which the meaning can be gathered the word 'watercourse' *prima facie* means an easement."

It was held in 6 Bom. H. C. R. (A C.) 191<sup>3</sup> that in construing grants by former Governments, the rule of English law as to the construction of grants to a subject by the Crown is the correct rule to be applied by the Courts in India. That being so, the question is whether it can be said that the plaintiff's ancestor had been expressly granted absolute proprietary rights in the flowing waters of the river passing by the side of the village. In my opinion, there is no doubt that under no construction, either express or implied, of the terms of the sanad can it be said that any such right has been granted to the inamdar. Mr. Coyajee relied on S. 37, Land Revenue Code, and contended that standing and flowing water is also included among the properties which may be vested in an individual or aggregate of individuals. That no doubt is so. Even rivers, streams, nallas, lakes, tanks, etc., can conceivably be of the private ownership of individuals, but it is expressly stated in that section that it is for the individual to prove that it has so become his property. So long as it is not proved that the running water of the river by the side of this village had become of the ownership of the inamdar, it must be taken that it continues to be the property of the Government. I have no doubt that the Peshwa Government did not intend to confer absolute proprietary rights in the flowing waters of the river on the inamdars, because the water of the river was to be used not simply by the inamdars of this village but by all persons in the villages which are situated either on or near the banks of the river. It is for that reason that this right is regarded in the nature of an easement unless there is an express proprietary grant of the same. All that can be said, therefore, is that by virtue of the sanad the plaintiff's ancestor became the grantee of the village and incidentally

1. (1851) 6 Ex. 353 : 20 L. J. Ex. 312 : 17 L. T. (O.S.) 79, Embrey v. Owen.

2. (1932) 19 A. I. R. 1932 P. C. 46 : 55 Mad. 268 : 59 I. A. 56 : 136 I. C. 413 (P. C.), Secretary of State v. Subbarayudu.

3. (1969) 6 Bom. H.C.R. (A C.) 191, Vaman Janardan Joshi v. Collector of Thana.



under the law, of half of the river bed adjoining the village, and in that capacity entitled to the reasonable use of the flowing water in the river. The inamdar cannot claim that the water rate levied by the Government belongs to him and not the Government. It is not the plaintiff's case that as the whole of the village including the river-bed and the running water has been granted to her, she alone is entitled to levy any water rate which she likes from the persons occupying her land. That would have been a logical argument on her contention that the proprietary right to the river-bed and the water running on it had vested in her. She concedes, and has got to concede on account of the result of the previous litigation, that the Government has the right to impose any rate which it thinks proper for the use of the water including water running on her own river bed. That concession itself demolishes her case of ownership of water. In my opinion, the inamdar's right cannot be higher than the right of a riparian owner to the reasonable use of water. That being so, no other question survives, and it must be held that the water rate levied by the Government belongs absolutely to the Government and not to the plaintiff.

It is not necessary to refer to the decisions of the Madras High Court relied on by the appellant in connexion with the rights of zamindars because it appears that in the Madras Irrigation Cess Act of 1865 there is a special proviso to S. 1 under which there may be an engagement between the zamindar or inamdar on the one hand and the Government on the other with regard to the levy of irrigation fees. The question arising there was whether the inamdar was bound to pay the water rate with regard to the use of water in his own land. The question in the present case is entirely different. It is not the alleged right of the inamdar not to pay any water rate to the Government but the alleged right to recover the water rate levied by the Government from persons using the water. Section 5, Bombay Irrigation Act, clearly empowers the Government to declare any river as a canal, and that being so, all the provisions with regard to compensation under S. 31 and others would apply to all riparian owners, and therefore, to the plaintiff also.

In the result the decree of the lower Court is confirmed and the appeal is dismissed with costs.

R.K.

*Appeal dismissed.*

[Case No. 56.]

**A. I. R. (33) 1946 Bombay 207**

**DIVATIA AND SEN JJ.**

*Kallawa Shidlingappa Angadi —*  
*Defendant — Appellant*  
*v.*

*Parappa Sankappa — Plaintiff —*  
*Respondent.*

Second Appeal No. 268 of 1943, Decided on 24th November 1944, against decision of Assistant Judge, Dharwar, in Appeal No. 285 of 1941.

(a) Practice — New point — Point of law.

A point of law which does not depend upon taking any new evidence can be allowed to be raised in second appeal. [P 208 C 2]

(b) Transfer of Property Act (1882), S. 52 — Maintenance proceedings — S. 52 can apply — *Lis* continues even after decree — If charge is created property can be sold in execution — No separate suit is necessary.

An alienation during the pendency of proceedings for maintenance in which certain properties are sought to be charged can come within S. 52 : ('40) 27 A.I.R. 1940 Bom. 395 and ('44) 31 A.I.R. 1944 Bom. 191, *Foll.* [P 209 C 1]

The doctrine of *lis pendens* applies to maintenance actions. In a maintenance suit the decree does not terminate the litigation, but the *lis* continues even after the decree, and the transfer of the property, the subject-matter of the suit, executed by the judgment-debtor after the decree in the suit is affected by *lis pendens* : ('35) 22 A. I. R. 1935 Mad. 867 ; ('38) 25 A. I. R. 1938 Nag. 129 and ('19) 6 A. I. R. 1919 Bom. 56, *Rel. on.* [P 209 C 1, 2]

It is immaterial that there is no specific provision in the decree that the properties are to be sold in its execution if the money be not paid. If the decree does create a charge on the properties, the decree-holder has the right to bring the charged properties to sale in execution proceedings and it is not necessary to file a separate suit for enforcing the charge. [P 209 C 2]

(c) Transfer of Property Act (1882), S. 52 — Award — Private — Maintenance charged on property — *Lis* begins with application to file award and continues till satisfaction of maintenance decree or its satisfaction becomes unobtainable.

When a private award creates a charge for maintenance, the presentation of the application to file the award must be regarded as a plaint for creating a charge over the suit properties and it would stand on the same footing as a plaint in an ordinary maintenance suit where a charge is sought to be created. It is not, therefore, necessary to consider as to whether in any case the charge does not begin from the date of the award decree. The *lis* commences with the application to take a decree in terms of the award. Once the *lis* begins to operate it will continue till the final satisfaction of the maintenance decree or till its satisfaction becomes unobtainable by reason of the bar of limitation : 4 Bom. 34, *Rel. on.* [P 210 C 2; P 211 C 1]

*S. B. Jathar* — for Appellant.

*S. H. Belavadi* — for Respondent.

**Divatia J.** — This is an appeal by the defendant in a suit for a declaration that



the suit properties were not liable for satisfaction of the decree passed in the defendant's favour in Suit No. 77 of 1928 and for a permanent injunction restraining the defendant from proceeding against the suit properties in execution of the decree. The facts which led to the litigation are shortly these. There were three brothers Bashetteppa, Chinnappa and Shidlingappa. The last one is dead and his widow is the defendant. The three brothers formed a joint Hindu family. On 3rd March 1928, the defendant filed an application in the nature of a suit to take a decree in terms of a private award between herself and the two brothers of her husband. In the award it was directed that the plaintiff therein was entitled to receive Rs. 66 per year as her maintenance from the two brothers and the amount of maintenance was fixed upon three specified family lands on which a charge was created for the same. A decree was passed in terms of the award on 31st March 1938, in that proceeding which was registered as suit No. 77 of 1928.

The plaintiff's father had purchased the three properties which were charged under the award decree from the two brothers on 3rd December 1935, for Rs. 5000. Out of that amount, Rs. 4000 were paid to a person who held a prior mortgage on these lands for Rs. 3500. The present defendant had filed a darkhast, No. 653 of 1939, presumably the first darkhast, to execute her maintenance decree against the three charged lands. The plaintiff interceded in the execution proceedings and claimed that he had become the owner of the lands. That objection seems to have been overruled, with the result that the plaintiff filed the present suit for the declaration and injunction mentioned above. His case was that he was a bona fide purchaser for value without notice of the alleged charge of the defendant on the suit properties. The defendant's contention was that the plaintiff's sale-deed was hollow and that the plaintiff's father was not a bona fide purchaser because he was well-acquainted with the family of her husband's brothers. The learned trial Judge decided the suit against the plaintiff on the ground that it was not proved that his father was a bona fide purchaser for value without notice and that it was not proved that the purchase was free from the maintenance charge in favour of the defendant. The suit was accordingly dismissed. On appeal by the plaintiff, the Assistant Judge held that the plaintiff's father was a bona fide purchaser

for value without notice of the charge and that, therefore, the suit lands were not liable to be sold in execution of the defendant's decree. He based his decision on the ground that the defendant was only a charge-holder of the suit lands and that charge, under S. 100, T. P. Act, 1882, could not be availed of against the person who purchased the lands without any notice of it. The learned Judge relied on a decision of the Oudh Court in A. I. R. 1937 Oudh 217<sup>1</sup> in which it was held that there was no difference in principle between a charge created by a decree and one created by a contract, and that the charge in the present case was governed by S. 100, T. P. Act. This second appeal is filed by the defendant against the decree allowing the plaintiff's appeal.

Mr. Jathar for the appellant has based his argument on a point of law which was not urged in the two lower Courts, but we have heard him as it is a point of law which does not depend upon taking any new evidence. The point urged by him is that the sale in favour of the plaintiff's father was affected by *lis pendens* inasmuch as at the date of the sale the maintenance decree obtained by the defendant was enforceable against the judgment-debtors from whom the plaintiff's father had purchased the properties, and that, therefore, under S. 52, T. P. Act, the plaintiff cannot dispute the defendant's right created under her decree. It is further contended that if the plaintiff's right is barred by *lis pendens*, then it does not matter whether the purchase by his father was with or without notice of the defendant's charge. It is, however, urged that the finding of the lower Court that the plaintiff's father had no notice of the charge is erroneous. With regard to the latter point, we are of opinion that there is no error of law in the finding made by the lower appellate Court. It is held that the plaintiff's father inquired from the brothers as to why the property was being sold and he found that a mortgage in favour of the Dharwar Bank was to be satisfied. It is true that he knew the two brothers for some years prior to the sale, but it does not appear that the defendant was living with the two brothers and that there is nothing to show that the plaintiff's father was put upon his inquiry as to whether any charge was created on the properties for the defendant's maintenance. That

1. (37) 24 A. I. R. 1937 Oudh. 217; 13 Luck 101; 166 I. C. 662 (F B), Mt. Indrani v. Maharaj Narain.



being so, we think that the lower appellate Court was right in holding that the plaintiff's father had no notice of the defendant's charge.

The only point that remains is whether the plaintiff's sale is affected by *lis pendens*. There is no doubt that an alienation during the pendency of proceedings for maintenance in which certain properties are sought to be charged can come within S. 52, Transfer of Property Act. The recent decisions in 41 Bom. L. R. 815<sup>2</sup> affirmed in 42 Bom. L. R. 883<sup>3</sup> and 46 Bom. L. R. 358<sup>4</sup> clearly establish that proposition. In the present case, the sale to the plaintiff's father was not during the pendency of the suit itself, but it was made after the award decree was passed and the question, therefore, is whether the doctrine of *lis pendens* would apply to an alienation or transfer made after the decree is passed in a maintenance suit, and, secondly, whether it would apply if the decree is not an ordinary decree, but a decree passed on an award in a private arbitration. For the purpose of the first point, Mr. Jathar relies upon the explanation to S. 52, Transfer of Property Act. Under that section, the *lis* once started from the date of the presentation of the plaint or the institution of the proceedings would continue till the complete satisfaction or discharge of the decree or the time when such satisfaction or discharge has become unobtainable by reason of the expiration of the period of limitation. In the present case, the decree is one for the payment of Rs. 66 every year and the charged properties are available in execution of that decree so long as it is enforceable. We think that such a maintenance decree does come under the explanation to S. 52, with the result that the *lis* would continue till the decree is either completely executed or its execution becomes unobtainable.

A decision of the Madras High Court in 59 Mad. 101<sup>5</sup> takes the same view. It is held there that the doctrine of *lis pendens* applies to maintenance actions. In a maintenance suit the decree does not terminate the litigation, but the *lis* continues even after the

decree, and the mortgage of the property, the subject-matter of the suit, executed by the judgment-debtor after the decree in the suit is affected by *lis pendens*. The Nagpur High Court has also held to the same effect: A.I.R. 1938 Nag. 129.<sup>6</sup> It is true the decision in that case is based not so much upon the principle of *lis pendens* as upon estoppel by record, but, in our opinion, there is no reason why it cannot be governed by the former principle. It is, however, contended by Mr. Belavadi on behalf of the respondent that the case does not come under S. 52 at all, firstly, because the decree is really a maintenance decree in which a charge on certain properties is declared, and, secondly, there is no specific provision in the decree that the properties are to be sold in its execution if the money was not paid. It is true that the decree does not state specifically that on the failure of the judgment-debtors to pay the amount the decree was to be executed by sale of the charged properties. But it does create a charge on the properties and, as held by our Court in 43 Bom. 631,<sup>7</sup> where the decree created a charge on certain immovable properties of the defendant in a money decree, the plaintiff had the right to bring the charged properties to sale in execution proceedings and that it was not necessary to file a separate suit for enforcing the charge.

There is no doubt, therefore, that even if the decree merely declared a charge on the property, it was executable as against the charged properties, and that, therefore, the properties were affected by the decree. It has also been so held by the Nagpur High Court in A. I. R. 1940 Nag. 163.<sup>8</sup> But the more serious objection urged by Mr. Belavadi against Mr. Jathar's contention is that the present decree is an award decree outside the Court, and that, therefore, the doctrine of *lis pendens* cannot apply to it especially when at the date when the properties were sold to the plaintiff's father in 1935 there was no application for execution of the award decree pending in any Court. The argument is that there was no regular suit before the Court, but only an application by the parties to take a decree in terms of the award. It is urged that there is nothing to

2. ('39) 26 A.I.R. 1939 Bom. 403 : 185 I. C. 81 : 41 Bom. L. R. 815, Gangubai v. Pagubai.

3. ('40) 27 A.I.R. 1940 Bom. 395 : I.L.R. (1941) Bom. 1: 42 Bom. L.R. 883: 192 I.C. 257, Gangubai v. Pagubai.

4. ('44) 31 A.I.R. 1944 Bom. 191 : I.L.R. (1944) Bom. 274 : 46 Bom. L. R. 358, Ramchandra Gururao v. Kamalabai Sarathi.

5. ('35) 22 A.I.R. 1935 Mad. 867 : 59 Mad. 101 : 158 I.C. 778, Ramasami Pillai v. Trichinopoly Co-operative Credit Bank Ltd.

6. ('38) 25 A.I.R. 1938 Nag. 129 : I.L.R. (1938) Nag. 431 : 172 I.C. 949, Ahsan Hussain Abdul Ali v. Maina.

7. ('19) 6 A.I.R. 1919 Bom. 56 : 43 Bom. 631 : 51 I. C. 929, Ambalal Bapubhai v. Narayan Tatyaba.

8. ('40) 27 A.I.R. 1940 Nag. 163 : I. L. R. (1941) Nag. 513 : 194 I.C. 861, Ghasiram v. Kundanbai.



show on the record that there was a dispute between the parties about any charge to be made for the defendant's maintenance, and that, therefore, there was no commencement of the *lis* at the time when the application to file the award was made. Secondly, even if the charge was embodied in the award decree, no application to execute the decree was filed till 1939, and that was after the sale to the plaintiff's father. The result, therefore, was that in 1935 when the property was sold there was no pendency of any proceeding in which any right to immovable property was directly and specifically in question. Now, it is true that there is nothing to show that there was any dispute about the properties to be charged between the defendant and the persons against whom she claimed maintenance. All that we know is that an award was obtained in which the suit properties were charged and a decree was taken in terms of the award. There is, however, no difference between a plaint in a maintenance suit in which there is a prayer to charge any family property for the amount of maintenance to be decreed and a case where an application is made to file a private award where a charge for maintenance on certain lands was created. In the former case it is clear, and it is also conceded, that the *lis* will begin to run from the date when the plaint was filed, but it is contended that in the latter case the *lis* cannot begin to run, firstly, because there was no immovable property directly and specifically in question, and, secondly, there was no pendency of any suit or proceeding at that time. There are two decisions which support Mr. Belawadi's contention : A.I.R. 1943 Oudh 354<sup>9</sup> and A.I.R. 1940 Nag. 8.<sup>10</sup> It is held in the former case that where the property is never the subject of a contest nor is the charge on it, and the only dispute is about a sum of money and the parties eventually agree upon a mode of satisfaction which is never in contest and never in dispute the doctrine of *lis pendens* does not apply. There also it was a case of a private award and it was held that the making of the application to file the award did not start the *lis* because the only questions which the Court had to decide on that application were whether the matter had been referred to arbitration, whether the award had been made thereon and whether there was any ground for remitting it under

para. 14 or set it aside under para. 15. The Nagpur case also laid down the same principle although it was not a case of an award. On the other hand, we have a decision of our Court in 4 Bom. 34.<sup>11</sup> In that case there was also a private award and a decree was passed according to that award. It was directed in the award that the plaintiff had a right to sell certain mortgaged properties in satisfaction of the debt. The award was presented on 23rd January 1874, and was filed on 23rd February 1874. Meanwhile on 14th February 1874, the property was attached in execution of a decree obtained by a creditor of the mortgagors and on 15th April 1874 it was sold and purchased by the defendant. It was held that the presentation in Court of the award obtained by the plaintiff was equivalent to the presentation of a plaint for the specific performance of the contract of mortgage and the proceedings consequent thereon constituted *lis pendens* during which a mere money decree-holder could not, by any proceedings which he might take, defeat the object of the plaintiff's application to the Court to file his award. This is a case decided before the Transfer of Property Act was enacted, but S. 52 merely declared what was already the law before the passing of the Transfer of Property Act as observed in Mulla's Transfer of Property Act at p. 219. We are clearly of the opinion that the principle of this case applies to the facts of the present case. Just as the application to file the award was regarded as equivalent to the presentation of the plaint for specific performance of the mortgage, so here the presentation of the application to file the award must be regarded as a plaint for creating a charge over the suit properties and it would stand on the same footing as a plaint in an ordinary maintenance suit where a charge was sought to be created. It is not, therefore, necessary to consider as to whether in any case the charge does not begin from the date of the award decree. On that point there is an authority of the Madras High Court in A.I.R. 1936 Mad. 589<sup>12</sup> that *lis pendens* operates from the decree in any case. We think that on the principle laid down in 4 Bom. 34,<sup>11</sup> it must be held that the *lis* commenced with the defendant's application to take a decree in terms of the award. Once the *lis* begins to operate it will continue till

9. ('43) 30 A. I. R. 1943 Oudh 354 : 19 Luck 1 : 210 I.C. 326 (F.B), Abdul Ghaffar v. Ishtiaq Ali.

10. ('40) 27 A. I. R. 1940 Nag. 8 : 188 I. C. 23, Badridas Lalchand v. Pratapgir.

11. ('79) 4 Bom. 34, Pranjivan Govardhandas v. Bajji.

12. ('36) 23 A.I.R. 1936 Mad. 589 : 165 I. C. 453, Jagannath v. Ramchandra.



the final satisfaction of the maintenance decree or till its satisfaction becomes unobtainable by reason of the bar of limitation. In 1935 when the alienation in suit was effected the maintenance decree was alive and, therefore, the alienation comes within the bar of *lis pendens*. As a result the defendant appellant is entitled to succeed.

The appeal is allowed, the decree of the lower appellate Court is set aside, the decree of the trial Court is restored and the plaintiff's suit dismissed. The appellant will be entitled to her costs in this Court and in the lower appellate Court. Each party will bear its own costs in the trial Court.

R.K.

*Appeal allowed.*

[Case No. 57.]

**A. I. R. (33) 1946 Bombay 211**

LOKUR AND WESTON JJ.

*Kaikhushroo Tantra — Defendant —*  
*Appellant*

v.

*Meherbai Tantra — Plaintiff —*  
*Respondent.*

First Appeal No. 144 of 1943, Decided on 17th November 1944, against decision of N. J. Wadia J., in Parsi Matrimonial Suit No. 10 of 1942.

Parsi Marriage and Divorce Act (1936), S. 32 (g)—Desertion by husband—Subsequent visits to wife not as husband but as boarder—Matrimonial relations are not revived and desertion does not end.

When the husband quarrelled with his wife and deserted her by leaving the house with his kit, the mere fact that he subsequently used to visit his wife's place for a specific purpose, not as her husband but merely as a boarder, does not indicate that he had revived the matrimonial relations and that the desertion which had commenced had come to an end: (1923) P. 18, *Rel. on*; (1864) 164 E. R. 1388, *Ref.* [P 212 C 1]

A. J. Poonawala — for Appellant.

J. P. Dastur and A. A. Adarkar —

for Respondent.

**Lokur J.** — This is an appeal under S. 47, Parsi Marriage and Divorce Act, 1936, against the decision of N. J. Wadia J., declaring that the marriage between the plaintiff and the defendant is dissolved and granting a divorce to the plaintiff under S. 35 of the Act. The plaintiff was married to the defendant in November 1922 and they lived together as husband and wife in various places till 24th December 1936. On that day they quarrelled and the defendant left the house with his kit, evidently with no intention of returning to her. On 1st January 1937, the plaintiff had to leave the flat which had been hired by her husband and she went to live in another place rented by her

brother. The defendant evidently felt the inconvenience of getting his meals and so he went to the plaintiff's residence in June 1937 to find out whether she was prepared to give him food for payment. The plaintiff, after consulting her brother, agreed to the proposal, hoping that it would bring about a reconciliation between them. But the defendant stayed with her only for his meals and tea and paid her Rs. 15 a month. He never stayed there to spend his nights and was in fact treating his wife's place of residence as a hotel where he could get his food for a monthly payment of Rs. 15. This arrangement continued till 26th November 1937, when the defendant stopped going to her house. He was subsequently convicted of defamation and sentenced to simple imprisonment for three months in December 1937. He was released from jail in March 1938, but did not go back to his wife. On 16th July 1940, he was declared a lunatic and was confined in the Mental Hospital at Yeravda. He was released in April 1942, and this suit was filed by the plaintiff on 16th June 1942. On these facts the learned Judge and the delegates held that desertion for more than three years was proved and the marriage was dissolved. Under S. 32, cl. (g), Parsi Marriage and Divorce Act, desertion of the wife by the husband for at least three years is a sufficient ground for granting divorce. The period during which the defendant was confined in the Lunatic Asylum has not to be taken into consideration in computing the period of three years. It is contended on behalf of the appellant that he may be deemed to have deserted the plaintiff on 26th November 1937, when he finally left her, and in that case, after deducting the period of his confinement in the Mental Hospital, three years had not elapsed when this suit was filed. On the other hand, if it be deemed that the plaintiff was deserted by him on 24th December 1936, when he quarrelled with her and went away with all his kit, then three years were completed at the date of the institution of the suit.

Thus, the real question is whether the desertion which commenced on 24th December 1936, should be deemed to have come to an end in June 1937 when the defendant entered into an arrangement with the plaintiff to take his meals and tea in her house on payment of Rs. 15 a month. This is really a question of fact and has to be decided by the Matrimonial Court. Section 47 allows an appeal against the decision of that



Court only on the ground that it is contrary to some law or usage having the force of law, or of a substantial error or defect in the procedure or investigation of the case which may have produced error or defect in the decision of the case upon the merits, and on no other ground. It is, however, urged that the question whether the facts proved amount to desertion or not is a question of law and, therefore, a wrong finding on that question can be interfered with in appeal. Desertion is defined in S. 2 (3) to mean desertion of one party to a marriage by the other without reasonable cause and without the consent, or against the will, of such party. To desert is to forsake or abandon, but it is difficult to define precisely what degree or extent of withdrawal from the wife's society constitutes forsaking or abandonment of her. In (1864) 164 E. R. 1388<sup>1</sup> it was held that so long as the husband treated his wife as a wife, by maintaining such degree and manner of intercourse as might naturally be expected from a husband of his calling and means, he should not be said to have deserted her. If that test is applied to the facts of this case, it is obvious that the defendant treated his wife merely as a hotel-keeper and the relations of husband and wife were not revived by the mere arrangement under which the defendant began to visit his wife in June 1937. As observed in (1923) P. 18<sup>2</sup> (p. 21):

"It has been almost a commonplace in this Court to hold that in order to ascertain whether there has been desertion, you must look at the conduct of the parties. There may be no matrimonial home, and yet no forfeiture of the rights of the spouses. Desertion is not the withdrawal from a place, but from a state of things. The husband may live in a place, and make it impossible for his wife to live there, though it is she and not he that actually withdraws; and that state of things may be desertion of the wife. The law does not deal with the mere matter of place. What it seeks to enforce is the recognition and discharge of the common obligations of the married state. If one party does not acknowledge them, the party who has so offended cannot be heard to say that he or she is not guilty of desertion on the ground that there has been no desertion by departure from a place."

It is, therefore, clear that the mere fact that the defendant used to visit his wife's place for a specific purpose, not as her husband but merely as a boarder, does not indicate that he had revived the matrimonial relations and that the desertion, which had commenced in December 1936, had come to an end. This must be the view taken by the learned Judge and the delegates when

they came to a finding that the plaintiff had been deserted by the defendant for more than three years before the suit was filed, and we see no reason to interfere with the finding. The appeal is dismissed with costs. The appellant shall pay the costs of such court-fees as he would have had to pay had he not been allowed to appeal as a pauper.

R.K.

*Appeal dismissed.*

[Case No. 58.]

**A. I. R. (33) 1946 Bombay 212**

DIVATIA AND LOKUR JJ.

*Institute of Radio Technology and others — Defendants — Applicants*  
v.

*Pandurang Baburao — Plaintiff — Opponent.*

Civil Revn. Appln. Nos. 669, 670 and 682 of 1944, Decided on 12th December 1944, against orders passed by Full Court, Bombay.

(a) Presidency Small Cause Courts Act (1882), Ss. 41, 43—Notice to quit valid—Jurisdiction under S. 41 is not ousted by tenants' taking defence under Bombay Rent Restriction Act, (16 [XVI] of 1939), S. 11.

When the landlord gives the tenant a valid notice to quit, the tenancy is determined in law at the expiration of the period and the Small Cause Court gets jurisdiction to entertain the application for summons in ejectment under S. 41. Even if the tenant relies on the provisions of S. 11, Bombay Rent Restriction Act, the tenancy will be deemed to be subsisting only if his defence succeeds and it is the Court which is seized of the application which has the power to decide whether the defence is good. The jurisdiction is not, therefore, ousted by taking up the defence under S. 11, Rent Restriction Act: 5 Bom. 295, *Disting.* [P 213 C 2; P 214 C 1]

(b) Bombay Rent Restriction Act (16 [XVI] of 1939), S. 11 — "Own occupation" explained.

The words "his own occupation" mean occupation of himself and all persons who are dependent on him. [P 214 C 2]

(c) Bombay Rent Restriction Act (16 [XVI] of 1939), S. 11 — Choice of selection is with landlord — Court cannot compel him to continue suit against tenant whom he does not desire to evict.

In a suit for eviction from four blocks on the second floor of a building, the judge was of the opinion that the plaintiff reasonably required the use of three blocks and not four and gave him the choice of selecting the three blocks of which he wanted possession. It was contended that it was for the Court to decide, after taking into consideration the wants, not only of the plaintiff but also of the defendants, as to which of the blocks should be given to the plaintiff and that in not so deciding the Court acted without jurisdiction and with material irregularity.

*Held* that it was the plaintiff's choice and the Court could not compel him to continue the suit against the tenant whom he did not desire to evict.

[P 214 C 2]

1. (1864) 164 E. R. 1388, *Williams v. Williams*.

2. (1923) 1923 P. 18 : 92 L. J. P. 14 : 128 L. T. 256, *Pulford v. Pulford*.



*H. C. Coyajee und V. H. Kamat —*  
for Applicants.  
*G. N. Thakor, B. G. Thakor and M. V. Parekh*  
— for Applicant No. 3.  
*A. G. Desai, P. S. Malvankar and N. H.*  
*Dharmadhikari —* for Opponent.

**Divatia J.** — These are three applications in revision against the judgments of the Small Cause Court Judge at Bombay. They arise out of three applications for summons registered as suits under S. 41 of the Presidency Small Cause Courts Act for eviction of the three defendants, the present petitioners, who were the plaintiffs' tenants. The case for the plaintiffs was that the tenant in each case occupied one block in a building at Dadar belonging to them. The plaintiffs were living and also doing their business near the dock area in Bombay. On account of the explosion which occurred in April last, the property, which they were occupying, was destroyed with the result that they were rendered homeless and a friend of their family accommodated them temporarily. They, therefore, wished to occupy a part of their own premises at Dadar. Plaintiff 1, who was an old man, was suffering from cancer, and wanted rooms with good light and air. He, therefore, selected four blocks on the second floor of his building and gave notices to the tenants of those blocks for eviction. As the notices were not complied with, the plaintiffs filed four applications for summons under S. 41. The defendants' case was that they had been occupying the premises for a long time, that the plaintiffs were not in need of four blocks for their reasonable and bona fide occupation and there was no reason why they should be ousted from possession. On the evidence led by the parties the learned Judge came to the conclusion that the plaintiffs reasonably and bona fide required at least three out of the four blocks for their occupation. He, therefore, asked the plaintiffs to select which three out of the four blocks they required. The plaintiffs selected the three blocks occupied by the present petitioners. The learned Judge thereafter dismissed the suit as against the defendant in the fourth suit and passed decrees for eviction against the three petitioners. Two of the three blocks are occupied by the Institute of Radio Technology and by its proprietor, Mr. Ambre, and the third by a grain merchant. In view of the fact that the Institute had its apparatus and machines installed in the blocks, the learned Judge below gave two months' time to all the defendants within which to vacate the premises. The petitioners then applied to

this Court in revision and obtained interim stay orders.

The first contention raised by Mr. Coyajee as well as Mr. Thakor on behalf of the petitioners relates to the jurisdiction of the Small Cause Court. It is urged that the Small Cause Court had no jurisdiction to entertain these applications for summons under S. 41. The point is indeed a novel one as it has not been taken, so far as I know, ever since the Bombay Rent Restriction Act of 1939 was enacted and even while the Rent Act of 1918 was in force, because the provisions of the two Acts on this point are common. It is contended that under S. 19 (d), Presidency Small Cause Courts Act, the Small Cause Court has no jurisdiction to entertain suits for the recovery of immovable property. The only jurisdiction which it possesses for passing orders of eviction is conferred by S. 41. It is, however, a condition precedent to the maintainability of the application under that section that the tenancy must have been determined, and it is only after its determination that an order for eviction could be made. It is further urged that by virtue of S. 11 of the Rent Restriction Act of 1939 the tenancy could not be determined as long as the tenant was ready and willing to pay the rent to the full extent allowable by the Act and perform the other conditions of the tenancy, or, among other things, if the premises are not reasonably and bona fide required by the landlord for his own occupation. On this ground it is urged that reading the two sections together no application for summons can be proceeded with when the tenant takes any defence under S. 11. Reliance is placed on the provisions of S. 43, that if the occupant does not appear at the time appointed and show cause to the contrary, the applicant shall, if the Small Cause Court was satisfied that he was entitled to apply under S. 41, be entitled to an order for possession of the property, and it is contended that, therefore, as soon as the tenant appears to show cause to the contrary the tenancy is not determined and the jurisdiction of the Court is ousted. In my opinion, this contention is unsustainable. Whether a tenancy has been legally determined or not is to be decided on the provisions of S. 111, T. P. Act, which says, among other things, that a lease of immovable property determines on the expiration of a notice to determine the lease, or to quit. Therefore, when the landlord gives the tenant a valid notice to quit, the tenancy is determined in law at the expiration of the



period and the Small Cause Court gets jurisdiction to entertain the application for summons. Even if the tenant relies on the provisions of S. 11, the tenancy will be deemed to be subsisting only if his defence succeeds and it is the Court which is seized of the application which has the power to decide whether the defence is good. The jurisdiction is not, therefore, ousted by taking up the defence. The only result of the defence being successful is that the Court cannot pass an order of eviction and the application would be dismissed. Mr. Thakor has relied on a decision of our Court in 5 Bom. 295,<sup>1</sup> and contended that if, for instance, the tenant sets up a title in himself, the Small Cause Court would have no jurisdiction to decide the matter. That question, however, does not arise in the present case, because the defendants have not disputed the plaintiffs' title in any way. They have admitted their ownership and have put in the defences under S. 11, Rent Act, in their capacity as tenants.

It is next contended that the words "performs the other conditions of the tenancy" in S. 11 show that it is the original tenancy that continues and that, therefore, it cannot be said to be determined. In my view, the original tenancy is determined by the notice and a new statutory tenancy is created if the defence succeeds. In further support of his argument, Mr. Thakor has relied upon the recently added provision in the Provincial Small Cause Courts Act by which the Small Cause Court can take cognizance of a suit for ejectment when the only substantial issue for decision is about the determination of the tenancy under the Transfer of Property Act. It is urged that this Court has recently held in a case under the former Act that where the tenant has defended the suit under S. 11, Rent Restriction Act, the substantial question between the parties is whether the landlord requires the premises for his own use or whether the tenant is willing to pay rent or not, and that, therefore, the Small Cause Court has no jurisdiction to proceed with the suit. In my opinion, that analogy cannot apply to the present case. We have no words in the Presidency Small Cause Courts Act similar to those in the recently amended Provincial Small Cause Courts Act. Under the Presidency Small Cause Courts Act, once the Court has initial jurisdiction over the case, it is not ousted because the tenant takes up a defence under S. 11, Rent Act.

1. ('80) 5 Bom. 295, Luckmidas v. Mulji Canji.

It is next contended that the words in the section are that the premises must be required by the landlord for his own occupation, that plaintiff 1 is now dead and plaintiff 2, who is his son, does not require these blocks for his own occupation. On that point evidence was led, and plaintiff 1, while he was alive, went into the box and stated that his family consisted of his son, his widowed sister, her two daughters, two daughters of his daughter and his cousin. The learned Judge was presumably satisfied with the evidence that those persons were the plaintiff's dependents, and that therefore they were entitled to live along with the plaintiff. In my opinion, the words "his own occupation" mean occupation of himself and all persons who are dependent on him. There is, therefore, no substance in that contention.

The last point urged before us was that when the learned Judge was of the opinion that the plaintiff reasonably required the use of three blocks and not four, he ought not to have given the plaintiff the choice of selecting the three blocks of which he wanted possession. It is contended that it is for the Court to decide, after taking into consideration the wants, not only of the plaintiff but also of the defendants, as to which of the four blocks should be given to the plaintiff, and that in not so deciding the Court acted without jurisdiction and with material irregularity. It is no doubt true that the learned Judge gave the choice of selection to the plaintiff and he selected the blocks of the three petitioners for reasons known to him. If the plaintiff had withdrawn his suit against the other defendant, the Court could not have compelled him to go on with that suit. As held in 23 Bom. L. R. 850,<sup>2</sup> it is the plaintiff's choice as to which part of the property he wishes to proceed against. In that case the plaintiff did not wish to turn out the defendants in one of the suits, and it was held that as he did not desire to do so, the appeal, so far as they were concerned, should be dismissed. It, therefore, follows that it is the plaintiff's choice and the Court cannot compel him to continue the suit against the defendant whom he does not desire to evict.

For these reasons, the decision of the lower Court cannot be said to be without jurisdiction or vitiated by illegality or material irregularity. As to the period within which

2. ('21) 8 A. I. R. 1921 Bom. 34 : 45 Bom. 1236 : 63 I. C. 41 : 23 Bom. L. R. 850, Rustomji v. Dosibai.



the petitioners are to hand over possession to the plaintiff, the lower Court gave two months' time to each of them which has now expired in November. Mr. Coyajee's client in the two petitions has got the Institute of Radio Technology where the apparatus and machinery have been installed and a part of it is occupied by the proprietor for his own use. Mr. Thakor's client is living in the block and is doing grain business elsewhere. We think that in the circumstances of the case Mr. Coyajee's client will require more time for making arrangements for shifting his instruments and apparatus elsewhere. We, therefore, discharge the rule in Civil Revision Application No. 682 of 1944, and direct that the possession of the block occupied by the petitioner in that application should be handed over to the opponent-original plaintiff before 31st January 1945. The petitioners in Civil Revision Applications Nos. 669 of 1944 and 670 of 1944 should hand over possession of the blocks occupied by them to the opponent before 28th February 1945. The rules in all the three applications are discharged with costs.

**Lokur J.** — I agree. I should like to add a few words regarding the question of the jurisdiction of the Presidency Small Cause Court to pass an order of eviction under S. 43, Presidency Small Cause Courts Act, when any question other than the determination of the tenancy is raised on an application made under S. 41. I think that question can be answered on the plain interpretation of the sections themselves. An application under S. 41 is not a suit, and although under S. 19 suits for the recovery of immovable property or for the determination of any other right to or interest in immovable property are excluded from the jurisdiction of the Small Cause Court, special provisions are made in ss. 41 to 43 for compelling a tenant to deliver possession of the demised property to the landlord on the determination of the tenancy. Hence, the principle laid down in 5 Bom 295<sup>1</sup> relied upon by Mr. Thakor, where the Small Cause Court is held not to possess jurisdiction to try suits for possession of immovable property when the question of title is raised, does not apply to an application under S. 41 where no such question is raised, as in this case. It is admitted that the petitioners are the tenants of the opponent and that notice sufficient for the determination of the tenancy under S. 106, T. P. Act, has been given. The tenancy having been thus determined by a proper notice,

the lessees are bound to put the lessor into possession of the property under S. 108 (q), T. P. Act. But the defence raised is that under S. 11, sub-s. (1), Bombay Rent Restriction Act, 1939, an order for the recovery of possession cannot be made as the petitioners have paid and are ready and willing to pay rent to the full extent and to perform all other conditions of the tenancy. The proviso to that sub-section, however, enables the landlord to recover possession of the premises from the tenant if they are reasonably and bona fide required by him for his own occupation and for certain other reasons mentioned in the proviso. Mr. Thakor contends that when such a defence is raised, it is outside the scope of the Small Cause Court, and under ss. 41 or 43 no other question except determination of the tenancy can be decided. Section 41 provides that when the landlord claims that the tenancy is determined, he may make an application to the Small Cause Court for a summons against the occupant or tenant calling upon him to show cause why he should not be compelled to deliver up the property. Then S. 43 provides that if the said occupant or tenant does not appear at the time appointed to show cause to the contrary, the applicant shall, if the Small Cause Court is satisfied that he is entitled to apply under S. 41, be entitled to an order addressed to a bailiff of the Court directing him to give possession of the property to the applicant on such day as the Court thinks fit to name in such order. This contemplates that not only must the applicant satisfy the Court that the tenancy is determined and he has a right to apply under S. 41, but also that the occupant does not show cause to the contrary, that is to say, show cause why an order addressed to the bailiff of the Court directing him to give possession of the property to the applicant should not be passed. The notice contemplated by S. 41 is intended to call upon the occupant to show cause why he should not be compelled to deliver up the property after the determination of the tenancy. This necessarily suggests that there may be other reasons why he should not be evicted even though the tenancy has been determined, and hence S. 43 provides that if he succeeds in showing cause to the contrary, the Small Cause Court will refuse to pass an order of eviction. One of such causes is that set out in S. 11, Bombay Rent Restriction Act, 1939, and the Small Cause Court has jurisdiction to see if the occupant has succeeded in showing that under that section he is entitled



to retain possession of the property in his occupation even after the determination of the tenancy. I, therefore, agree that the Small Cause Court had jurisdiction in this case to decide whether the applicant was entitled to obtain an order of eviction under S. 43 in view of the provisions of S. 11, Bombay Rent Restriction Act of 1939. On other points I agree with the view taken by my learned brother and with the order proposed by him.

R.K.

*Revision dismissed.*

[ Case No. 59. ]

## \* A. I. R. (33) 1946 Bombay 216

BHAGWATI J.

*Tan Bug Taim and others — Petitioners*  
v.

*Collector of Bombay — Respondent.*

O. C. J. Misc. No. 26 of 1945, Decided on 9th August 1945.

(a) Government of India Act (1935), Ss. 100 and 104 and Sch. VII — Powers of Imperial Parliament and of Indian Legislature—Scope of.

The Imperial Parliament is supreme and has powers to enact laws affecting the liberty of person and the rights of property enjoyed by the subject in any manner whatever and has the power to deprive a subject of his liberty of person and also of his rights of property in any manner whatever without assigning any reason whatsoever or without making compensation for the same. But the powers which are conferred on the Indian Legislature under the terms of the Government of India Act are circumscribed within the items in the lists of Sch. VII to the Act, though the powers of the Indian Legislature to make laws with respect to the items in those lists are plenary within their own sphere. In the exercise of those powers to make laws with respect to those items the Indian Legislature does not act as an agent of or exercise any delegated authority from the Imperial Parliament. It exercises plenary powers, as full powers as the Parliament itself could exercise with respect to the items in those lists. Even though those lists may have been meant to be as exhaustive and comprehensive as human ingenuity could make them, they were meant to comprise all that could be thought of as within the *ordinary* activities of the Government, and are not really exhaustive and, therefore, residuary powers of legislation were vested in the Governor-General under S. 104.

[P 232 C 2; P 234 C 1, 2]

(b) Government of India Act (1935), S. 100 and Sch. VII, Lists — Principles in regard to interpretation of provisions of Act and items in lists in Sch. VII—Legislation affecting liberty or rights of property of subject not to be allowed except to extent warranted by words used.

No doubt the Act being a Constitution Act a large and liberal construction should be put upon its provisions and the items specified in the lists in Sch. VII should be read as extending to all ancillary and subsidiary matters which can fairly and reasonably be said to be comprehended in the same. But where the context or the circumstances

warrant a limited construction being put upon a topic or category of legislation it is open to the Court to do so: ('44) 31 A. I. R. 1944 F. C. 73, *Rel. on.*

Strict construction should be put upon those provisions of the Act which go to curtail the liberties of the subject or impose burdens and obligations upon him. Therefore, the items in the lists of Sch. VII should not be so construed as to deprive the subject of his liberties or to impose burdens or obligations upon him beyond those which are warranted by the words used therein in spite of the items contained in those lists being read as extending to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in the same: *Case law referred.* [P 234 C 2]

(c) Government of India Act (1935), Part XII, Sections commencing with S. 292 — Nature of — Ss. 298 (1) and 299 (1) and (2) are not merely restrictions on legislative powers of Indian Legislature but are statutory recognition of fundamental principles of British jurisprudence, international law, etc.

What was sought to be enacted by the sections in Part. XII, commencing with S. 292, was not a restriction on the powers of the Legislature but was certain fundamental principles of British jurisprudence, international law, His Majesty's prerogative to grant pardons, remissions of punishments and the like which should not be in any manner whatsoever affected or departed from in the exercise of the legislative powers invested in the Indian Legislature under the terms of the Act. Examples of this are to be found, *inter alia*, in the provisions of S. 298 (1) and S. 299 (1) and (2), which are not merely restrictions on the legislative powers of the Indian Legislature but are in reality the statutory recognition of the fundamental principles of British jurisprudence enacted therein.

[P 235 C 1]

(d) Precedent — Decisions of Australian Courts — Value of.

The decisions of the Australian Courts are not binding on Courts in India but when relevant they will be listened to by an Indian Court with attention and respect and if it finds itself in agreement with them it will deem its own opinion to be strengthened and confirmed. But there are few subjects on which the decisions of other Courts require to be treated with greater caution than that of federal and provincial powers: ('39) 26 A.I.R. 1939 F.C. 1, *Rel. on.*

[P 236 C 2]

(e) Government of India Act (1935), S. 1—Interpretation of Act — Legislative practice in India and in England at time of passing of Act can be looked to.

While construing the provisions of the Government of India Act the Court is entitled to look to the Legislative practice prevailing in England as well as in India at the time of the passing of the Act: ('40) 27 A.I.R. 1940 Bom. 65 (F.B.), *Rel. on.*

[P 239 C 1]

(f) Land Acquisition Act (1894), Preamble, Part VI and Ss. 36 (2) and 48—Temporary occupation of land provided in Part VI is distinct from and is not included in acquisition of land which is object of Act.

The proviso to S. 36 (2) and S. 48 far from establishing that the temporary occupation of land provided for in Part VI of the Act was included in the acquisition of land which was the object of the Act, go to establish that a clear demarcation was



made by the Legislature between the acquisition of land which resulted in the land being vested absolutely in the Crown free from all encumbrances on the one hand and the temporary occupation and use of waste or arable land which even though needed for any public purpose or for a company did not create any rights in the Government beyond the rights of such temporary occupation thereof. [P 242 C 1]

(g) Trusts Act (1882), Ch. IX and S. 3—Obligations in nature of trust provided in Ch. IX are not included in definition of trusts which only were subject-matter of Act.

The very heading of Ch. IX and the terms of S. 80 definitely show that the relationships provided for in Ch. IX are not trusts but obligations in the nature of trusts and, therefore, it cannot be said that merely because those obligations were enacted within the provisions of the Act, they were included in the definition or conception of trusts which only were the subject-matter of the enactment of the Act. [P 242 C 2]

(h) Contract Act (1872), S. 2 and Ch. V — Obligations included in Ch. V are not contractual obligations and are not included in contracts which only were subject-matter of Act.

The obligations included in Ch. V are certainly not contractual obligations, nor could they be brought by any stretch of imagination within the definition of contract enacted in S. 2. They were, however, included in the Act by the enactment of Chap. V thereof because even though they were not contracts, the obligations created thereunder resembled those created by contract. It cannot, therefore, be said that those relations though resembling those created by contracts were included in contracts which only were the subject-matter of the enactment. [P 243 C 1]

(i) Easements Act (1882), Ss. 4 and 52—Licences are distinct from and not included in easements.

The conceptions of easements and licences are quite distinct and it cannot be said by reason of the enactment of the provisions as to licences in the Act that licences were included in easements. [P 243 C 1]

(j) Government of India Act (1935), Sch. VII, List II, Item 21—Expression “land” in—Scope of—Expression “that is to say” — Meaning of—Words and phrases.

The expression “that is to say” is the commencement of an ancillary clause which explains the meaning of the principal clause. It has the following properties: (1) it must not be contrary to the principal clause; (2) it must neither increase nor diminish it; (3) but where the principal clause is general in terms it may restrict it. The topic or category of legislation “land” in Item 21 being general in terms should, therefore, be taken as restricted and not merely illustrated by what follows the words “that is to say” in that item. Therefore, the only things which would be included in the topic of “land” in Item 21 would be the items which are specifically enumerated in what follows the expression “that is to say” in that item and it would not be possible to read in the topic or category “land” anything beyond what has been described in those particular items. [P 244 C 2; P 245 C 1]

(k) Government of India Act (1935), S. 100—Words “with respect to” in—Meaning of—Words and phrases.

The words “with respect to” in S. 100 mean that the subject-matter of legislation must substantially be with respect to matters in one list or the other of Sch. VII. A remote connection would not be enough. It must be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in that topic or category of legislation. [P 245 C 1]

(l) Government of India Act (1935), Sch. VII, List II, Item 21 and S. 299 (5) — Expression “rights in or over land” in Item 21 has same meaning as expression rights in or over immovable property in S. 299 (5) and means proprietary rights and not rights of temporary occupation or possession.

The expression “rights in or over land” in the latter part of Item 21 is used in the same sense as the expression rights in or over immovable property in S. 299 (5). The rights in or over immovable property which are referred to in S. 299 (5) are proprietary rights in the sense of rights title or interest therein and not the rights of temporary use and possession of the same. The expression “rights in or over land” in Item 21, therefore, means not personal rights, not rights of temporary use and possession of land, but rights whereby some interest is created in the land itself. [P 246 C 1, 2]

\*(m) Defence of India Act (1939), S. 2 (2)(xxiv) — Rules under, R. 75A—Requisition of immovable property under S. 2 (2) (xxiv) of the Act and R. 75A of the Rules does not come within Items 9 and 21 of List II, Sch. VII or any other items in lists in Sch. VII, Government of India Act — Enactment of S. 2 (2) (xxiv) and R. 75A without public notification under S. 104, Government of India Act, is ultra vires the Central Legislature.

The enactment of S. 2 (2) (xxiv) of the Act and R. 75A, Defence of India Rules, with reference to the requisition of immovable property in the absence of a public notification by the Governor-General under S. 104, Government of India Act, is ultra vires the Central Legislature as such requisition is comprised neither in Items 9 and 21 of List II, Sch. VII nor in any other items of the lists in Sch. VII, Government of India Act. [P 24 C 1, 2]

The requisition of immovable property enacted in S. 2 (2) (xxiv), Defence of India Act, and R. 75A, Defence of India Rules, does not create in the Government any interest therein. It only creates in the Government the rights to temporary use and possession of immovable property. Such requisition is not included in, nor is it an ancillary or subsidiary matter which can fairly and reasonably be said to be comprehended in compulsory acquisition of land in Item 9, List II, Sch. VII, Government of India Act. Nor does it amount to “rights in or over land” and is, therefore, not included in Item 21, List II, Sch. VII, Government of India Act. Nor can it be construed as transfer of property from the owner to the Government within the meaning of Item 8, List III, Sch. VII, Government of India Act. [P 247 C 1]

The requisition of immovable property under S. 2 (2) (xxiv), Defence of India Act, and R. 75A, Defence of India Rules, thus not being comprised in any of the three lists in Sch. VII, Government of India Act, the Central Legislature had no power to legislate with respect to the same, in the absence of a public notification by the Governor-General under S. 104, Government of India Act, even though there was a proclamation of emergency by



the Governor-General under S. 102 (1), Government of India Act. [P 247 C 2]

(n) Defence of India Rules (1939), Rr. 75A and 81 — *A* occupying premises as tenant and carrying on business of restaurant therein — Premises with landlord's fixtures therein requisitioned—Loss of goodwill attached to premises and business resulting from requisition cannot convert requisition of premises into requisition of goodwill or business.

*A* occupied certain premises as tenant and carried on the business of a restaurant therein. The order made by the Collector under R. 75A requisitioned the premises together with the landlord's fittings and fixtures and did not in terms requisition the goodwill attached to the premises or the business of restaurant conducted therein :

*Held* that the loss of the goodwill attached to the premises and the business of the restaurant conducted therein would no doubt be the necessary result of the requisition of the premises by the Collector but that fact or the fact that *A* could claim compensation for suspension or destruction of goodwill attached to the premises and the business would not, however, convert the requisition of the premises into requisition of the goodwill attached to those premises and the business. [P 249 C 1]

(o) Defence of India Act (1939), S. 2 (2) (xxiv) — Words "any property movable or immovable" in — Meaning of — They cover commercial undertaking—Commercial or business undertaking can be proceeded against not only under S. 2 (2) (xx) and R. 81 but also under S. 2 (2) (xxiv) and R. 75A.

The words "any property movable or immovable" in S. 2 (2) (xxiv) include within their scope all property whatever, movable or immovable, within the definitions thereof in the General Clauses Act and, therefore, must necessarily include all kinds of property, land, building, machinery and chattels of any kind and anything that can be described as property and this would *prima facie* cover a business and its goodwill which are the essential ingredients of a commercial undertaking. [P 250 C 1]

The mode provided in S. 2 (2) (xx) and R. 81 is not the only mode in which the Government can deal with a commercial or business undertaking. The Government can requisition the same under S. 2 (2) (xxiv) and R. 75A. Under the terms of S. 2 (2) (xx) and R. 81, the Government controls and directs in what manner the particular property employed in agriculture, trade or industry should be dealt with by the owners thereof. These powers of control are narrower in their scope than powers of requisition of such property vested in the Government under the provisions of S. 2 (2) (xxiv) and R. 75A, and have been specially vested in the Government under S. 2 (2) (xx), for the purposes therein specified. Therefore, even though S. 2 (2) (xx) and R. 81 deal with commercial or industrial undertakings, the mode which is therein prescribed is not the only mode in which the Government can deal with property employed in agriculture, trade or industry. The wider powers which are vested in the Government under S. 2 (2) (xxiv) and R. 75A are not in any manner whatever curtailed by the provisions of S. 2 (2) (xx) and R. 81. It cannot, therefore, be said that the only manner in which the Government can deal with a commercial or business undertaking is under S. 2 (2) (xx) and R. 81. The Government would have, by

virtue of the powers vested in it under S. 2 (2) (xxiv) and R. 75A, the power to requisition a commercial or business undertaking and to requisition a business like that of restaurant as a running concern : ('43) 30 A. I. R. 1943 Lah. 41 (F. B.), *Not approved* ; ('46) 33 A. I. R. 1946 Cal. 140, *Rel. on.* [P 250 C 2; P 251 C 1]

(p) Defence of India Act (1939), S. 15 — Provisions of, are mandatory and not merely directory or recommendatory.

The provisions of S. 15 are mandatory and not merely directory or recommendatory. It is, therefore, the bounden duty of any authority or person acting in pursuance of the Act to interfere with the ordinary avocations of life and the enjoyment of property as little as may be consonant with the purposes therein mentioned : ('43) 30 A. I. R. 1943 Lah. 41 (F. B.) and ('44) 31 A. I. R. 1944 Mad. 285, *Not approved.* [P 252 C 2; P 253 C 1]

(q) Defence of India Act (1939), S. 16 (1) — Orders made in purported exercise of power under Act how far protected under S. 16 (1) from interference by civil Court — Requisition order requiring delivery of possession of premises *forthwith* held was in flagrant breach of S. 15 and not protected under S. 16 (1).

Section 16 (1) would not protect an order made in the purported exercise of any power conferred by or under the Act from being called in question in any Court, unless the order in question was made within the four corners of the provisions of the Act and was made in bona fide exercise of the power conferred by or under the Act; and the civil Court will have jurisdiction to go into the question of the legality or validity of an order, even though made in purported exercise of the power conferred by or under the Act, if the provisions of the Act were not complied with or the powers conferred by the Act were being misused or had been exceeded or were being used *mala fide* and for a collateral purpose : ('43) 30 A. I. R. 1943 Lah. 41 (F. B.) ; ('44) 31 A. I. R. 1944 Mad. 285 ; ('43) 30 A. I. R. 1943 Nag. 26 and ('45) 32 A. I. R. 1945 Bom. 212 (F. B.), *Rel. on.* [P 254 C 2]

The business of a Chinese restaurant was carried on in certain premises which were situate in a prominent place in Bombay. The restaurant was fitted up with costly fixtures, fittings and furniture, employed about 24 servants, commanded a great reputation, catered for a large clientele and enjoyed considerable goodwill and was one of the leading Chinese restaurants in Bombay. The Collector passed a requisition order under R. 75A, Defence of India Rules, directing the proprietor to *forthwith* deliver possession of the premises which were required to be used as a Depot for the Royal Indian Navy. The Collector stated that he would have allowed time to the proprietor to vacate the premises if he had requested him to that effect instead of rushing to the Court for help :

*Held* that the order requiring the delivery of possession of the premises *forthwith* was in the circumstances in flagrant breach of the provisions of S. 15 and, hence, was not protected under S. 16 (1) and was illegal and inoperative. [P 225 C 1]

(r) Specific Relief Act (1877), Chapter VIII, Ss. 45 and 50—S. 45 takes away jurisdiction of High Courts to issue writ of mandamus — Power to issue writs of prohibition if also taken away.

The provisions enacted in Chap. VIII, Specific Relief Act, do take away the jurisdiction of the



High Courts of Calcutta, Madras and Bombay to issue the high prerogative writ of mandamus which they enjoyed prior to the enactment of Chap. VIII, and their power to issue orders in the exercise of their jurisdiction to issue high prerogative writs of mandamus and prohibition (the latter to the extent they are incorporated in S. 45) are now to be found within the four corners of Section 45. [P 258 C 2]

\* (s) Specific Relief Act (1877), S. 45, Proviso (b)—Expression “any law for the time being in force” in—Meaning of — Order of public officer requisitioning property illegal — Court can direct him to forbear from enforcing that order.

The expression “any law for the time being in force” used in Proviso (b) to S. 45 should be read as “Royal Charter, Statute or Common Law” as known in England, i. e., not only the statute or the enactments of Indian Legislature but also the common law of the land which is being administered by the Courts in British India. It is not restricted to statute law or enactments of the Indian Legislature : (‘36) 23 A. I. R. 1936 P. C. 269 and (‘39) 26 A. I. R. 1939 Bom. 431, *Expl.*; *Case law referred.* [P 259 C 1]

It is one of the cardinal principles of British jurisprudence that no person shall be deprived of his property except by authority of law, a principle which finds a statutory recognition in S. 299 (1), Government of India Act. That is the principle which would be enforced by Courts in British India as a part of the common law to be administered by them in the course of the administration of justice, and would be equally applicable to private individuals as to public officers acting in their public character. If a public officer acting in his public character acted contrary to that principle of law, it would be certainly open to the Courts to direct him to forbear from doing any act contrary thereto, it being under that law for the time being in force clearly incumbent on the public officer acting in his public character to forbear from doing an act contrary to that well-recognised principle of common law. [P 259 C 2]

Accordingly where an order passed by a public officer for the requisition of property under the Defence of India Rules is illegal the Court can pass an order under S. 45 directing him to forbear from acting upon that order. [P 260 C 1]

(t) Specific Relief Act (1877), S. 45, Proviso (b)—Order by public officer requisitioning property of A under R. 75A, Defence of India Rules—Application by A under S. 45 for order directing public officer to forbear from acting upon order on ground that R. 75A is ultra vires and requisition order illegal, is maintainable.

An order requisitioning the property of A was passed by a public officer under R. 75A, Defence of India Rules. A thereupon made an application under S. 45, Specific Relief Act, for an order prohibiting the public officer from acting upon his order on the ground that S. 2 (2) (xxiv), Defence of India Act, and R. 75A, Defence of India Rules, under which the order was made were ultra vires the Central Legislature and the order was illegal and inoperative in law. It was contended that the application was not maintainable as the real motive of A was to obtain a declaration that the requisition order was *ultra vires* and illegal and inoperative in law which declaration could not be obtained in proceedings under S. 45 :

*Held* that (1) the application was maintainable. The contentions in the application that the provisions of law under which the requisition order was issued were ultra vires and the order itself was illegal were merely grounds which it was necessary for A to establish for obtaining relief under S. 45 ; [P 260 C 1]

(2) to obtain relief under S. 45 it was not necessary for A to obtain declaration that the provisions of law under which the requisition order was made were ultra vires and that the requisition order was illegal. It was open to A to treat the order and the provisions of law under which it was issued as mere nullity and void and no proceedings or suit to have the same set aside or declared void would be necessary to be taken by A before he would be entitled to the relief prayed for by him under S. 45 : 29 Bom. 480 and (‘18) 5 A. I. R. 1918 Bom. 188 (F. B.), *Rel. on.* [P 260 C 1, 2]

(u) Specific Relief Act (1877), S. 45, Proviso (b)—Public officer purporting to pass order under statute—Statute can be shown to be invalid.

Where a public officer purports to pass an order under a statute it is open to the person affected by the order to show in proceedings under S. 45 that the statute was ultra vires and the order invalid. It is not correct to say that Proviso (b) to S. 45 was based on the assumption that the statute under which it was clearly incumbent on the public officer acting in his public character to do or forbear from doing any specific act was a valid statute. [P 260 C 2]

(v) Specific Relief Act (1877), S. 45, Proviso (d) — Specific and adequate remedy referred to in Proviso (d) must be equally convenient, speedy and effectual—Remedy by way of suit held was not adequate under the circumstances within Proviso (d).

The specific and adequate remedy referred to in Proviso (d) to S. 45 should be equally convenient, speedy, beneficial and effectual, and if no such specific and adequate legal remedy did exist, it will be open to an applicant to file a petition for obtaining an order under S. 45 : (1884) 12 Q.B.D. 461 and (‘18) 5 A. I. R. 1918 Mad. 763 (F. B.), *Rel. on* ; (‘21) 8 A. I. R. 1921 Cal. 159, *Not approved.* [P 262 C 1]

A requisition order requiring A to forthwith deliver the possession of certain property of which he was in occupation was passed by a public officer purporting to act under R. 75A, Defence of India Rules. A thereupon made an application under S. 45, Specific Relief Act, for an order directing the public officer to forbear from acting upon the requisition order on the ground that it was ultra vires and illegal. It was contended that the application under S. 45 was not maintainable as A had other specific and adequate legal remedy by way of suit against the Government of India for obtaining the relief claimed by him in his application :

*Held* that the legal remedy by way of suit could not be said to be an adequate remedy for the simple reason that before such suit the requisite notice under S. 80, Civil P. C., would have to be given by A and before the suit could be instituted after the expiry of two months next after notice had been given the mischief which was sought to be prevented, viz., the execution of the requisition order which was illegal might be done by or at the instance of the public officer. Proviso (d) to S. 45, therefore, was no bar to the application by A under S. 45. [P 261 C 1]



(w) Specific Relief Act (1877), S. 45, Provisos (f) and (g)—Scope and object of Proviso (f)—Court if can pass order against public officer acting as agent of Government—Public officer under delegation of power by Central Government passing requisition order under R. 75A, Defence of India Rules, directing A to deliver possession of property—Public officer can be restrained under S. 45 from acting upon requisition order—Neither Proviso (f) nor Proviso (g) is a bar.

Proviso (f) to S. 45 is enacted to meet those cases where the party against whom an order under S. 45 is sought was merely acting as the agent of the Secretary of State, the Central Government, the Crown Representative, or any Provincial Government, and besides owing his duty to the principal, owed no duty whatever to the subject. In those cases where, apart from such agent owing a duty to his principal, he also owed a duty to the subject, the Court would have jurisdiction to issue an order against him under S. 45.

[P 264 C 1]

Under the authority delegated to him under S. 2 (4), Defence of India Act, the public officer (Collector of Bombay) passed a requisition order under R. 75A, Defence of India Rules, directing A to deliver possession of certain property which was in his occupation. In the application by A for an order directing the Collector to forbear from acting upon the requisition order on the ground that it was ultra vires and illegal it was contended on behalf of the public officer that the petitioner was barred under S. 45, Proviso (f) because in passing the requisition order the public officer was acting as the agent or servant of the Central Government and in making the order under S. 45 as prayed for by A against the public officer the Court would be making an order which would be binding on the Central Government. It was further contended that the application was also barred under Proviso (g) to S. 45 :

*Held* that (1) the public officer to whom power had been delegated by the Central Government under S. 2 (4), Defence of India Act, was not acting as an agent of the Government but as a public officer empowered in that behalf and since the Government was not a party to the proceedings no order passed therein as prayed for would bind the Government ;

[P 262 C 2]

(2) even assuming that the public officer in passing the requisition order was acting as the agent of the Central Government an order as prayed for by A could still be made against the public officer because independently of any duty which he owed to the Central Government, the principal, he also owed a duty to A by reason of the common law principle (or by reason of S. 299 (1), Government of India Act), namely, that no person could be deprived of his property except under the authority of law. A breach of such duty would give A a cause of action against the public officer entitling him to sustain a petition against the public officer under S. 45 : ('36) 23 A. I. R. 1936 P. C. 269, *Rel. on* ;

[P 262 C 2]

(3) it may be that by reason of the public officer acting as the agent of the Central Government and by reason of the conclusion of the Court that the enactment of S. 2 (2) (xxiv), Defence of India Act, and Rule 75A, Defence of India Rules, under which the requisition order was made was ultra vires the Central Legislature being the foundation for making the requisite order against the public

officer, the Central Government would respect the decision of the Court : (1916) 1 K. B. 595 ; ('21) 8 A. I. R. 1921 Cal. 159 and ('27) 14 A. I. R. 1927 Mad. 22, *Rel. on* ; [P 263 C 1]

(4) but in making the order prayed for against the public officer the Court could not be said to be making an order binding on the Central Government which would come within the mischief of Proviso (f) to S. 45 ; [P 264 C 1]

(5) nor could the making of an order as prayed for contravene the provisions of Proviso (g) to S. 45 as no claim was made by A against the Crown. No doubt if the object of the petition by A was to obtain an order upon the public officer and servant of the Crown merely to enforce satisfaction of a claim upon the Crown the petition by A would be barred under Proviso (g) to S. 45 but such was not the case : (1872) 7 Q. B. 387 and ('36) 23 A. I. R. 1936 P. C. 269, *Rel. on*. [P 265 C 1]

(x) Interpretation of Statutes—Same expression may be presumed to have same meaning in every part of Act.

It is reasonable to presume that the same meaning is implied by the use of the same expression in every part of an Act. When precision is required no safer rule can be followed than to call the same thing by the same name. [P 246 C 2]

(y) Evidence — Competency of witness — Witness not having opportunity to know about a matter—Question put to him disallowed.

In considering the question whether any goodwill was attached to a restaurant or the premises in which it was situate it is only the people visiting the restaurant or the persons connected with the conduct of the restaurant who can say whether people visited the restaurant because of its name or because of the premises in which it was situate. A witness who was not competent to speak on the subject was asked some questions about it by counsel. The questions were disallowed.

[P 225 C 1]

V. F. Taraporewalla, M. M. Jhaveri and C. N. Daji — for Petitioners.

C. K. Daphtary, Advocate-General and G. N. Joshi — for Respondent.

**Order.** — The petitioners are partners carrying on business in partnership in the firm name and style of Kokwah Chinese Restaurant at Dhanraj Mahal, Apollo Bunder, Bombay. They have been occupying shops Nos. 1, 5 and 11 on the ground-floor of the Dhanraj Mahal and have been conducting the business of the restaurant since 22nd March 1944, when they purchased the restaurant together with its paraphernalia and goodwill from the previous owners thereof on payment of a sum of Rs. 42,000. The restaurant has been in existence in any event from and after May 1942 when the previous owners stopped their business of curios which they had been carrying on there along with the business of restaurant and converted the whole premises for their user as a restaurant. The restaurant employs about twenty-four servants and is fitted up with costly fixtures, fittings and furniture which has been installed therein. It also enjoys considerable goodwill



in so far as it commands a great reputation and caters for a large clientele including members of the fighting forces of the Allied Nations. It has a large establishment and is one of the leading Chinese restaurants in Bombay. It appears that the entire land and the building thereon known as the Dhanraj Mahal was requisitioned by the Collector of Bombay by his order dated 7th April 1942, and except the ground floor the upper floors have been since then in the actual occupation of the officers of the Royal Indian Navy and the members of their families. When such requisition was made the Government entered into the possession of the upper floors of Dhanraj Mahal and continued to manage the same through one Homiyar Dhanjishaw Broacha whose services were transferred by the owner of the Dhanraj Mahal to the Government. The shops on the ground floor appear, however, to have remained in the possession of the owner and he employed his own manager to look after the said shops who prepared the bills and recovered the rents from the tenants of the shops on the ground floor.

On or about 31st May 1944, a month's notice was served on the proprietor of the Kokwah Chinese Restaurant requiring the proprietor to vacate the premises at the end of June 1944, as the premises in his occupation were required reasonably and bona fide by the Government for the Royal Indian Navy. Correspondence thereafter ensued between the then attorneys of the proprietor of the Kokwah Chinese Restaurant and the Solicitors of the Central Government at Bombay on behalf of the Government. It seems to have been realised by the Government that they could not so terminate the tenancy of the proprietors of the Kokwah Chinese Restaurant and the intention of the Government to acquire possession of the premises of the Kokwah Chinese Restaurant came to an unnatural end. It appears that thereafter on 21st October 1944, the Collector of Bombay, the respondent herein, addressed a letter to the proprietor of the Kokwah Chinese Restaurant, Dhanraj Mahal, calling upon him under R. 75A (5) of the Defence of India Rules, 1939, to furnish him within one week from date information on the various points therein mentioned with regard to the restaurant. This letter was addressed by the respondent in connection with the proposed requisition of the Kokwah Chinese Restaurant under the Defence of India Act. By his letter dated 13th November 1944, the first petitioner furnished the requisite information

to the respondent wherein he disclosed the names of the petitioners as the proprietors of the said restaurant, pointed out that the fixtures, fittings, goodwill of the restaurant had been bought over by the petitioners from its previous owners in March 1944, at a price of Rs. 42,000, enclosed a list of crockery, furniture and provisions bought over at the time of the sale, also pointed out that since the premises were rented by the previous owners expenses had been incurred for the fitting up of kitchen, staircase and other fixtures and the premises had been decorated and fitted up for the purposes of a Chinese restaurant which expenses had been included besides the goodwill in the price paid by the present owners to the previous owners of the restaurant, and also intimated to the respondent the net monthly income of the restaurant which was estimated at Rs. 1,000 per month.

After the exchange of this correspondence between the proprietors of the Kokwah Chinese Restaurant and the respondent in October-November 1944, the respondent served on the proprietors of the Kokwah Chinese Restaurant an order being Order No. MILY-86 bearing date 16th February 1945. It was marked "Very Urgent," intimating to them that in the exercise of the powers conferred by sub-r. (1) of R. 75A, Defence of India Rules, read with notification of the Government of India, Defence Co-ordination Department, No. 1336/OR/1/42, dated 25th April 1942, the respondent requisitioned the said property and directed possession thereof to be delivered to the Commander 167 L of C sub-area *forthwith*, subject to certain conditions therein mentioned. On page 2 of the said order were printed instructions to the owner and tenant, viz., the proprietors of the Kokwah Chinese Restaurant, that in the event of failure on their part to hand over possession of the requisitioned property on this date, steps to enforce compliance with the above order would be taken through the police without further warning to them, that the police had instructions to use such force as may in their opinion be reasonably necessary for securing compliance with the said order, *vide* Rule 132, Defence of India Rules, and that non-compliance with the order was moreover an offence punishable with imprisonment which may extend to three years or with fine or with both, *vide* R. 75A (7), Defence of India Rules. This order dated 16th February 1945, was served on the proprietors of the Kokwah Chinese Restaurant immediately thereafter. The peti-



tioners, therefore, filed this petition on 19th February 1945, asking that the respondent be ordered and directed by an order and injunction of this Court under S. 45, Specific Relief Act, 1877, to forbear from enforcing and/or executing the requisition order dated 16th February 1945, and/or enforcing delivery of possession of the premises as directed by the requisition order, and/or from taking any other steps or proceedings under or in respect of the order; for costs, and further and other reliefs. An application for an interim injunction in terms of prayer (b) of the petition was made on the very same day, 19th February 1945, to me and on that application, I granted a rule *nisi* and interim injunction in terms of prayer (b) of the petition, making it returnable on Friday, 23rd February 1945.

In para. 5 of their petition the petitioners contended that Rule 75A, Defence of India Rules, appears to have been framed by the Central Government in the exercise of its powers under S. 2 (2) (xxiv), Defence of India Act, that "requisition" was a distinct and separate category of legislative powers, that requisitioning of property was not covered by or included in any entry in the three lists contained in Sch. VII, Government of India Act, 1935, that the Central Legislature was not competent and had no authority to legislate in respect thereof, and that, therefore, the said order had no legal foundation in law, was *ultra vires*, bad and inoperative in law. Without prejudice to their contentions, the petitioners contended in para. 6 of their petition that by means of the order which purported to be made under R. 75A and apparently referred to and was issued in respect of the premises, the real and true aim of the respondent was to aim at and affect their business and undertaking which they had been carrying on at the premises, that the object of the respondent was really and truly to curb, control and proceed against the business and undertaking of the petitioners and that he had, therefore, no jurisdiction, power or authority to proceed under R. 75A, the only way in which he could have acted in the matter having been to proceed under R. 81, Defence of India Rules, and that, therefore, the order of the respondent being without jurisdiction, power or authority was illegal, *ultra vires*, invalid and inoperative in law. The petitioners also contended in Paras. 7 and 8 of their petition that by reason of the various allegations made in Para. 7, the order had been issued by the respondent not for the bona

fide purpose mentioned in the order, viz., efficient prosecution of the War, but for the purpose of stifling and limiting the business of Chinese restaurant-keepers in the Fort area and that the order had not thus been made bona fide for the purpose for which it purported to have been made, but was passed for a collateral purpose, and that, therefore, the same was illegal, void and inoperative in law. The petitioners lastly contended in Para. 9 of the petition, without prejudice to all their other contentions, that the order was passed requiring the petitioners to hand over possession "*forthwith*" and no reasonable or proper time was granted to them for the purpose of delivering the premises under the order, that the respondent was bound to act in such a manner as to interfere with the ordinary avocations of life and enjoyment of property as little as possible, that the respondent had acted in such a way as to cause the greatest inconvenience and hardship to the petitioners and that, therefore, having disregarded the provisions of S. 15, Defence of India Act, the order was in any event illegal, void and inoperative in law. It was on the basis of these contentions which I have herein set out, that the petitioners submitted that their case fell within the provisions of S. 45, Specific Relief Act, and asked for an order and injunction of this Court in terms of prayer (a) of their petition.

The rule *nisi* was served on the respondent and he filed an affidavit in reply on 1st March 1945. The respondent contended in the first instance that the petition was misconceived and incompetent. Without prejudice to this contention he denied the several allegations and contentions set out in the petition. He denied that he or the Government desired to discriminate against the owners of Chinese restaurants, but stated that on the contrary the premises were bona fide required by the Government for the purpose stated in the requisition order. He further stated that although the order required the petitioners to hand over possession "*forthwith*" of the premises in their occupation, he would, as in other cases, have given a reasonable time to the petitioners to vacate and give possession of the premises to the Commander 167 L of C sub-area if the petitioners had requested him to that effect instead of rushing to the Court. He submitted that the action taken by him was perfectly legal and proper under the Defence of India Act and the Defence of India Rules, that the



petitioners had entirely misconceived their remedy and prayed that the petition should be dismissed with costs. The petitioners filed an affidavit in rejoinder reiterating their allegations and contentions with regard to the alleged discrimination by the respondent exercised by him against the owners of the Chinese restaurant-keepers and also stating that when the previous Chinese restaurants had been requisitioned the respondent had been approached with a request to give reasonable time when the respondent had stated that it was not in his hands to do so and suggested that the Chief Secretary to the Government of Bombay might be approached in that behalf. It was also stated that on the present occasion the Chinese Consul whose assistance was sought by the petitioners spoke on phone to the Chief Secretary to the Government of Bombay who, however, expressed his inability to do anything in the matter. It was submitted that the requisition order was void, inoperative, illegal and *ultra vires* and should be set aside.

The rule came on for argument before me on 24th March 1945, when Mr. Jhaveri appeared for the petitioners and Mr. G. N. Joshi appeared for the respondent. At that hearing, Mr. Jhaveri applied for an adjournment for hearing upon testimony of witnesses to be examined in like manner as in a suit under R. 582, High Court Rules. He said that he wanted to prove, (a) that two Chinese restaurant-keepers were served with such notices and their premises were requisitioned and that the petitioners' was the third Chinese restaurant requisitioned by the respondent, and (b) that the respondent served notices on only Chinese restaurant-keepers and not on others belonging to any other nationality with a view to discriminate against the Chinese restaurant-keepers. There being a dispute as to the facts between the petitioners and the respondent, I adjourned the matter for hearing upon testimony of witnesses to be examined in like manner as in a suit and fixed the rule for hearing on Tuesday 3rd April 1945. The rule accordingly came on for hearing before me on 3rd April 1945, when Mr. Jhaveri appeared for the petitioners and Sir Jamshedji Kanga appeared for the respondent. After Mr. Jhaveri had read the petition and affidavits Sir Jamshedji Kanga applied that the question whether the petition lies under S. 45, Specific Relief Act, should be tried as a preliminary issue. I directed that that issue be tried

as a preliminary issue and thereupon Sir Jamshedji Kanga addressed arguments in support of his contention. Whilst the arguments had proceeded for some time, I asked Mr. Jhaveri whether, in view of the fact that the petitioners had contended in para. 5 of their petition that the enactment of S. 2, sub-s. (2), cl. (xxiv), Defence of India Act, and R. 75-A, Defence of India Rules, was challenged as *ultra vires* the Central Legislature, it may not be necessary to make the Central Government a party to this petition. Mr. Jhaveri stated that he would consider that aspect of the question but wanted time in order to enable him to do so. I also pointed out to counsel appearing for both the parties that under R. 584, High Court Rules, I had the power to direct that the present petition and rule should be served on the Central Government in view of the contentions taken by the petitioners in para. 5 of their petition. Sir Jamshedji Kanga then stated that the Solicitor to the Central Government at Bombay who was then in Court and was instructing him on behalf of the respondent was prepared to waive service of the rule and was willing to instruct counsel on behalf of the Central Government to argue the rule if the Court was of opinion that the rule should be served on the Central Government under R. 584, High Court Rules. I then adjourned the rule to the Monday following, i.e., 9th April 1945, to enable Mr. Jhaveri to make up his mind whether he would make the Central Government a party to this petition. The rule ultimately came on for hearing and final disposal before me on 13th June 1945, when Mr. Taraporewalla appeared with Mr. Jhaveri and Mr. C. N. Daji for the petitioners and the Advocate-General and Mr. G. N. Joshi appeared for the respondent. At the very commencement of the hearing, Mr. Taraporewalla stated that he had considered the position and had come to the conclusion that neither the Government of Bombay nor the Central Government were necessary parties to the petition and his client did not want to serve the rule on them. In view of the above statement of Mr. Taraporewalla I also did not think it necessary to direct that the rule should be served on the Central Government and put the petitioners to the risk of having had to pay their costs in the event of the petition being dismissed.

The Advocate-General for the respondent continued the arguments on the preliminary issue as to whether the petition lies



under S. 45, Specific Relief Act. He adopted all the arguments which had been advanced on the previous occasion by Sir Jamshedji Kanga and made a further submission that the petitioners were not entitled to maintain this petition under S. 45 based on the alternative submission like the one which the petitioners had made in para. 6 of the petition, and that if the petitioners wanted to urge their main contention which they had set out in para. 5 of the petition, viz., that the enactment of S. 2 (2) (xxiv), Defence of India Act, and R. 75A, Defence of India Rules, was *ultra vires* the Central Legislature, they could not fall back upon the alternative contention which they had set out in para. 6 of their petition. He submitted that the petition disclosed no cause of action, was misconceived and should be dismissed with costs. Mr. Taraporewalla in reply urged that there was no provision of law which prevented him even in a petition under S. 45, Specific Relief Act, from relying upon alternative contentions and submissions for the purpose of the relief which he prayed for under that section. He also pointed out that in any event in paras. 7 and 8 of their petition the petitioners had challenged the said order dated 16th February 1945, as issued by the respondent for a collateral purpose and mala fide and that under the authority of a decision of the Calcutta High Court in 40 Cal. 836,<sup>1</sup> he was entitled to an order under S. 45 if the allegations and contentions set out in para. 8 of the petition were substantiated by him. He further stated that even under paras. 9 and 10 of their petition the petitioners were entitled to contend that the order was illegal, void and inoperative in law as offending the provisions of S. 15, Defence of India Act, and that in no event was there any justification for the Court's holding that the petition could not lie under S. 45 or was misconceived as contended by the respondent. On a further discussion the Advocate-General agreed with this point of view and stated that in view of the decision of the Calcutta High Court in 40 Cal. 836<sup>1</sup> cited by Mr. Taraporewalla, he would not contend that the Court could decide the matter on the preliminary issue, and accordingly I ordered that the matter should proceed on the merits. Apart from the arguments which were advanced before me by both the parties in an elaborate and exhaustive manner on the various points of law arising on this petition and which I shall

1. (13) 40 Cal. 836 : 22 I. C. 388, Prasad Chunder De v. Corporation of Calcutta.

deal with hereafter, there were two questions of fact on which evidence was led by both the parties, viz., (1) whether there was any goodwill attaching to the Kokwah Chinese restaurant, and (2) whether the respondent was guilty of any discrimination as against the owners of Chinese restaurants.

As regards the first question, whether there was a goodwill attaching to the Kokwah Chinese restaurant, petitioner 1 gave evidence himself and also called Chen Hin Hong who is the manager of the Chinese Museum situate at Apollo Bunder in the building next door to the Dhanraj Mahal. The first petitioner stated that he had purchased this restaurant from the previous owner thereof in March 1944, for a consideration of Rs. 42,000. He produced a document executed by the previous owner in his favour on 23rd March 1944. He also deposed to the fact that his restaurant commanded a very good clientele, had a central situation and was situated in the building the upper floors of which were occupied by Naval employees and was very popular. The Advocate-General tried in his cross-examination of petitioner 1 to show that this restaurant had a majority of its clients from the military personnel, that it was only after the present war that there was a brisk demand for restaurants and in particular those serving Chinese food, that there was besides the business of the restaurant which was taken over by the petitioners from the previous owners thereof a business of selling curios the value of which was also comprised in the sum of Rs. 42,000 paid by the petitioners to the previous owners, and that, therefore, there was nothing like a goodwill attached to the Kokwah Chinese restaurant which the petitioners could claim. Chen Hin Hong, the manager of the Chinese Museum, deposed to the fact that the restaurant was run side by side with the curios shop up to about five or six months after the advent of the war, but that the business of the restaurant having been found to be a flourishing one the then owners had stopped the business of selling curios and the business that was thereafter conducted was mainly that of a restaurant though some remnants of the curios which they already had used to be there in the shop. He also stated that the Kokwah Chinese Restaurant enjoyed a very good clientele and was run on a fairly large scale, meaning thereby that a considerable goodwill was attached to the Kokwah Chinese Restaurant. In the cross-examination of this witness also the Advocate-General tried



to show that the increase in the custom was mainly due to the increase of the military personnel visiting the shop during the present war, and further elicited that people associated with nice decoration and good food the name "Kokwah" intending thereby that there was no goodwill attached either to the premises or the name of the Chinese Kokwah Restaurant. In the re-examination of this witness when Mr. Taraporewalla asked the witness if "people went to the Kokwah Chinese Restaurant because of the name Kokwah or because the Chinese restaurant was situated in those premises?", the Advocate-General objected to that question being asked by Mr. Taraporewalla to the witness, saying that the witness was not the person who could say why people visited the particular restaurant, and it was only the people visiting the restaurant who could say that or it was only the persons connected with the conduct of the restaurant who could say that, but certainly not the witness. While upholding the objection of the Advocate-General to this question I could not help remarking that the objection also went to the root of the answer which he had elicited in the cross-examination of the witness, viz., people associated the nice decoration and the good food with the name Kokwah, as according to him the witness was certainly not competent to say anything in that behalf. In answers to the Court this witness definitely stated that people did not visit the restaurant because it was named the Kokwah Chinese Restaurant, it was not the name that attracted the customers but it was the good food that was served there. It had a good situation with the Yacht Club on the one side, and with the Green's Hotel on the opposite side. There were the naval officers' quarters in the building itself, which enjoyed the central position having regard to all the circumstances named by him, in effect suggesting that the restaurant commanded a goodwill.

On behalf of respondent 1, Homiyar Dhanjishaw Broacha was examined as a witness. He was the manager of the building up to May 1942, when the upper floors of the same were requisitioned by the Government. He stated that the name Kokwah Chinese Restaurant had been adopted by the owners of the restaurant only in the beginning of 1944 the same having been run in other names prior thereto. He further stated that the business of a restaurant had been carried on in the whole of the premises only after May 1942, the business carried on prior

to that date having been that of a restaurant as well as of a curios shop conducted side by side by the then owners thereof. In the cross-examination of this witness, it was elicited that he had nothing to do with the shops on the ground floor of the Dhanraj Mahal or the tenants thereof or with the preparation of the bills or the recovery of the rents thereof after May 1942, as the management of the shops on the ground floor was being looked after by the manager in the employ of the owner after May 1942, his services having been transferred to the Government when the upper floors of the Dhanraj Mahal were requisitioned by the Government in 1942. The one thing which was established in the evidence of this witness was that after May 1942, the business of a restaurant was the sole business carried on in these premises, that it was largely frequented by military personnel as well as the civil population and that the custom commanded by the restaurant was fairly large.

As regards the second question whether the respondent was guilty of any discrimination as against the owners of Chinese restaurants, petitioner 1 was not able to lead any evidence which would go to show that such discrimination was ever resorted to by the respondent. The respondent, on the other hand, put in certain correspondence which had taken place between the petitioners' attorneys and his attorney between 29th March 1945 and 3rd April 1945, wherein the petitioners' attorneys demanded particulars of the requisition orders served on Chinese restaurant keepers and on keepers of restaurants in the Fort locality belonging to other nationalities, which particulars were furnished by the respondent's attorney to the petitioners' attorneys along with the letters dated 31st March 1945, and 3rd April 1945. These particulars demonstrated that besides the two Chinese restaurants which had been already requisitioned a number of restaurants belonging to Iranis and owners of other nationalities were also requisitioned by the respondent. These statements were not challenged by the petitioners and were sufficient to prove that there was no discrimination exercised by the respondent as against the owners of the Chinese restaurants as alleged by the petitioners.

On this evidence I have come to the conclusion that the petitioners purchased the Kokwah Chinese Restaurant from the previous owners thereof together with its goodwill for a sum of Rs. 42,000 and a substantial



portion of that sum of Rs. 42,000 was paid for the goodwill of that restaurant. As to what exact sum out of the Rs. 42,000 represented the goodwill of the restaurant, it will be for whoever is concerned in the future with the determination of the value of the goodwill to consider. Suffice it to say that there was a goodwill attached to the Kokwah Chinese Restaurant and the premises occupied thereby, that the value of it was a part of the consideration of Rs. 42,000 paid by the petitioners to the previous owners thereof and that the goodwill which is attached to the premises is a distinct and valuable asset and property of the petitioners. I have also come to the conclusion that the petitioners have failed to establish that the respondent was guilty of any discrimination against the owners of Chinese restaurants and that the requisition order dated 16th February 1945, cannot be challenged at all on that ground.

There thus remain to be disposed of by me three substantial points of law which have been the subject-matter of great contest between the parties: (1) whether the enactment of S. 2 (2) (xxiv), Defence of India Act, and R. 75A, Defence of India Rules, is *ultra vires* the Central Legislature; (2) whether even if R. 75A, Defence of India Rules, is *intra vires* the powers of the Central Legislature, the requisition order dated 16th February 1945, is illegal, void and inoperative in law by reason of the respondent having no jurisdiction, power or authority to issue the same under the provisions of R. 75A, Defence of India Rules; and (3) whether the requisition order dated 16th February 1945, is illegal, void and inoperative in law as contravening the provisions of S. 15, Defence of India Act. If the answer to some or more of the above questions is in favour of the petitioners, the further question which would arise for my consideration would be (4) whether, even if the requisition order dated 16th February 1945, was illegal, void and inoperative in law on some or more of the grounds above-mentioned, the Court has power to issue an order against the respondent under S. 45, Specific Relief Act. Question 1, therefore, which I have got to consider is whether the enactment of S. 2 (2) (xxiv), Defence of India Act, and Rule 75A, Defence of India Rules, is *ultra vires* the Central Legislature. This question was very hotly contested between the parties before me and very elaborate and exhaustive arguments were addressed by both the parties to me extending over several hearings. The determination of this question depends on the construction

of the Government of India Act, 1935. It may not be out of place, therefore, to refer to the relevant provisions of the Government of India Act, 1935, which have been canvassed before me.

Part II of the Act deals with the Federation of India including in its various chapters provisions as to the Federal Executive, the Federal Legislature, the legislative powers of the Governor-General and Provisions in case of failure of Constitutional machinery. Part III of the Act deals with the Governors' Provinces including in its various chapters the provisions as to the Provincial Executive, the Provincial Legislature, the Legislative Powers of Governors and the Provisions in case of failure of Constitutional machinery. Part V of the Act deals with Legislative Powers and is important for the purposes of this petition. Section 99 therein enacts that subject to the provisions of the Act, the Federal Legislature may make laws for the whole or any part of British India or for any Federated State, and a Provincial Legislature may make laws for the Province or for any part thereof. Section 100 (1) enacts that notwithstanding anything in the two next succeeding sub-sections the Federal Legislature, has, and a Provincial Legislature has not, power to make laws with respect to any of the matters enumerated in List I in Sch. VII to the Act (hereinafter called the "Federal Legislative List"). Section 100 (2) enacts that notwithstanding anything in the next succeeding sub-section, the Federal Legislature, and, subject to the preceding sub-section, a Provincial Legislature also, have power to make laws with respect to any of the matters enumerated in List III in the schedule (hereinafter called the "Concurrent Legislative List"). Section 100 (3) enacts that subject to the two preceding sub-sections the Provincial Legislature has, and the Federal Legislature has not, power to make laws for a Province or any part thereof with respect to any of the matters enumerated in List II in the schedule (hereinafter called the "Provincial Legislative List"). These are the three lists, the Federal, the Concurrent and the Provincial Legislative Lists enacted under S. 100 of the Act which lay down the subject-matters of the Federal and the Provincial laws. Section 102 enacts that notwithstanding anything in the preceding sections of the chapter, the Federal Legislature, shall, if the Governor General has in his discretion declared by Proclamation (in the Act referred to as a "Proclamation of Emergency") that



a grave emergency exists whereby the security of India is threatened, whether by war or internal disturbance, have power to make laws for a Province or any part thereof with respect to any of the matters enumerated in the Provincial Legislative List: Provided that no Bill or amendment for the purposes aforesaid shall be introduced or moved without the previous sanction of the Governor-General in his discretion, and the Governor-General shall not give his sanction unless it appears to him that the provision proposed to be made is a proper provision in view of the nature of the emergency. Section 102 (4) enacts that a law made by the Federal Legislature which that Legislature would not but for the issue of a Proclamation of Emergency have been competent to make shall cease to have effect on the expiration of a period of six months after the Proclamation has ceased to operate, except as respects things done or omitted to be done before the expiration of the said period.

Section 104 deals with what are called the Residual Powers of Legislation. It enacts that the Governor-General may by public notification empower either the Federal Legislature or a Provincial Legislature to enact a law with respect to any matter not enumerated in any of the lists in Sch. VII to the Act, including a law imposing a tax not mentioned in any such list, and the executive authority of the Federation or of the Province, as the case may be, shall extend to the administration of any law so made, unless the Governor-General otherwise directs. It further enacts that in the discharge of his functions under the section the Governor-General shall act in his discretion. There is annexed to the Act Sch. VII which consists of the Legislative Lists, List I being the Federal Legislative List, List II being the Provincial Legislative List, and List III being the Concurrent Legislative List. These are the relevant provisions of the Government of India Act which require to be considered in this connection. It may not be out of place also to set out the relevant provisions of the Defence of India Act (35 [XXXV] of 1939) and the Defence of India Rules made thereunder. The preamble to the Defence of India Act says:

"Whereas an emergency has arisen which renders it necessary to provide for special measures to ensure the public safety and interest and the defence of British India and for the trial of certain offences :

And whereas the Governor-General in his discretion has declared by proclamation under sub-

s. (1) of S. 102, Government of India Act, 1935, that a grave emergency exists whereby the security of India is threatened by war; It is hereby enacted as follows :"

Section 2, Defence of India Act, provides :

"(1) The Central Government may, by notification in the Official Gazette, make such rules as appear to it to be necessary or expedient for securing the defence of British India, the public safety, the maintenance of public order or the efficient prosecution of war, or for maintaining supplies and services essential to the life of the community.

(2) Without prejudice to the generality of the powers conferred by sub-s. (1), the rules may provide for, or may empower any authority to make orders providing for, all or any of the following matters, namely :

\* \* \* \* \*

(xxiv) the requisitioning of any property, movable or immovable, including the taking possession thereof and the issue of any orders in respect thereof;

(4) The Central Government may by order direct that any power or duty which by rule under sub-s. (1) is conferred or imposed upon the Central Government shall in such circumstances and under such conditions, if any, as may be specified in the direction be exercised or discharged—(a) by any officer or authority subordinate to the Central Government, or (b) whether or not the power or duty relates to a matter with respect to which a Provincial Legislature has power to make laws, by any Provincial Government or by any officer or authority subordinate to such Government; or (c) by any other authority."

Section 15, Defence of India Act, enacts that any authority or person acting in pursuance of the Act shall interfere with the ordinary avocations of life and the enjoyment of property as little as may be consonant with the purpose of ensuring the public safety and interest and the defence of British India. Section 16 (1), Defence of India Act, enacts that no order made in exercise of any power conferred by or under the Act shall be called in question in any Court. Section 19, Defence of India Act, enacts that where by or under any rule made under this Act any action is taken of the nature described in sub-s. (2) of S. 299, Government of India Act, 1935, there shall be paid compensation, the amount of which shall be determined in the manner, and, in accordance with the principles, therein set out. It provides in effect for compensation to be paid in accordance with certain principles for compulsory acquisition of immovable property, etc. Rule 2 (11), Defence of India Rules, defines "requisition" as meaning in relation to any property, to take possession of the property or to require the property to be placed at the disposal of the requisitioning authority. Rule 75A, Defence of India Rules, runs as follows :



"(1) If in the opinion of the Central Government or the Provincial Government it is necessary or expedient so to do for securing the defence of British India, public safety, the maintenance of public order or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community, that Government may by order in writing requisition any property, movable or immovable, and may make such further orders as appear to that Government to be necessary or expedient in connection with the requisitioning :

Provided that no property used for the purpose of religious worship and no such property as is referred to in R. 66 or in R. 72 shall be requisitioned under this rule.

(2) When the Central Government or the Provincial Government has requisitioned any property under sub-r. (1), that Government may use or deal with the property in such manner as may appear to it to be expedient, and may acquire it by serving on the owner thereof, or where the owner is not readily traceable or the ownership is in dispute, by publishing in the Official Gazette, a notice stating that the Central or Provincial Government, as the case may be, has decided to acquire it in pursuance of this rule.

(3) Where a notice of acquisition is served on the owner of the property or published in the Official Gazette under sub-r. (2), then at the beginning of the day on which the notice is so served or published, the property shall vest in Government free from any mortgage, pledge, lien or other similar encumbrance, and the period of the requisition thereof shall end.

(4) Whenever in pursuance of sub-r. (1) or sub-r. (2) the Central Government or the Provincial Government requisitions or acquires any movable property, the owner thereof shall be paid such compensation as that Government may determine:

Provided that, where immediately before the requisition, the property was by virtue of a hire-purchase agreement in the possession of a person other than the owner, the amount determined by Government as the total compensation payable in respect of the requisition or acquisition shall be apportioned between that person and the owner in such manner as they agree upon, and in default of agreement in such manner as an arbitrator appointed by the Government in this behalf may decide to be just.

(5) The Central Government or the Provincial Government may with a view to requisition any property under sub-r. (1) or determining the compensation payable under sub-r. (4), by order—

(a) require any person to furnish to such authority as may be specified in the order such information in his possession relating to the property as may be so specified;

(b) direct that the owner, occupier or person in possession of the property shall not without the permission of Government dispose of it or where the property is a building, structurally alter it or where the property is movable remove it from the premises in which it is kept till the expiry of such period as may be specified in the order.

(5A) Without prejudice to any powers otherwise conferred by these Rules, any person authorised in this behalf by the Central Government or the Provincial Government may enter any premises and inspect such premises or any property therein or thereon for the purpose of determining whether, and, if so, in what manner, an order under this rule should be made in relation to such premises

or property or with a view to securing compliance with any order made under this rule.

(7) If any person contravenes any order made under this rule he shall be punishable with imprisonment for a term which may extend to three years or with fine or with both.

It was urged by Mr. Taraporewalla for the petitioners that the requisition of property which is the subject-matter of S. 2 (2) (xxiv), Defence of India Act, which is defined in Rule 2 (11), Defence of India Rules, and provided for in R. 75A, Defence of India Rules, is a category of legislation by itself, is not included in any of the items in the three lists of the seventh schedule to the Government of India Act and being, therefore, not within the competence of the Federal or the Provincial Legislatures would fall within the residual powers of legislation vested in the Governor-General under S. 104, Government of India Act. It is common ground that the Governor-General did not issue any public notification empowering the Federal Legislature (which by virtue of S. 316, Government of India Act, is to all intents and purposes the Central Legislature exercising those powers which are given to the Federal Legislature under S. 100, Government of India Act) to enact a law with respect to this matter of requisition of property, and it was, therefore, urged that even though the Central Legislature passed, by virtue of the proclamation of emergency made by the Governor-General under sub-s. (1) of S. 102, Government of India Act, the Defence of India Act (35 [XXXV] of 1939), the enactment of the provisions as regards requisition of property contained in S. 2 (2) (xxiv), Defence of India Act, was *ultra vires* the Central Legislature.

The Advocate-General, on the other hand, urged that in the present case he was not concerned with requisition of any movable property but was only concerned with requisition of the leasehold interest in the premises occupied by the Kokwah Chinese Restaurant, including the landlord's fittings and fixtures, which was according to him requisition of immovable property. He contended that the requisition of such immovable property was requisition of "land" which had been defined in S. 299 (5), Government of India Act, 1935, as including immovable property of every kind and any rights in or over such property, thus including within that category the leasehold interest in the said premises which were sought to be requisitioned by the respondent. He urged that the requisition of



"land" was included in Item 9 in List II of Sch. VII, which dealt with the compulsory acquisition of land and was in any event included in Item 21 in the said list which dealt with "land," that is to say, rights in or over land, land tenures, including the relation of landlord and tenant, and the collection of rents; transfer, alienation and devolution of agricultural land; land improvement and agricultural loans; colonization; Courts of Wards; encumbered and attached estates; treasure trove. He, therefore, urged that the Central Legislature had, by virtue of the proclamation of emergency under S. 102 (1), Government of India Act, the power to enact the provision with reference to requisition of land and, therefore, the enactment of S. 2 (2) (xxiv), Defence of India Act, was *intra vires* the Central Legislature. By way of preliminary observations on the method of approach which should be adopted by the Court in the determination of these rival contentions of both the sides, the Advocate-General submitted that the Government of India Act, 1935, was a Constitution Act and in the construction of that Act the Court should not approach the matter in a narrow and a pedantic sense but should give a large and liberal interpretation to the provisions of that Act. He relied upon the principles of construction which have been laid down in this behalf in various cases beginning with (1935) A. C. 500,<sup>2</sup> in which it was observed (page 518) :

"Indeed, in interpreting a constituent or organic statute such as the Act, that construction most beneficial to the widest possible amplitude of its powers must be adopted. This principle has been again clearly laid down by the Judicial Committee in (1930) A.C. 124<sup>3</sup> at p. 136. 'Their Lordships do not conceive it to be the duty of this Board—it is certainly not their desire—to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the Provinces to a great extent, but within certain fixed limits are mistresses in theirs.' 'The Privy Council, indeed, has laid down that Courts of law must treat the provisions of the British North America Act by the same methods of construction and exposition which they apply to other statutes. But there are statutes and statutes; and the strict construction deemed proper in the case, for example, of a penal or taxing statute or one passed to regulate the affairs

of an English parish, would be often subversive of Parliament's real intent if applied to an Act passed to ensure the peace, order and good government of a British Colony'."

He also relied upon the observations of the Appeal Court in (1936) A. C. 578<sup>4</sup> (p. 613) :

"The constitution has been described as the federal compact, and the construction must hold a balance between all its parts . . . it is appropriate to apply the words of Lord Selborne in (1878) 3 A.C. 889<sup>5</sup> at p.904. 'The established Court of justice, when a question arises (in regard to a constitution) whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions.'"

It is true that a Constitution must not be construed in any narrow and pedantic sense. The words used are necessarily general, and their full import and true meaning can often only be appreciated when considered, as the years go on, in relation to the vicissitudes of fact which from time to time emerge. It is not that the meaning of the words changes, but the changing circumstances illustrate and illuminate the full import of that meaning. It has been said that 'in interpreting a constituent or organic statute such as the Act [i.e., the British North America Act], that construction most beneficial to the widest possible amplitude of its powers must be adopted': 1935 A. C. 500<sup>2</sup> at p. 518."

He further relied on the case in A. I. R. 1939 F. C. 1,<sup>6</sup> in which at p. 4, col. 2, Gwyer C. J. observed that:

"The Judicial Committee have observed that a Constitution is not to be construed in any narrow and pedantic sense: per Lord Wright in 1936 A. C. 578.<sup>4</sup> The rules which apply to the interpretation of other statutes apply, it is true, equally to the interpretation of a constitutional enactment. But their application is of necessity conditioned by the subject matter of the enactment itself; and I respectfully adopt the words of a learned Australian Judge: 'Although we are to interpret the words of the Constitution on the same principles of interpretation as we apply to any ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act that we are interpreting,—to remember that it is a Constitution, a mechanism under which laws are to be made, and not a mere Act which

2. ('35) 22 A.I.R. 1935 P.C. 158: 1935 A. C. 500: 157 I. C. 571 : 104 L.J.P.C. 58 : 153 L. T. 283, British Coal Corporation v. The King.

3. ('30) 17 A.I.R. 1930 P. C. 120 : 126 I. C. 88 : 1930 A. C. 124 : 99 L. J. P. C. 27 : 142 L.T. 98, Henrietta Muir Edwards v. Attorney-General for Canada.

4. (1936) 1936 A. C. 578 : 105 L. J. P. C. 115: 155 L. T. 393, James v. Commonwealth of Australia (No. 2).

5. (1878) 3 A. C. 889 : 4 Cal. 172 : 5 I. A. 178 (P.C.), The Queen v. Burah.

6. ('39) 26 A. I. R. 1939 F. C. 1 : I. L. R. (1939) Kar F. C. 6 : 1939 F. C. R. 18 : 180 I. C. 161 (F.C.), In re C. P. Motor Spirit Act.



declares what the law is to be ;' (1908) 6 Com. L. R. 469<sup>7</sup> per Higgins J. at p. 611.

Especially is this true of a federal constitution, with its nice balance of jurisdictions. I conceive that a broad and liberal spirit should inspire those whose duty it is to interpret it; but I do not imply by this that they are free to stretch or pervert the language of the enactment in the interests of any legal or constitutional theory, or even for the purpose of supplying omissions or of correcting supposed errors. A Federal Court will not strengthen, but only derogate from its position, if it seeks to do anything but declare the law; but it may rightly reflect that a Constitution of Government is a living and organic thing, which of all instruments has the greatest claim to be construed *ut res magis valeat quam pereat*." (So as the thing should have validity rather than it should perish).

He, therefore, urged that the Court should in interpreting provisions of the Government of India Act adopt a broad and liberal construction rather than a narrow and pedantic one. The Advocate-General pointed out that the powers of the Indian Legislature were plenary powers of legislation within the limits laid down in the Government of India Act of 1935. He relied upon the observations of Lord Selborne in (1878) 3 A. C. 889<sup>8</sup> where in expressing the views of the Board his Lordship used this very significant language (p. 904):

"The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself."

He also relied on the observations of Gwyer C. J. in A. I. R. 1941 F. C. 16<sup>9</sup> at p. 24, col 2:

"... Within their own sphere the powers of the Indian Legislature are as large and ample as those of Parliament itself, (1878) 3 A. C. 889,<sup>8</sup> and the burden of proving that they are subject to a strange and unusual prohibition against retrospective legislation must certainly lie upon those who assert it,"

and also upon the observations of the same learned Chief Justice in A.I.R. 1942 F. C. 17<sup>9</sup> at p. 20, col. 2:

"... Indian Legislatures within their own sphere have plenary powers of legislation as large and of the same nature as those of Parliament itself. If that was true in 1878, it cannot be less true in 1942. Every intendment ought, therefore, to be made in favour of a Legislature which is exercising the powers conferred on it. Its enactments ought not to be subjected to the minute scrutiny which may be appropriate to an examination of the by-laws of

a body exercising only delegated powers, nor is the generality of its power to legislate on a particular subject to be cut down by the arbitrary introduction of far-fetched and impertinent limitations."

The Advocate-General further pointed out that the scope of the powers granted by the Government of India Act, 1935, to the Indian Legislature, even though they were plenary within their own spheres, was to be found in the three Legislative Lists of Sch. VII to the Act. As to the nature of those lists he relied upon the observations contained in an extract from the White Paper where Sir Samuel Hoare is reported to have stated as follows:

"But the only bridge that we could find between these two diametrically opposite points of view was to have three lists, namely, the Federal List, the Provincial List and the Concurrent List, each as exhaustive as we could make it, so exhaustive as to have little or nothing for the residuary field. I believe that we have succeeded in that attempt and that all that is likely to go into the residuary field are perhaps some quite unknown spheres of activity that neither my Hon. friend nor I can contemplate at this moment. We find that we have really exhausted the ordinary activities of Government in the three other fields. I agree with my Hon. friend that it means complications. I believe that it also means the possibility of increased litigation."

Besides this extract from the White Paper he also relied upon the observations of Gwyer C. J. in A.I.R. 1941 F.C. 16<sup>9</sup> at p. 25, col. 1:

"Parliament seems to have been content to take a number of comprehensive categories and to describe each of them by a word of broad and general import. In the case of some of these categories, such as 'Local Government,' 'Education,' 'Water,' 'Agriculture' and 'Land,' the general word is amplified and explained by a number of examples or illustrations, some of which would probably on any construction have been held to fall under the more general word, while the inclusion of others might not be so obvious. Thus 'Courts of Wards' and 'treasure-trove' might not ordinarily have been regarded as included under 'Land,' if they have not been specifically mentioned in Item 21. I think, however, that none of the items in the lists is to be read in a narrow or restricted sense, and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it."

He also relied upon the observations of Sulaiman J. in A. I. R. 1941 F. C. 47<sup>10</sup> p. 54, col. 1:

"No doubt, every effort appears to have been made to make the three lists as comprehensive and exhaustive as well as exclusive as possible; and it may well be that barring personal or customary laws, it would only be extremely rare cases which would not come in any one of these three lists so as to fall within the residual powers of legislation dealt with by S. 104 of the Act. Nevertheless, in view of the large number of items in the three lists, it is almost impossible to prevent a certain amount

7. (1908) 6 Com. L. R. 469, Attorney General for New South Wales v. Brewery Employees Union.

8. ('41) 28 A. I. R. 1941 F. C. 16 : I. L. R. (1941) Kar F. C. 72 : 1940 F. C. R. 110 : 192 I. C. 138 (F.C.), United Provinces v. Mt. Atiqah Begum.

9. ('42) 29 A. I. R. 1942 F. C. 17 : 21 Pat. 587 : I.L.R. (1942) Kar F. C. 21 : 199 I. C. 322 (F.C.), Bhola Prasad v. Emperor.

10. ('41) 28 A.I.R. 1941 F. C. 47 : I. L. R. (1941) Kar. F. C. 25 : 1940 F. C. R. 188 : 192 I. C. 225 (F. C.), Subramanyan v. Muttuswami.



of overlapping. Absolutely sharp and distinct lines of demarcation are not always possible. Rigid and inflexible watertight compartments cannot be ensured. . . . To avoid such difficulties the Imperial Parliament has thought fit to use the expression 'with respect to' which obviously means that looking at the legislation as a whole, it must substantially be with respect to matters in one list or the other. A remote connexion is not enough."

He further relied upon the observations of Gwyer C. J. in A. I. R. 1942 F. C. 17<sup>9</sup> (p. 19, col. 2):

"The words . . . explain or illustrate and do not amplify or limit the words immediately preceding them and cover the whole field of possible legislation on the subject."

To the same effect were the observations of their Lordships of the Privy Council which were relied upon by him in (1945) 8 F. L. J. 69,<sup>11</sup> where Lord Simonds who delivered the judgment of the Board observed (p. 72):

"The Indian Constitution is unlike any that have been called to their Lordships' notice in that it contains what purports to be an exhaustive enumeration and division of Legislative powers between the Federal and Provincial Legislatures."

On the basis of these authorities he urged that the lists of Sch. VII to the Government of India Act were exhaustive and should be read as comprising each and every legislative power which could possibly be exercised by the Indian Legislature. He also urged that the residual powers of legislation vested in the Governor-General under S. 104, Government of India Act, should not be resorted to unless and until all the categories in the lists were absolutely exhausted. In that behalf he relied upon the observations of Gwyer C. J. in A. I. R. 1939 F. C. 1<sup>6</sup> (p. 5, col. 1) that the attempt to avoid a final assignment of residuary powers by an exhaustive enumeration of legislative subjects has made the Indian Constitution Act unique among federal Constitutions in the length and detail of its Legislative Lists. He also relied upon the observations of Sulaiman J. in A. I. R. 1941 F. C. 47<sup>10</sup> (p. 55, col. 1):

"But resort to that residual power should be the very last refuge. It is only when all the categories in the three lists are absolutely exhausted that one can think of falling back upon a *nondescript*."

He, therefore, contended that the power to requisition immovable property should be read by the Court as having been included in Item 9 or in any event Item 21 in List II, Sch. VII to the Government of India Act. The Advocate-General further urged that in the matter of the construction of the Constitution Act like the Government of

India Act, 1935, regard should be had to the legislative practice prevailing in England as well as in India in order to determine what is ordinarily treated as embraced within a particular topic or category of legislation. He relies upon the observations of the Privy Council in (1933) A. C. 156<sup>12</sup> in which their Lordships have observed (p. 165):

"When a power is conferred to legislate on a particular topic it is important, in determining the scope of the power, to have regard to what is ordinarily treated as embraced within that topic in legislative practice and particularly in the legislative practice of the State which has conferred the power."

He also relied upon the observations of Beaumont C. J. in 42 Bom. L. R. 10<sup>13</sup> where the learned Chief Justice observed (p. 45):

"In construing the Government of India Act, 1935, the Court is entitled to look to the legislative practice prevailing in England and in India at the time when it was passed."

Mr. Taraporewalla for the petitioners, however, urged that though the Government of India Act was a Constitution Act and a large and liberal interpretation should be given to the terms thereof, that canon of construction did not abrogate the other canon of construction which was equally well-known and which has been enunciated by Maxwell on the Interpretation of Statutes, Edn. 8, at p. 248:

"The tendency of modern decisions, upon the whole, is to narrow materially the difference between what is called a strict and a beneficial construction. All statutes are now construed with a more attentive regard to the language, and criminal statutes with a more rational regard to the aim and intention of the Legislature, than formerly. It is unquestionably right that the distinction should not be altogether erased from the judicial mind, for it is required by the spirit of our free institutions that the interpretation of all statutes should be favourable to personal liberty, and this tendency is still evinced in a certain reluctance to supply the defects of language, or to eke out the meaning of an obscure passage by strained or doubtful inferences. The effect of the rule of strict construction might almost be summed up in the remark that, where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject and against the Legislature which has failed to explain itself. But it yields to the paramount rule that every statute is to be expounded according to its expressed or manifest intention and that all cases within the mischiefs aimed at are, if the language permits, to be held to fall within its remedial influence. . . . Statutes which encroach on the rights of the subject whether as regards person

12. ('33) 20 A. I. R. 1933 P. C. 16 : 143 I. C. 91 : 1933 A. C. 156 : 102 L. J. P. C. 6 : 148 L. T. 62 (P.C.), *Croft v. Dunphy*.

13. ('40) 27 A. I. R. 1940 Bom. 65 : I.L.R. (1940) Bom. 58 : 186 I. C. 817 : 42 Bom. L. R. 10 (F.B.), *Sir Byramjee Jeejeebhoy v. Province of Bombay*.

11. ('45) 32 A. I. R. 1945 P. C. 98 : I.L.R. (1945) Kar. P. C. 153 : 72 I. A. 91 : 220 I. C. 143 : 1945-8 F. L. J. 69 (P.C.), *Governor-General in Council v. Province of Madras*.



or property, are similarly subject to a strict construction in the sense before explained. It is a recognised rule that they should be interpreted, if possible, so as to respect such rights. It is presumed, where the objects of the Act do not obviously imply such an intention, that the Legislature does not desire to confiscate the property, or to encroach upon the right of persons, and it is, therefore, expected that, if such be its intention, it will manifest it plainly, if not in express words, at least by clear implication and beyond reasonable doubt."

He urged that the canon of construction which warrants a large and liberal construction to be put on the provisions of the Constitution Act should be modified by the canon which enjoins the Courts to adopt a strict construction in respect of enactments which provide for confiscation of property and encroach upon the rights and liberties of the subject and that the Courts should not adopt such a construction unless and until the intention of the Legislature in that behalf was plainly manifest if not in express words, at least by clear implication and beyond reasonable doubt. He further urged that it was one of the cardinal principles of British jurisprudence that no person should be deprived of his property save by authority of law and that the Legislature should not enact any laws authorising the confiscation of the property of the subject unless due provision was made for compensation to be rendered to the subject for such deprivation of his property. He relied in this behalf on the provisions of S. 299 (1) and (2) of the Government of India Act which he submitted were a statutory enactment of these principles of British jurisprudence. He did not dispute that the Imperial Parliament had supreme and plenary powers to legislate on any subject whatever and in any manner whatever, so as to deprive a subject of the liberty of person as well as his rights of property. He, however, submitted that there was in this respect a distinction between the powers of the Imperial Parliament and those of the Indian Legislature that whereas there were no limitations to the legislative powers of the Imperial Parliament, the powers of the Indian Legislature were circumscribed within the lists of the seventh schedule to the Government of India Act, and that even though the powers conferred on the Indian Legislatures within their own spheres were plenary, the same were also circumscribed by the salutary provisions contained *inter alia* in S. 299 (1) and (2) of the Government of India Act hereinbefore referred to. He also contended that at no time had such a claim to confiscate the property

of the subject been ever put forward before, either by the Indian Legislature or by the Government of India and it was only as an act of State that the Government could deprive or confiscate the property of the subject; if it did not amount to an act of State, it was open to the subject to challenge the whole action of the Government which deprived him of his rights of property. He, therefore, urged that having regard to these principles of construction which were pointed out by him, the Court should read the items in the lists of the seventh schedule to the Government of India Act in such manner as would not warrant the confiscation of the property of the subject by the Government or give the Legislature power to enact provisions with regard thereto.

Mr. Taraporewalla further urged that even though the lists of the seventh schedule to the Government of India Act might have been thought quite exhaustive by the framers of the Act as shown from the extract of the White Paper which was referred to by the Advocate-General and even though the lists contained topics or categories of legislation which were to be read in a large and liberal and not a narrow or restricted sense, the rule of interpretation of those lists which should be adopted was that these topics or categories of legislation should be so construed as only to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprised in the same. Though S. 100, Government of India Act, gave to the Federal and the Provincial Legislatures the power to make laws with respect to the matters enumerated in the respective lists therein referred to, the words "with respect to" obviously meant that looking at the legislation as a whole it must substantially be with respect to matters comprised in the items in those lists. A remote connection was not enough. He pointed out that even though it was the intention of the framers of the Act and the fond hope which they entertained as shown from the extract from the White Paper above referred to that all possible categories of legislation had been exhausted in those lists, there had been several occasions after 1939 when fresh topics of legislation which were not comprised in those lists were inserted in those lists by way of amendments or additions thereto. He also pointed out that those lists, however exhaustive they might be, were, admittedly, within the terms of the extract from the White Paper, concerned with the *ordinary*



activities of the Government, and requisitioning of property could not be one of the ordinary activities of the Government ever contemplated by the framers of the Government of India Act. He, therefore, urged that there was no justification for including the requisition of land in Item 9 in List II of the seventh schedule to the Government of India Act or Item 21 in the list, as requisitioning was not an ancillary or subsidiary matter which could fairly and reasonably be said to be comprised in the items but was remotely connected with the topics of legislation therein contained. Mr. Taraporewalla also urged that the residual power of legislation which was vested in the Governor General under the terms of S. 104, Government of India Act, was not a mere non-descript as stated in the judgment of Sulaiman J. in A. I. R. 1941 F. C. 47<sup>10</sup> at p. 55. There were various topics of legislation which could not be thought of by the framers of the Act as comprised in the ordinary activities of the Government, and would have to be dealt with when emergency arose such as the present war which necessitated considerable encroachment on the liberties of the subject and his rights of property. When occasion arose for such emergency legislation it would be but natural to find that the particular powers which were sought to be acquired by the Government to meet the emergency might not be covered by the items in the lists of the seventh schedule to the Government of India Act. Special measures might have to be enacted to meet the needs of the situation, and apart from the instances cited by Mr. Taraporewalla where the lists having been found wanting, certain amendments had got to be made either to the lists or to the definitions contained in the Act, the residual power of Legislature might have to be exercised by the Governor General under S. 104, Government of India Act. He, therefore, contended that the resort to the residual power of legislation vested in the Governor General under S. 104, Government of India Act, was not merely a remote possibility as contended by the Advocate General but was a living reality, and the same could certainly be invoked in times of emergency like the present war in order to invest in the Government powers of requisitioning of property and other like powers which would encroach upon the liberties of the subject and his rights of property in times of such emergency.

Mr. Taraporewalla did not dispute that legislative practice was no doubt one of the

guides in the construction of the provisions of the Government of India Act and the items in the lists of the seventh schedule to the Act as contended by the Advocate General. These are the points of view which, it was urged by the Advocate General and Mr. Taraporewalla, should be adopted by the Court in considering the question whether the enactment of S. 2 (2) (xxiv), Defence of India Act, and R. 75A, Defence of India Rules, is *ultra vires* the Central Legislature. There is no doubt on the authorities cited before me that the Imperial Parliament is supreme and has powers to enact laws affecting the liberty of person and the rights of property enjoyed by the subject in any manner whatever. The Imperial Parliament has got the power to deprive a subject of his liberty of person and also of his rights of property in any manner whatever without assigning any reason whatsoever or without making any compensation for the same. When, however, one comes to the powers granted to the Indian Legislature under the Government of India Act, 1935, the powers which are conferred on the Indian Legislature under the terms of that Act are circumscribed within the items in the lists of Sch. VII to the Act, though the powers of the Indian Legislature to make laws with respect to the items in those lists are plenary within their own sphere. In the exercise of those powers to make laws with respect to those items the Indian Legislature does not act as an agent of or exercise any delegated authority from the Imperial Parliament. It exercises plenary powers, as full powers as the Parliament itself could exercise with respect to the items in those lists. Even though those lists may have been meant to be as exhaustive and comprehensive as human ingenuity could make them, they were meant to comprise all that could be thought of as within the *ordinary* activities of the Government. Even though the emergency like the present war could well have been within the contemplation of the framers of the Constitution Act, there is no doubt that such powers as may have to be exercised in the case of such emergency could not have been contemplated to have been included in the items in those lists. Such powers as may have to be exercised by the Government according to the exigencies of the situation would have to be given to the Indian Legislature having due regard to the development of the situation from time to time and the exigencies of the situation and certainly could not have been forethought when the framers of the Govern-



ment of India Act put down the enumeration of the topics or categories of legislation in the lists of the seventh schedule to the Government of India Act.

Even with regard to the ordinary activities of the Government, it was not humanly possible to exhaust all categories of legislation, with the result that as evidenced by the enactment of the India and Burma (Miscellaneous Amendment) Act of 1940 (3 & 4 Geo. VI, c. 5) which effected the amendment of the definition of "taxation" in S. 311 (2), Government of India Act, and the addition of Items 48 (a) and 48 (b) in the items contained in the Federal Legislative List as also certain amendments in the Provincial and the Federal Legislative Lists by reason of the inclusion of the Universities in the category of 'Education' and also by the enactment of the Indian Estates Duties Act of 1945 (8 & 9 Geo. VI, c. 7) and the insertion of Item 56 (a) in the Federal Legislative List and Item 45 (a) in the Provincial Legislative List in the lists of the seventh schedule to the Government of India Act by reason of the decision given by the Federal Court in 1944-7 F. L. J. 215 : A. I. R. 1944 F. C. 73,<sup>14</sup> in regard to the estate duty proposed to be levied by the Government of India, these lists, which were fondly hoped by the framers of the Government of India Act to be as exhaustive and comprehensive as possible, were found not to be absolutely so. If that is the position, it is but consonant with reason that the emergency powers sought to be given to the Government by the enactment of the provisions of the Defence of India Act by the Central Legislature, even though that was done in pursuance of a proclamation issued by the Governor-General in that behalf, could not have been at all contemplated by the framers of the Government of India Act when the lists of Sch. VII came to be compiled by them. That is the real reason why the residual powers of legislation were vested in the Governor-General under the terms of S. 104, Government of India Act. In spite of the fond hope entertained by the framers of the Government of India Act that only personal laws and some rare items of legislation would have to be covered by the provisions of the residual powers of legislation invested in the Governor-General under the terms of S. 104, Government of India Act, such powers

as had to be invested in the Government by reason of the emergency which was brought about by the present war could not all have been contemplated and included in the topics or categories comprised in the items in the lists of Sch. VII to the Act.

If, as I have already observed, the lists of Sch. VII, Government of India Act, were not as exhaustive and comprehensive as were intended by the framers of the Act to be, it remains to be seen how far the power of requisition of land can be said to have been comprised in Item 9 or in Item 21 in List II, sch. VII, Government of India Act. In this behalf I may observe that I entirely agree with Mr. Taraporewalla as regards his submission on the method of approach and the canons of construction which should be adopted in the interpretation of the Constitution Act like the Government of India Act. I am of opinion that the canon of construction which warrants a large and liberal construction to be put upon the various provisions of the Government of India Act should be modified by the canon of construction which lays down that a strict construction should be put upon those provisions which go to curtail the liberties of the subject or impose burdens and obligations upon him. If this principle of interpretation be adopted, it is abundantly clear that the items in the lists of Sch. VII, Government of India Act, should not be so construed as to deprive the subject of his liberties or to impose burdens or obligations upon him beyond those which are warranted by the words used therein in spite of the items contained in those lists being read as extending to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in the same. Before one can read a power like the requisition of land in Item 9 which relates to compulsory acquisition of land or Item 21 which relates to land with the amplification or explanation thereof contained in the latter part of that category, one should have due regard to the principles of British jurisprudence which, as I have already stated, have been enacted in S. 299 (1) and (2), Government of India Act, and should as far as possible avoid a construction which runs counter to those salutary provisions of the Act. If regard be had to these principles of interpretation in regard to the construction of the provisions of the Government of India Act and the items in the lists of Sch. VII thereto, it would, in my opinion, require considerable stret-

14. ('44) 31 A. I. R. 1944 F. C. 73: I.L.R. (1944) Kar F.C. 130: 1944 F. C. R. 317: 1944-7 F.L.J. 215 : 220 I. C. 162 (F. C.), In re Powers of Federal Legislature to levy Estate Duty.



ching of words which is not justified by the various considerations to which I will advert hereafter, to read that requisition of land is included either in Item 9 or Item 21, in List II of Sch. VII, Government of India Act. Before I proceed with those considerations, I may here dispose of one argument which was advanced by the Advocate General that S. 299 (1) and (2), Government of India Act, did not give statutory recognition to the general principles of British jurisprudence which I have referred to above but merely enacted the limitations on the legislative powers invested by the Government of India Act in the Indian Legislature. He pointed out that that provision was to be found enacted in Part XII of the Act which dealt with Miscellaneous and General items and was under the heading of "Provisions as to certain legal matters" which commenced with S. 292 of the Act. This argument, however, ignores the fact that the Government of India Act had dealt with restrictions on legislative powers in Chap. II of Part V thereof commencing with S. 108 of the Act, and that there was no question of laying down any further restriction on the same in Part 12 thereof commencing with S. 292 of the Act. What was sought to be enacted under that heading and by the sections commencing with S. 292 of the Act were not restrictions on the powers of the Legislature but were certain fundamental principles of British jurisprudence, international law, His Majesty's prerogative to grant pardons, remissions of punishments and the like which should not be in any manner whatsoever affected or departed from in the exercise of the legislative powers invested in the Indian Legislature under the terms of the Government of India Act. Examples of this are to be found, *inter alia*, in the provisions of S. 298 (1), S. 299 (1) and (2), Government of India Act, which are not merely restrictions on the legislative powers of the Indian Legislature but are in reality the statutory recognition of the fundamental principles of British jurisprudence enacted therein.

I now proceed to consider how far requisition is included in the conception of acquisition. If one has regard to the dictionary meaning of the word "acquisition" it has been defined in the Oxford English Dictionary as: (1) Action of acquiring: *see* Acquire; and (2) A thing acquired or gained. The verb "Acquire" in its turn has been defined as: (1) To gain, or get as one's own (by one's exertions or qualities); and (2) To

receive, to come into possession of. The word "Requisition," on the other hand, has been defined as: (1) (a) The action of requiring: a demand made by a person; (b) A requirement, necessary condition; (2) The (or an) action of formally requiring one to perform some action, discharge some duty, etc.; the fact of being so called upon. Also, a written demand of this nature; (3) The action of requiring a certain amount or number of anything to be furnished; a demand or order of this nature, especially one made upon a town, district, etc., to furnish or supply anything required for military purposes; (4) The state or condition of being called or pressed into service or use, the last two meanings being in consonance with the idea of requisition of property for the purposes of the State or for military purposes. This is the dictionary meaning attached to the words "Acquisition" and "Requisition." Even though the second part of the definition of the verb "Acquire" gives an impression that the receiving or coming into possession of a thing may, apart from the gaining or getting it as one's own, be included in the word "Acquisition," the central idea in the word "Acquisition" is that whatever rights a person acquires in the thing which is the subject-matter of such acquisition are proprietary rights in the same, whereas the central idea in the word requisition is that the person requiring the thing requires it for his own use or for some particular purpose, as is amply illustrated by the dictionary meaning of the word "Requisition" which defines it as: (1) (a) to require (anything) to be furnished for military purposes; to put in requisition; (b) to make demands upon (a town, etc.); (2) (a) to make requisition for; to demand, call for, request to have or get; and (b) to call in for some purpose. This dictionary meaning, therefore, of the words "Acquisition" and "Requisition" does not carry the matter any further. When we go, however, to consider the decided cases on the point, so far as the word "Acquisition" is concerned, we find it used only in the sense of the compulsory acquisition of land which is enacted in the Land Acquisition Act, 1 [I] of 1894, or the compulsory purchase of land which is known to English law. As regards the word "Requisition," we have a consideration of the same in (1925) P 61,<sup>15</sup> where the following observations have been made (p. 65):

"The next question is as to requisition. The effect of requisition may be of the most various

15. (1925) 1925 P. 61; 94 L. J. P. 37 : 132 L. T. 750, *The Meandros*.



kinds. It is not an operation of stereotyped form. Requisition is not a term of art. It is barely more than a colloquial expression which has come into use during recent years. It has some connection with a term with which English people became familiar twenty-five years ago—the term ‘commandeering.’ A requisition is a process by which the State takes the use or the possession of, or the property in, chattels, and sometimes in land. But it is infinitely various. If, for instance, a stack of hay is requisitioned, it is requisitioned to be consumed; if premises are requisitioned they are requisitioned to be occupied; and if a ship is requisitioned it may be requisitioned for the purpose of being sent to sea, or sunk at the mouth of a harbour, or for a purpose which is satisfied the next day . . . The possession of the vessel and the control of her passed for the time being; . . . The property in her did not pass. It is obvious, upon the facts being examined, that the owners of the *Meandros* never were disseised, in the technical sense, of property in her. All they were deprived of for the time being was the use and possession of her.”

A consideration of the whole of the passage above referred leads to the conclusion that requisition was there taken to be a deprivation of the owners of the property for the time being of the use and possession thereof. It was not understood in the sense of the acquisition of ownership in the property or the rights in or over such property. This case in (1925) P. 61<sup>16</sup> was considered in (1927) 1 K. B. 458<sup>16</sup> where Wright J. observed (pages 464-465) :

“‘Requisition’ so used in para. 25 means, in my judgment, some effective and positive dominion or control constituted by a definite order given under the regulations . . . To amount to a requisition the direction must, I think, . . . amount to a requirement that the vessel be placed at the disposal of the Government . . . The word ‘requisition’ appears from the Oxford Dictionary to have been adopted from the French, and as early as 1837 was used by Carlyle as meaning ‘to require anything to be furnished for military purposes.’ It came, however, into official prominence during the Great War and, in particular, was employed in the Proclamation by the Admiralty dated 3rd August 1914, in connexion with the requisition and taking up of British vessels; it was employed in several of the War Emergency Regulations, especially Art. 39 B B B, and in the Indemnity Act, 1920 S. 2, sub-s. (1), and Schedule, Part I, . . . Pickford L. J. . . . when Master of the Rolls, again discussed the meaning of the word in 7 Ll. L. Rep. 226,<sup>17</sup> . . . He obviously would regard as a requisition a case where the Government having taken possession of a cargo kept it in the ship at their disposal, . . .”

These observations again lead to the conclusion that the word “requisition” was understood to mean a dominion or control of the property and not the acquisition of rights of ownership therein. The Advocate-General

in this connection drew the attention of the Court to a decision of the High Court of Australia on appeal from the Supreme Court of New South Wales reported in 68 Com. L. R. 261<sup>18</sup> which he contended was on all fours with the present case. The authority of the decisions of Australian and Canadian Courts was considered by Gwyer C. J. in A.I.R. 1939 F. C. 1<sup>6</sup> (p. 5, col. 1) :

“The decisions of Canadian and Australian Courts are not binding upon us, and still less those of the United States, but, where they are relevant, they will always be listened to in this Court with attention and respect, as the judgments of eminent men accustomed to expound and illumine the principles of jurisprudence similar to our own; and if this Court is so fortunate as to find itself in agreement with them, it will deem its own opinion to be strengthened and confirmed. But there are few subjects on which the decisions of other Courts require to be treated with greater caution than that of federal and provincial powers, for in the last analysis the decision must depend upon the words of the Constitution which the Court is interpreting; and since no two Constitutions are in identical terms, it is extremely unsafe to assume that a decision on one of them can be applied without qualification to another. This may be so even where the words or expressions used are the same in both cases; for a word or a phrase may take a colour from its context and bear different senses accordingly.”

I will, therefore, approach a consideration of the decision cited by the Advocate-General, reported in 68 Com. L. R. 261,<sup>18</sup> with due regard to the observations set out above. In that case the question for the consideration of the High Court was whether the taking under Reg. 54 of the National Security (General) Regulations by the Commonwealth for an indefinite period of the exclusive possession of property constituted an acquisition of property within the meaning of S. 51 (xxxi) of the Constitution, and whether Reg. 60H of the National Security (General) Regulations did not provide just terms within the meaning of S. 51 (xxxi) of the Constitution in respect of such a taking of possession by the Commonwealth. The facts of the case were that on 12th May 1942, certain vacant land owned by the Bank of New South Wales which had been in the occupation of one Arthur Dalziel as a weekly tenant at a rental of £8 per week from the Bank and had been used as a car-parking station for about 13 years by him was requisitioned and taken possession of by the Quartermaster-General for the Commonwealth by virtue of Reg. 54 of the National Security (General) Regulations pursuant to a notice in writing dated 5th May 1942. The notice directed the Quartermaster, United

16. (1927) 1 K. B. 458 : 96 L. J. K. B. 144 : 136 L. T. 358, *France Fenwick & Co. v. The King*.

17. 7 Ll. L. Rep. 226, *Bombay & Persia Steam Navigation Co. v. Shipping Controller*.

18. 68 Com. L. R. 261, *Minister of State for the Army v. Dalziel*.



States Armed Forces in Australia, to occupy the land and authorised him to do in relation to the land anything which any person having an unencumbered interest in the fee simple in the land would be entitled to do by virtue of that interest and provided that, while the land remained in possession of the Commonwealth, no person should exercise any right of way over the land or any other right relating thereto, whether by way of an interest in land or otherwise. There was correspondence between the solicitors of Arthur Dalziel and the Deputy Assistant Director of Hirings in regard to the compensation payable to him in respect of such requisitioning. The Central Hirings Committee determined certain compensation as payable to Dalziel which he refused to accept, forwarding his claim for compensation to a Compensation Board which in its turn found that Dalziel was entitled to compensation, but that the basis set out in the Basis of Compensation Order made under Reg. 60H did not provide just terms. The Board did not make any allowance for loss of profits and fixed the amount of profits as £197 as full compensation, comprising 13 weeks at £8 per week in lieu of reasonable notice to quit, £104; goodwill £91; and for removal of fixtures £2, refusing to allow any additional amount for future or other rental. Dalziel applied to the Supreme Court of New South Wales in accordance with S. 60G for a review of the assessment made by the Compensation Board on the ground that he was entitled to more compensation than the amount awarded by the Board. A similar application was made by the Minister of State for the Army, on the ground that Dalziel was not entitled to any compensation in addition to that offered by the Central Hirings Committee. Upon preliminary points of law Roper J. held that the right to the possession of the land conferred upon the Commonwealth by Reg. 54 of the National Security (General) Regulations was an acquisition of property within the meaning of S. 51 (xxxi) of the Constitution, so that the Commonwealth could only take possession of the land under the regulation on just terms, that Reg. 60H did not provide just terms and, therefore, it was *ultra vires*, and that the compensation payable should, therefore, be determined without regard to the Basis of Compensation Order made by the Minister on 23rd March 1942, as amended, and under the ordinary established principles of the law of compensation for the compulsory taking of pro-

perty. From this decision the Minister appealed, by special leave, to the High Court. The matter came on for hearing before a Bench constituted by Latham C.J., Rich, Starke, McTiernan and Williams JJ. The majority of the Court (Latham C. J. dissenting) held that the taking under Reg. 54 of the National Security (General) Regulations by the Commonwealth for an indefinite period of the exclusive possession of the property constituted an acquisition of property within the meaning of S. 51 (xxxi) of the Constitution. Latham C. J., however, in his dissenting judgment held that the taking of possession of land under such an authority as that conferred by Reg. 54 was different in legal significance from any acquisition of an interest in the land. Latham C. J. observed:

"In the present case, the Commonwealth has not acquired any interest of any kind in the land, that it has not acquired any interest either from the owner of the fee simple or from the tenant and that the possession of the Commonwealth may, I think, properly be described as that of a licensee whose rights are defined by the Regulations."

The ratio of that decision of Latham C. J. is very important for the purpose of the decision in the present case, and I fully endorse the same. The learned Chief Justice in the course of his decision observed:

"Sub-regulations 1 and 2 again emphasize the assumption made by the Regulations as a whole, namely, that there is a distinction between acquisition of property and other acts which may be done by virtue of the Regulations, including taking possession and user of land which may cause loss or damage to persons interested in property. . . . It has already been shown that the Regulations proceed upon the basis that the taking possession of land under the Regulations does not amount to the acquisition of land. The National Security Act is based upon the same assumption. Section 5 of that Act provides that 'the Governor General may make regulations for securing the public safety and the defence of the Commonwealth and the Territories of the Commonwealth, and in particular . . . (b) for authorizing—(i) the taking of possession or control, on behalf of the Commonwealth, of any property or undertaking; or (ii) the acquisition, on behalf of the Commonwealth, of any property other than land' . . ."

[See the same provisions in the Emergency Powers (Defence) Act, 1939 (2 & 3 Geo. VI, c. 62, S. 1 (2) (b) (i) and (ii). And see also the Compensation (Defence) Act, 1939 (2 & 3 Geo. VI, c. 75 S. 1). The distinction between (i) and (ii) is the distinction between taking of possession of property and the acquisition property.]

"In the present case the question arises as to the acquisition of land. The Commonwealth cannot be said to have acquired land unless it has become the owner of land or of some interest in land. If the Commonwealth becomes only a possessor but does not become an owner of land, then, though



the Commonwealth may have rights in respect to land, which land may be called property, the Commonwealth has not in such a case acquired property . . . Accordingly, in my opinion, the facts that the right to possession is the most valuable attribute of ownership, that possession is *prima facie* evidence of ownership, and that possession may develop into ownership, do not justify any identification of possession with ownership, but, on the contrary, emphasize the distinction between the two ideas. The fact that the Commonwealth is in possession of land as a result of action under the Regulations does not show that the Commonwealth has become the owner of the land or of any estate in the land . . . The rights of the Commonwealth are to take and remain in possession of the land and to use it for purposes of defence. In such use, but only for the purposes of such use, the Commonwealth has the rights of an owner in fee simple. The Commonwealth can, at will, give up possession at any time. The rights of the Commonwealth, by reason of the terms of the National Security Act, S. 19, cannot last for longer than the war and six months afterwards. In my opinion the Commonwealth is unable to alienate these rights so as to entitle any other person to enjoy them. The right is limited to a right to the Commonwealth to use the land for defence purposes, and such a right cannot be transferred to any other person. The mode of such use may be as determined by the Commonwealth, but any use must be by or on behalf of the Commonwealth. The right may be said to be personal to the Commonwealth. The only question is, as I have already said, whether these rights are proprietary rights. That which can be owned in respect of land is, as already stated, an estate. The Minister has not an estate in fee simple or any lesser freehold estate, nor, in my opinion, has he a chattel interest. The Bank of New South Wales is still the owner of the land and Dalziel is still the tenant under a weekly tenancy. No other tenancy has been created and there has been no assignment of Dalziel's tenancy. The Commonwealth is, in my opinion, in the position of a licensee with rights as stated in the regulation . . . In the present case the rights of the Commonwealth to use land for purposes of defence are created, not by contract, but by action taken by the Commonwealth under the Regulations. But the rights so created are, in my opinion, of the same character as those which were created in the cases cited—they are inalienable personal rights and the Commonwealth is not a grantee of property but a licensee. Such personal rights are not proprietary rights."

After having come to that conclusion on grounds of general reasoning, the learned Chief Justice came to the conclusion that the taking of possession of land under the regulations did not amount to the acquisition of an interest in land so as to bring about an acquisition of property within the meaning of S. 51 (xxxi) of the Constitution. The learned Chief Justice further supported his reasoning that there was a real difference between, on the one hand, taking possession of land for a temporary purpose under those particular regulations, and, on the other hand, the acquisition of land, by reference to similar statutes and decisions

of the Courts thereon. He referred to the cases in (1920) A. C. 508,<sup>19</sup> (1915) 3 K. B. 649;<sup>20</sup> (1920) 1 K. B. 680;<sup>21</sup> (1922) 2 A. C. 180,<sup>22</sup> (1921) 3 K. B. 183<sup>23</sup> and (1942) 1 K. B. 375<sup>24</sup> and also the provisions of the Defence Act, 1842 (5 & 6 Vic. c. 94, s. 16), the Defence of the Realm Consolidation Act, 1914 (5 Geo. V, c. 8), and the Emergency Powers (Defence) Act, 1939, made thereunder, and reached the conclusion that the authorities to which he had referred showed in his opinion that the taking of possession of land under such an authority as that conferred by Reg. 54 was different in legal significance from any acquisition of an interest in land. The learned Chief Justice reiterated his conclusion:

"In the present case the Commonwealth has not acquired any interest of any kind in the land. It has not acquired any interest either from the owner of the fee simple or from the tenant. The possession of the Commonwealth may, I think, properly be described as that of a licensee whose rights are defined by the Regulations."

I have quoted these passages from the judgment of Latham C. J. *in extenso* for the simple reason that, in my opinion, they throw a flood of light on the question which I have to decide in the present case as to whether the requisition of land is included in the item of compulsory acquisition of land in Item 9 in List II of Sch. VII, Government of India Act. As I have already stated, I perfectly endorse the ratio of that decision which was reached by Latham C. J. The other learned Judges who delivered the majority judgment of the High Court in that case were mainly guided by the consideration that if they came to the conclusion that the requisition of land in that case was not an acquisition of land within the meaning of S. 51 (xxxi) of the Constitution, Dalziel would not on their construction of Reg. 60H of the National Security (General) Regulations and the Basis of Compensation Order made thereunder be able to get proper compensation in respect of the requisition of his land by the Commonwealth. The learned Judges, therefore, appear to have

19. (1920) 1920 A. C. 508 : 89 L. J. Ch. 417 : 122 L. T. 691, Attorney-General v. De Keyser's Royal Hotel.

20. (1915) 3 K. B. 649 : 84 L. J. K. B. 1961 : 113 L. T. 575, A Petition of Right, *In re*.

21. (1920) 1 K. B. 680 : 89 L. J. K. B. 126 : 122 L. T. 540, Whitehall Court, Limited v. Ettlinger.

22. (1922) 2 A. C. 180 : 91 L. J. K. B. 593 : 127 L. T. 247, Matthey v. Curling.

23. (1921) 3 K. B. 183 : 90 L. J. K. B. 1177 : 125 L. T. 675, Robinson & Co. v. The King.

24. (1942) 1 K. B. 375 : 111 L. J. K. B. 185 : 166 L. T. 87 : 1942-1 All E. R. 126, Swift v. Macbean.



stretched the point in favour of Dalziel and held that the exclusive possession of the property which was taken by the Commonwealth was, together with the rights created in the Commonwealth under the terms of the notice dated 5th May 1942, closely analogous to, though not identical with, compulsory acquisition of land, and was, therefore, an acquisition of property within the meaning of S. 51 (xxxi) of the Constitution. I respectfully dissent from the reasoning adopted by the majority of the learned Judges of the High Court of Australia in that case and prefer to adopt the ratio of Latham C. J. in arriving at the conclusion that the requisition of land by the Commonwealth in that case was not an acquisition of property within the meaning of S. 51 (xxxi) of the Constitution.

I am, therefore, of opinion that the authorities cited by the Advocate-General do not lend support to his contention that requisition is included in acquisition but that it is separate and distinct from acquisition. Turning now to the legislative practice in England as well as in India which, according to the authorities cited before me by the Advocate-General, can be resorted to while construing the provisions of a Constitution Act like the Government of India Act, one finds that so far as legislative practice in England is concerned, the Defence Act, 1842 (5 & 6 Vic. c. 94), which was an Act to consolidate and amend the laws relating to the Services of the Ordnance Department, and the Vesting and Purchase of Lands and Hereditaments for those Services, and for the Defence and Security of the Realm, laid down a clear distinction between the compulsory purchase of lands and all provisions analogous to compulsory acquisition of land on the one hand, and the taking of lands for a temporary purpose in which case the erections on such lands were to be removed before the lands were restored to the owner and compensation was to be made for the injury done to the land so restored to the possession of the owner.

The next enactment of the Imperial Parliament after the Defence Act, 1842, in this behalf was the Emergency Powers Defence Act, 1939 (2 & 3 Geo. VI, c. 62), which was an Act to confer on His Majesty certain powers which it was expedient that His Majesty should be enabled to exercise and to make further provision for purposes connected with the defence of the realm. Under

S. 1 (1) it was enacted that: Subject to the provisions of that section His Majesty by Order in Council might make such regulations as appeared to him to be necessary or expedient for securing the public safety, the defence of the realm, the maintenance of public order and the efficient prosecution of any war in which His Majesty might be engaged and for maintaining supplies and services essential to the life of the community. Section 1 (2) enacted that without prejudice to the generality of the powers conferred by the preceding sub-section the Defence Regulation might, so far as appeared to His Majesty in Council to be necessary or expedient for any of the purposes mentioned in that sub-section, . . . authorise (i) the taking of possession or control, on behalf of His Majesty, of any property or undertaking; (ii) the acquisition, on behalf of His Majesty, of any property other than land. This makes a clear distinction between requisition on the one hand and acquisition of property on the other. It is noteworthy that these were the provisions of the Emergency Powers (Defence) Act, 1939, and the Compensation Defence Act, 1939, which were referred to by Latham C. J. in the judgment in 68 Com. L.R. 261<sup>18</sup> at page 275 as laying down a distinction between taking of possession of property on the one hand and the acquisition of property on the other. The Advocate General drew my attention to a passage in Halsbury's Laws of England, Hailsham Edition, Vol. VI, p. 532, para. 660, which stated that:

"Certain compulsory powers of purchasing any lands, buildings, or other hereditaments or easements, either absolutely or for a limited period, or of stopping up or diverting public or private footpaths, or bridle roads, may also be exercised at any time by the Secretary of State for War for the service of the department or the defence of the realm."

Mr. Taraporewalla, however, drew my attention to the relevant provisions contained in S. 16 of the Defence Act of 1842 which were supposed to be the foundation of the statements contained in para. 660 in Halsbury's Laws of England above referred to, and it was found that instead of lending support to that statement there was a clear distinction drawn between compulsory purchase of land absolutely and temporary use and possession of land for a limited period. I am, therefore, of opinion that so far as legislative practice in England is concerned, there is no warrant for holding that requisition is included in the acquisition.



As regards the legislative practice in India, Mr. Taraporewalla traced the position right from the year 1861 when the Indian Councils Act, 1861 (24 & 25 Vic. c. 67) was enacted. That was an Act passed by the Imperial Parliament to make better provision for the Constitution of the Council of the Governor General of India, and for the the Local Government of the several Presidencies and Provinces of India. By S. 22 of that Act which laid down the extent of the powers of the Governor General in Council to make laws and regulations at the meetings of the Council it was enacted that :

"The Governor-General in Council shall have power at Meetings for the Purpose of making Laws and Regulations as aforesaid, and subject to the Provisions herein contained, to make Laws and Regulations for repealing, amending, or altering any Laws or Regulations whatever, now in force or hereafter to be in force in the Indian Territories now under the Dominion of Her Majesty, and to make Laws and Regulations for all Persons, whether *British* or *Native*, *Foreigners* or others, and for all Courts of Justice whatever, and for all Places and Things whatever within the said Territories, and for all Servants of the Government of India within the Dominions of Princes and States in alliance with Her Majesty; and the Laws and Regulations so to be made by the Governor-General in Council shall control and supersede any Laws and Regulations in anywise repugnant thereto . . . Provided always, that the said Governor-General in Council shall not have the Power of making any Laws or Regulations which shall repeal or in any way affect any of the Provisions of this Act or . . ."

Certain provisos were there enacted which laid down the limitations on the absolute authority to make laws and regulations for all persons, whether British or native, foreigners or others, and for all Courts of Justice whatever, and for all places and things whatever within the said territories and for all servants of the Government of India within the dominions of Princes and States in alliance with Her Majesty. By this section, the Governor-General in Council was given absolute powers to make such laws and regulations, subject only to the limitations contained in those provisos which were all of a general nature. When, however, the Government of India Act, 1915, consolidated up to 1919 (5 & 6 Geo. V, c. 61, 6 & 7 Geo. V, c. 37 and 9 & 10 Geo. V, c. 101), was enacted legislative powers were granted to the Indian Legislature with a classification of Central and Provincial subjects between the Central and Provincial Legislatures. Under S. 63 of that Act, an Indian Legislature was constituted consisting of the Governor-General and two Chambers, viz. the Council of State and the Legislative Assembly. Section 65(1) of that Act conferred on the Indian Legislature

powers to make laws which were almost parallel to the powers granted to the Governor-General in Council by S. 22, Councils Act of 1861. There were, however, limitations of such powers enacted by S. 65(2) of that Act which limited the powers of the Indian Legislature to enact laws, which limitations were again parallel to those which were laid down in the provisos to S. 22 of the earlier Act. Provisions were, however, made for the making of rules under that Act : (a) for the classification of subjects in relation to the functions of the Government as Central and Provincial subjects, for the purposes of distinguishing the functions of Local Governments and Local Legislatures from the functions of the Governor-General in Council and the Indian Legislature, (b) for devolution of authority in respect of Provincial subjects to Local Governments and for the allocation of revenue or other monies to those Governments. These devolution rules were to be made by the Governor-General in Council with the sanction of the Secretary of State in Council and were to be approved of by both the Houses of Parliament. In accordance with the provisions of the Act in that behalf Devolution Rules No. 308(s), dated 16th February 1920, were made which provided, *inter alia*, for the classification of subjects into Central and Provincial subjects. Under those rules we had for the first time a classification of those subjects which were enumerated in Sch. I, Part I, as the Central subjects, and in Sch. I, Part II, as the Provincial subjects, the enumeration of those subjects being parallel to the enumeration contained in the lists of Sch. VII to the Government of India Act, 1935. Item 15 of Sch. 1, Part II, setting out the Provincial subjects, related to "Land acquisition, subject to legislation by the Indian Legislature." This meant that even though land acquisition was there treated as a Provincial subject, the enactment in respect of the same was to be subject to legislation in respect of the same by the Indian Legislature itself.

This subject of land acquisition was at that time the subject-matter of an enactment by the Indian Legislature, viz., Land Acquisition Act, 1 [I] of 1894. It was an Act to amend the law for the acquisition of land needed for public purposes and for companies and for determining the amount of compensation to be made on account of such acquisition, and the preamble to that Act ran as under :

"Whereas it is expedient to amend the law for the acquisition of land needed for public purposes



and for companies and for determining the amount of compensation to be made on account of such acquisition ; It is hereby enacted as follows :—

There was no definition of acquisition given in S. 3 which was the section of definitions in the Act, but Part II of the Act dealt under the heading of acquisition with the procedure with reference to the same. After laying down the provisions for preliminary investigation, objections to acquisition, declaration of intended acquisition, and the like provisions, the Act laid down that the Collector was to make an award under his hand of (i) the true area of the land, (ii) the compensation which in his opinion should be allowed for the land, and (iii) the apportionment of the said compensation among all the persons known or believed to be interested in the land, of whom, or of whose claims, he had information, whether or not they had respectively appeared before him. After the Collector had made his award he was empowered to take possession of the land which was thereupon to vest absolutely in the Crown free from all encumbrances. Special powers were given in cases of urgency where even though no award had been made by the Collector, the Collector was, whenever the Provincial Government so directed, empowered on the expiration of fifteen days from the publication of the notice of the intended acquisition, to take possession of any waste or arable land needed for public purposes or for a company, and in such cases such land was thereupon to vest absolutely in the Government, free from all encumbrances. Provision was made for reference to Court in the event of the award of the Collector not being acceptable to the persons interested and ss. 23 and 24 of the Act provided what matters were to be considered in determining compensation and what matters were to be neglected in determining the same. These were the matters to be considered by the Collector and by the Court alike, and there were provisions for the apportionment of compensation as well as for payment of the amount finally determined. Under these provisions the word "acquisition" was used as meaning taking over of the land which was to vest absolutely in the Crown free from all encumbrances and that was the only sense in which the word "acquisition" was used. Part VI of the Act, however, dealt with temporary occupation of land, and under S. 35 of the Act it was enacted that whenever it appeared to the Provincial Government that the temporary occupation and use of any waste or

arable land were needed for any public purpose or for a company, the Provincial Government might direct the Collector to procure the occupation and use of the same for such term as it should think fit, not exceeding three years from the commencement of such occupation. Provision was made for the payment of compensation to persons interested in such land, and S. 36 of the Act enacted that on the expiration of the term, the Collector was to make or tender to the persons interested compensation for the damage (if any) done to the land and not provided for by agreement reached between the Collector and the persons interested therein and was to restore the land to the persons interested therein, subject however to this proviso that if the land had become permanently unfit to be used for the purpose for which it was used immediately before the commencement of such term, and if the persons interested should so require, the Provincial Government should proceed under the Act to acquire the land as if it was needed permanently for a public purpose or for a company. It was argued by the Advocate-General that the enactment of the provision for temporary occupation of land in the Land Acquisition Act showed that the temporary occupation of land therein contemplated was included in the acquisition of land and that the requisition of land which was the subject of the present inquiry which was analogous to the temporary occupation of land provided for in Part VI of the Act was thus included in the compulsory acquisition of land, being Item 9 in List II of Sch. VII to Government of India Act. It is to be noted, however, that this temporary occupation of land which was provided for in Part VI, Land Acquisition Act, appears to have been enacted in the Act not because such temporary occupation of land was included in the acquisition of land which was the object of the enactment of that Act, but because as stated in the proviso to S. 36 (2) of the Act the persons interested in the land, the subject-matter of such temporary occupation thereof, were entitled to, if the land had become permanently unfit to be used for the purpose for which it was used immediately before the commencement of such term of temporary occupation to require the Provincial Government to proceed under that Act to acquire the land as if it was needed permanently for a public purpose or for a company. I am of opinion that but for this proviso to S. 36 (2) of the Act the temporary occupation of land which is the



subject-matter of enactment in Part VI, Land Acquisition Act, would never have been included in that Act at all. I am supported in this conclusion of mine by the provisions of S. 48 of the Act which lay down that except in the cases provided for in S. 36, the Government should be at liberty to withdraw from the acquisition of any land of which possession had not been taken. It shows that once the possession was taken the acquisition of land was final and the Government could not withdraw from the same, because under the earlier provisions of the Act once possession of the land was taken by the Collector the land was to vest absolutely in the Crown free from all encumbrances. Once the acquisition was complete, all persons interested in the land ceased to have any interest therein and the Crown became the absolute owner of the land free from all encumbrances. Before such possession was taken, the Government was to be at liberty to withdraw from the acquisition of the land. No such power was, however, given to the Government to withdraw from the acquisition of land in those cases which were provided for in S. 36 of the Act, because in those cases the persons interested in the land were entitled, if the land had become permanently unfit to be used for the purpose for which it was used immediately before the commencement of such term of temporary occupation of land, to require the Provincial Government to proceed under the Act to acquire the land as if it was needed permanently for a public purpose or for a company. In my opinion, therefore, these provisions of the Land Acquisition Act, far from establishing that the temporary occupation of land provided for in Part VI of the Act was included in the acquisition of land, go to establish that a clear demarcation was made by the Legislature between the acquisition of land which resulted in the land being vested absolutely in the Crown free from all encumbrances on the one hand and the temporary occupation and use of waste or arable land which even though needed for any public purpose or for a company did not create any rights in the Government beyond the rights of such temporary occupation thereof.

In the course of his arguments on this aspect of the question Mr. Taraporewalla drew my attention to various other enactments of the Indian Legislature in which similar provisions were included by the Legislature in those enactments, though they were not included in the main pro-

visions enacted therein. He drew my attention in this behalf to the Indian Trusts Act 2, [II] of 1882. It was an Act to define and amend the law relating to private trusts and trustees, and the preamble to that Act ran as under :

"Whereas it is expedient to define and amend the law relating to private trusts and trustees ; It is hereby enacted as follows :"

The trusts which were the subject-matter of that enactment were defined in S. 3 of the Act and right up to Chap. VIII which ended with S. 79 of the Act all provisions with reference to the trusts and trustees were enacted therein. Chapter IX, however, of that Act laid down provisions as regards "Certain obligations in the Nature of Trusts" and the various relationships which were analogous to that between a trustee and a *cestui que trust* were provided for in the sections which were enacted under Chap. IX of that Act beginning with S. 80 and ending with S. 96 thereof. By no stretch of imagination could those relationships be brought within the definition of trusts, and the very heading of Chap. IX and the terms of S. 80 definitely showed that those relationships which were provided for in that chapter were not trusts but were obligations in the nature of trusts. Could it be urged, therefore, by reason of the fact that those obligations in the nature of trusts were enacted within the provisions of the Trusts Act that those relationships were included in the definition or conception of trusts, which only were the subject-matter of the enactment of that Act? Mr. Taraporewalla similarly drew my attention to the Contract Act 9, [IX] of 1872. The preamble to that Act ran as under :

"Whereas it is expedient to define and amend certain parts of the law relating to contracts; It is hereby enacted as follows :"

The definition of contract was given in S. 2 of the Act and in Chaps. I to IV of the Act were found all the provisions as regards the contracts which were the subject-matter of that enactment. Chapter V, however, enacted provisions as regards certain relations resembling those created by contract, and in S. 68 to S. 72 of that Act provisions were enacted with regard to those relations resembling those created by contract, viz., claim for necessities supplied to person incapable of contracting or on his account, reimbursement of person paying money due by another in payment of which he is interested, obligation of person enjoying benefit of non-gratuitous act, responsibility of finder of goods, and liability of person to whom



money is paid, or thing delivered, by mistake or under coercion. These obligations were certainly not contractual obligations, nor could they be brought by any stretch of imagination within the definition of contract enacted in S. 2 of the Act. They were, however, included in the Act by the enactment of Chap. V thereof because even though they were not contracts, the obligations created thereunder resembled those created by contract. Could it, therefore, be contended that those relations though resembling those created by contracts were included in contracts which only were the subject-matter of the enactment, viz., the Contract Act 9 [IX] of 1872? Mr. Taraporewalla finally drew my attention to the Easements Act, 5 [V] of 1882. The Act was called the Easements Act, 1882. It was, however, an Act to define and amend the law relating to easements and licences, and the preamble of the Act ran as under:

"Whereas it is expedient to define and amend the law relating to easements and licences; It is hereby enacted as follows:"

The definitions of easements and of licences were to be found respectively in S. 4 and S. 52 of the Act. The distinction between easements and licences has been well-known to law. The very definition of a licence under S. 52 of the Act in terms lays down that a licence is the grant of a right to do something or to continue to do something in or upon the immovable property of the grantor which would in the absence of such right be unlawful and such right does not amount to an easement or an interest in the property. It is unnecessary here to dilate upon the distinction between easements on the one hand and licences on the other. Suffice it to say that these two conceptions are quite distinct the one from the other and it could not be urged by reason of the enactment of the provisions as to licences in the Easements Act that licences were included in easements. Mr. Taraporewalla, therefore, urged that by reason of the enactment of the provisions as to temporary occupation of land in the Land Acquisition Act, 1 [I] of 1894, it could not be validly contended that temporary occupation of land was included within the acquisition of land. I accept this argument of Taraporewalla and have come to the conclusion that the enactment of these provisions as to temporary occupation of land in the Land Acquisition Act does not establish what is contended for by the Advocate-General, viz., that temporary occupation of land for public

purposes or for a company was included in the compulsory acquisition of land.

No change was or has been made in this conception of the acquisition of land since the enactment of the Land Acquisition Act, 1 [I] of 1894, by the Indian Legislature. That this was the meaning attached to acquisition of land was well-known to the framers of the Devolution Rules when they compiled the classification of subjects and included land acquisition subject to legislation by the Indian Legislature as Item 15 in the list of Provincial subjects contained in Sch. I, Part II, thereof. Even after the year 1920, when these Devolution Rules were published no change has been made in the conception of the acquisition of land, either by any legislative enactment or by any decided cases on the point. The same conception of acquisition of land which has obtained since the Land Acquisition Act, 1 [I] of 1894, was enacted has continued ever since, and that conception was also known to the framers of the Government of India Act, 1935, when they compiled the lists of Sch. VII, Government of India Act. If any regard be had to the legislative practice in India, the result of that as hereinbefore stated is that the term "acquisition of land" or "compulsory acquisition of land" has all along been known as the taking over of land by the Government so that the land vests absolutely in the Crown free from all encumbrances. The Advocate-General drew my attention in this connection to the provisions of the Defence of India Act, 35 [XXXV] of 1939, and the Defence of India Rules framed thereunder. He relied in particular upon the provisions of S. 19, Defence of India Act, which enacts that:

"Where by or under any rule made under this Act any action is taken of the nature described in sub-s. (2) of S. 299, Government of India Act, 1935, there shall be paid compensation, the amount of which shall be determined in the manner, and in accordance with the principles, hereinafter set out." He pointed out that under sub-s. (1), cl. (e), of that section, it was provided that:

"The arbitrator in making his award shall have regard to—

(i) the provisions of sub-s. (1) of S. 23, Land Acquisition Act, 1894, so far as the same can be made applicable; and

(ii) whether the acquisition is of a permanent or temporary character."

He urged that in this provision the Legislature had enacted that the acquisition which was the subject-matter of the rules as to compensation enacted in that section could be of a permanent or a temporary character and that, therefore, the word "acquisition"



was used by the Legislature there not in the sense of the acquisition of land as known to the Land Acquisition Act, 1 [I] of 1894, viz., an acquisition of land which vested absolutely in the Crown free from all encumbrances. This argument of the Advocate-General, however, cannot carry him any further, because it is this very Act, viz., the Defence of India Act, 35 [XXXV] of 1939, and the provisions as to requisition of land enacted therein under S. 2 (2) (xxiv) of that Act which are impugned as *ultra vires* the Central Legislature and it would be of no avail to refer to the provisions of the impugned Act itself as a guide to the legislative practice in India. Even though this provision is no doubt to be found in S. 19 of the Act, we have in R. 2, sub-r. (11), Defence of India Rules, enacted thereunder, a definition of "requisition" which says that :

" 'requisition' means in relation to any property to take possession of the property or to require the property to be placed at the disposal of the requisitioning authority."

When we go further to R. 75A which deals with the requisitioning of property, no doubt within the definition of this very word "requisition", a clear demarcation is to be found between requisition and acquisition. In sub-r. (1) provision is made as regards the requisition of property. In sub-r. (2) power is given to the Central Government or the Provincial Government which has requisitioned any property under sub-r. (1) to use or deal with the property in such manner as may appear to it to be expedient and to acquire it by serving on the owner thereof, or where the owner is not readily traceable or the ownership is in dispute, by publishing in the Official Gazette, a notice stating that the Central or Provincial Government, as the case may be, has decided to acquire it in pursuance of this rule. Sub-rule (3) provides that :

"where a notice of acquisition is served on the owner of the property or published in the Official Gazette under sub-r. (2), then at the beginning of the day on which the notice is so served or published, the property shall vest in Government free from any mortgage, pledge, lien or other similar encumbrance, and the period of the requisition thereof shall end."

This, if at all, emphasises the distinction between the requisition of property which only gives to the Government the right to use or deal with the property in such manner as may appear to it to be expedient and the acquisition of property which vests the property in the Government free from any mortgage, pledge, lien or other similar encumbrance, and further provides that once

there is acquisition of the property in that sense the requisition thereof which is provided in the earlier part of R. 75A shall end. The provisions of the Defence of India Act and the Defence of India Rules framed thereunder, therefore, in my opinion, instead of helping the Advocate-General go very far to support the contention of Mr. Taraporewalla that requisition is not included in acquisition. Having regard, therefore, to the various considerations, the decisions of the English and the Australian Courts and the legislative practice prevailing in England as well as India hereinbefore referred to, I have come to the conclusion that the requisition of land, the subject-matter of these proceedings, is not included in, nor is it an ancillary or subsidiary matter which can fairly and reasonably be said to be comprehended in the item of compulsory acquisition of land which is Item 9 in List II of Sch. VII to the Government of India Act.

I will now proceed to consider whether the requisition of land is included in Item 21 in List II of Sch. VII to the Government of India Act. As I have already stated Item 21 relates to land, that is to say, rights in or over land, land tenures, including the relation of landlord and tenant, and the collection of rents; transfer, alienation and devolution of agricultural land; land improvement and agricultural loans; colonization; Courts of Wards; encumbered and attached estates; treasure trove. The topic or the category of legislation "land" is no doubt very wide in its scope and would include within itself a very wide range of topics. The framers of the Government of India Act have, however, thought it fit to elaborate that topic by adding what may be described as an amplification or explanation of that topic or category of legislation. This amplification or explanation is, however, prefaced by the expression "that is to say." This expression "that is to say" has been the subject-matter of judicial interpretation. In Stroude's Judicial Dictionary, 2nd edition, we find under the heading "That is to say" the following (p. 2040) :

" 'That is to say' is the commencement of an ancillary clause which explains the meaning of the principal clause. It has the following properties : (1) it must not be contrary to the principal clause; (2) it must neither increase nor diminish it; (3) but where the principal clause is general in terms it may restrict it."

If this judicial interpretation of the expression "that is to say" be adopted in this context, it would show that the topic or the category of legislation, "land" which is



general in terms, should be taken as restricted by what follows in this Item 21. If that is so, the only things which would be included in the topic or category of land would be the items which are specifically enumerated in what follows the expression "that is to say" in Item 21, and it would not be possible to read in the topic or category of "land" anything beyond what has been described in those particular items. If one has regard to the diversity of the subjects which have been mentioned in the latter part of Item 21 following the expression "that is to say," one might naturally come to the conclusion that they were really restrictive of the general manner in which the topic or category of legislation, "land" has been described therein. The Advocate-General urged that what has been described in the latter part of this Item 21, following the expression "that is to say" was purely illustrative and was not limitative of the general topic or category of legislation "land" and, therefore, contended that the requisition of land which was the subject-matter of these proceedings was included in this general topic or category of legislation "land" as having relation to land and as being ancillary or subsidiary matter which could fairly and reasonably be said to be comprehended in the same. I do not agree with this interpretation which is sought to be put upon this Item 21 by the Advocate-General. Even though the items comprised in these lists have got to be read not in a narrow and restricted sense but in a large and liberal manner, there are no doubt limitations to that principle of interpretation as I have already observed. The subject-matter of legislation which comes for consideration before the Court must be "with respect to" a topic or category of legislation enumerated in the lists. This means that it must substantially be with respect to matters in one list or the other. A remote connection would not be enough. It must be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in that topic or category of legislation. Could it be said that merely because the requisition of land which is the subject-matter of these proceedings has reference to "land," such requisition is ancillary or subsidiary to that topic or category of legislation "land," and can be said to be fairly and reasonably comprised within it, or could it be urged as it has been urged by Mr. Tarporewalla that such requisition of land is only remotely connected with the topic or

category of legislation "land" described in Item 21? In my opinion even though a large and liberal interpretation requires to be given to this topic or category of legislation "land" described in Item 21, it is of necessity limited by the user of the expression "that is to say" which I have already stated has been judicially interpreted to mean laying down restrictions on the generality of the topic or category of legislation which it goes to explain. I am, therefore, of opinion that the general topic or category of legislation "land" described in Item 21 is limited in its scope by the user of the expression "that is to say" followed by the amplification and explanation of that item by describing the various modes in which that legislative power invested in the Legislature has got to be exercised. I am supported in this construction of mine by the remarks of their Lordships of the Federal Court in (1944) 7 F. L. J. 215<sup>14</sup> where their Lordships held (headnote):

"It cannot be said that the word 'succession' used in Entry 56 of List I which speaks of duties in respect of succession to property is capable of comprehending every kind of passing of property intended to be comprised in the question under reference. The expression 'in respect of' in the entry indicates that succession is the subject-matter of the taxation and not merely the occasion. There is more reason and justification for placing a limited construction on Entry 56 in List I than the wider one."

In spite of the large and liberal interpretation which had been ordained by their Lordships of the Federal Court in the earlier decisions of that Court which I have already referred to above, their Lordships in this case came to the conclusion that there was more reason and justification for placing a limited construction on that entry than the wider one, meaning thereby that where the context or the circumstances warranted a limited construction being put on a topic or category of legislation it was open to the Court to do so. In the present case also, having regard to the expression "that is to say," and the amplification and explanation contained in the latter part of Item 21, I feel I am justified in coming to the conclusion that that amplification and explanation was really restrictive or limitative of the general topic or category of legislation "land" described in Item 21.

If that is the true construction of the contents of Item 21, it remains to consider whether the rights in or over land which have been mentioned therein as the subject-matter comprised in this topic or category of legislation "land" do include the requisi-



tion of land which is the subject-matter of these proceedings. If the Legislature has got the power to enact laws with regard to rights in or over land, it was contended that it could also have the power to legislate with regard to the creation of those rights, transfer of those rights and amplification and explanation of those rights, and it was, therefore, contended that it was open to the Legislature under this Item 21, to legislate for the requisition of land of the type enacted in S. 2 (2) (xxiv), Defence of India Act, and Rule 75A, Defence of India Rules. This argument is no doubt very plausible. It was, however, pointed out to me that the expression 'rights in or over land' has been used in S. 299 of the very same Government of India Act, 1935. Section 299 (5) enacts that in that section "land" includes immovable property of every kind and any rights in or over such property. This expression is no doubt again capable of a very wide interpretation. It was in fact contended by the Advocate-General that any rights in or over immovable property included the right to requisition property as was sought to be done in this very matter by the Collector *qua* the proprietors of the Kokwah Chinese Restaurant. If one has regard, however, to the subject-matter of S. 299, Government of India Act, 1935, which has been described in the marginal note thereof as "Compulsory acquisition of land" etc., one finds that the rights in or over immovable property which are the subject-matter of that section are proprietary rights in the sense of right, title, or interest therein and not the rights of temporary use and possession of the same which are the rights claimed under the requisition of property the subject-matter of these proceedings.

Section 299 (1) gives a statutory recognition to the general principle of British jurisprudence that no person shall be deprived of his property save by authority of law. That could only have reference to the proprietary rights enjoyed by an individual in respect of property of every kind or sort. Sub-section (2) of S. 299 makes this clearer still. It provides that if any law is enacted authorising the compulsory acquisition for public purposes of any land, etc., that law should provide for payment of compensation for the property acquired. Sub-section (3) of S. 299 again provides that no bill or amendment making provision for the transference to public ownership of any land or for the extinguishment or modification of rights therein, should be introduced or moved in

either Chamber of the Federal Legislature without the previous sanction of the Governor General in his discretion, or in a Chamber of a Provincial Legislature without the previous sanction of the Governor in his discretion. This again provides for a transference of land to public ownership or for extinguishment or modification of rights therein, meaning thereby the creation of rights in property in any person other than the owner thereof. In my opinion, the rights in or over immovable property which are the subject-matter of enactment in this S. 299 are rights of ownership in or over such property which can be aptly described as right, title and interest in the property, but are certainly not what may be called personal rights to temporary use and possession of land which are the rights vested in the Government by the requisition of property. If this be the true construction of the expression "rights in or over immovable property" which has been used in S. 299, Government of India Act, can it be said that the same expression which has been used in Item 21, in List II of Sch. VII to the Government of India Act is used in any different sense whatever? Maxwell on the Interpretation of Statutes, 8th Edn., p. 276, lays down :

"It is, at all events, reasonable to presume that the same meaning is implied by the use of the same expression in every part of an Act: (1869) 4 Ex. 126,<sup>25</sup> at p. 130, (1838) 6 A. & E. 56,<sup>26</sup> at p. 68, (1877) 5 Ch. D. 535;<sup>27</sup> the judgment of Cockburn C. J. in (1871) 6 Q.B. 729,<sup>28</sup> at p. 731 and Baggally L. J. in (1877) 2 P. D. 163,<sup>29</sup> at p. 174. When precision is required, no safer rule can be followed than always to call the same thing by the same name." Having regard to this principle of interpretation, I am of opinion that the expression "rights in or over land" used in the latter part of Item 21 is used in the same sense as the expression rights in or over immovable property which is used in S. 299 (5), Government of India Act, and that the rights in or over land mean not personal rights, not rights of temporary use and possession of land, but rights whereby some interest is created in the land itself. If that is the true construction of the expression "rights in or

25. (1869) 4 Ex. 126 : 38 L. J. Ex. 45 : 19 L. T. 737 : 17 W. R. 466, *Courtauld v. Legh*.

26. (1838) 6 A. & E. 56 : 7 L. J. M. C. 33, *The Queen v. Poor Law Commissioners; In the matter of the Hotborn Union*.

27. (1877) 5 Ch. D. 535 : 46 L. J. Ch. 424 : 37 L. T. 312, *In re Kirkstall Brewery, Co. Ltd. and Reduced*.

28. (1871) 6 Q. B. 729 : 40 L. J. Q. B. 214 : 24 L. T. 808 : 19 W. R. 1165, *Smith v. Brown*.

29. (1877) 2 P. D. 163, *The Franconia*.



over land," the rights which are created in the Government by the requisition of land of the nature described above do not create in the Government any interest in the land. They only create in the Government the rights to temporary use and possession of land which are, to use the words of Latham C. J. in 68 Com. L. R. 261,<sup>18</sup> the rights of a licensee and no more. These rights of temporary use and possession which are created in the Government are not, in my opinion, ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in the expression "rights in or over land" and which are by reason of the amplification and explanation of the general topic or category of legislation "land" mentioned in Item 21 deemed to be comprised within that topic or category of legislation "land" as already indicated above. I have, therefore, come to the conclusion that the requisition of immovable property which is the subject-matter of these proceedings is not included in Item 21 in List II of the seventh schedule to the Government of India Act.

I might refer in passing to a half-hearted attempt which was made by the Advocate-General to include the requisition of land within Item 8 in List III of the seventh schedule to the Government of India Act. Item 8 in List III relates to "Transfer of property other than agricultural land; registration of deeds and documents." Here again the Advocate-General was confronted with the legislative practice in India which was to be found in the enactment of the Transfer of Property Act, 4 [IV] of 1882, which was an Act to define and amend certain parts of the law relating to the transfer of property by act of parties. The expression "transfer of property" was well known to the framers of the Government of India Act, 1935, and on the reasoning which I have adopted above, it was impossible to contend that the requisition of property of the nature we have in these proceedings could by any stretch of imagination be construed as a transfer of property from the owner of the property to the Government. In so far as this particular point was not seriously pressed by the Advocate-General, I do not think it is necessary for me to deal with it in any further detail.

Having regard to all the circumstances detailed above, I have come to the conclusion that the requisition of land is not included either in Item 9 or Item 21 in List II of the seventh schedule to the Government

of India Act, and that even though there was a proclamation of emergency by the Governor-General under S. 102 (1), Government of India Act, the Central Legislature did not derive any power to make a law with respect to a topic or category of legislation which was not comprised in any of the three lists of the seventh schedule to the Government of India Act. I, therefore, hold that the Central Legislature had no power or authority to enact a provision with regard to the requisition of land as was comprised in S. 2 (2) (xxiv), Defence of India Act, and R. 75A, Defence of India Rules framed thereunder in the absence of any public notification by the Governor-General under S. 104 (1), Government of India Act, issued by him in exercise of his residual powers of legislation and empowering the Central Legislature to enact a law with reference thereto. I, therefore, hold that the enactment of S. 2 (2) (xxiv), Defence of India Act, and R. 75A, Defence of India Rules, framed thereunder with reference to the requisition of immovable property without a public notification by the Governor-General under S. 104, Government of India Act, is *ultra vires* the Central Legislature.

The next question which arises for my consideration is whether even if R. 75A, Defence of India Rules, is not *ultra vires* the powers of the Central Legislature, the requisition order dated 16th February 1945 is illegal, void and inoperative in law, by reason of the respondent having no jurisdiction, power or authority to issue the same under the provisions of R. 75A, Defence of India Rules. Mr. Taraporewalla contended that though ostensibly the respondent was requisitioning the premises occupied by the Kokwah Chinese Restaurant including landlord's fittings and fixtures, which if literally read would mean that as he was requisitioning immovable property or land, what the respondent was really doing was under the guise of that requisition to requisition also the commercial undertaking of the petitioners. He urged that the goodwill attached to those premises was valuable asset and property of the petitioners and could not be divorced from the premises which were being requisitioned, that the requisition of the premises necessarily entailed a requisition of the goodwill which went along with those premises, that the goodwill which was attached to the premises and the business of Kokwah Chinese Restaurant which was carried on in those premises was movable property which the respondent was in no



event entitled to requisition under the terms of the notification of the Government of India, Defence Co-ordination Department, No. 1336/OR/1/42, dated 25th April 1942, that in any event what was being requisitioned was a commercial undertaking under the guise of the requisition of the premises described in the order dated 16th February 1945, that the only way in which that commercial undertaking could be dealt with was under R. 81, Defence of India Rules, and that, therefore, the requisition order which had been served on the petitioners was without any jurisdiction, power or authority in the respondent to issue the same under the provisions of R. 75A, Defence of India Rules, and was, therefore, illegal, void and inoperative in law. The Advocate-General, on the other hand, contended that the only thing that was sought to be done under the terms of the requisition order dated 16th February 1945, was the requisition of the premises occupied by the Kokwah Chinese Restaurant including the landlord's fittings and fixtures, that the Government did not either in terms or by necessary implication requisition the goodwill attached to the premises or to the business of the Kokwah Chinese Restaurant, that the destruction if any of the goodwill which might result from the premises being handed over by the petitioners to the respondent in accordance with the terms of the requisition order was not the direct result of the requisition of the premises by the respondent, that such destruction of the goodwill was a matter to be taken into account by the authorities in awarding compensation to the petitioners which compensation was always being made and was going to be made even to the petitioners without stint or reserve, that by no stretch of imagination could the requisition order dated 16th February 1945 be construed as requisition of the goodwill of the premises and the business of the Kokwah Chinese Restaurant, that the respondent was not dealing in any manner whatever with the commercial undertaking which was carried on by the petitioners in the premises, that what was sought to be done by the respondent was within the four corners of the provisions of S. 2 (2) (xxiv), Defence of India Act, and R. 75A, Defence of India Rules, that in any event S. 2 (2) (xx), Defence of India Act, and R. 81A, Defence of India Rules, had no application to the facts of the present case and that the requisition order dated 16th February 1945, was passed by the respondent with full jurisdiction, power or authority to issue the same under R. 75A,

Defence of India Rules, and was, therefore, not illegal, void and inoperative in law as contended by the petitioners.

In this connection it is necessary to bear in mind that the respondent did not in terms requisition the goodwill attached to the premises or the business of Kokwah Chinese Restaurant conducted therein. Could it be, therefore, urged by reason of the fact that such goodwill was necessarily attached to the premises and the business of the Kokwah Chinese Restaurant conducted therein, that by merely requisitioning the premises of the Kokwah Chinese Restaurant together with the landlord's fittings and fixtures the respondent was also requisitioning the goodwill attached to the premises and the business of the Kokwah Chinese Restaurant conducted therein? The respondent at no time had any express or implied intention of using the said premises except as a Detailed Issue Depot for the Royal Indian Navy. At no time was there any intention express or implied that the respondent or the military authorities to whom the possession of the premises was ordered by him to be handed over were going to use the premises for the purpose of carrying on the business of a restaurant therein. No doubt the delivery over of possession of the premises by the petitioners to the respondent or to the Military authorities as directed in the requisition order would result in the suspension or the partial destruction of the goodwill attached to the premises or the business of the Kokwah Chinese Restaurant conducted therein, if the petitioners were not in a position to obtain suitable premises in the locality and to carry on their business of the Kokwah Chinese Restaurant in such premises. It might as well be that all the advantage which they had obtained by reason of their ownership of the goodwill might be lost to them, their custom might be destroyed and whenever the petitioners happened to get back possession of the premises after the emergency was over, they might not be able to enjoy that advantage of the goodwill attached to the premises and the business as they were enjoying at the present moment. Could it be, however, said that by reason of these circumstances the respondent was requisitioning the goodwill along with the premises? In my opinion the loss of the goodwill attached to the premises and the business of the Kokwah Chinese Restaurant conducted therein would no doubt be the necessary result of the requisition of



the premises by the respondent. The same would not, however, convert the requisition of the premises into a requisition of the goodwill attached to those premises and the business. It would no doubt be a count in the claim for compensation which the petitioners would be entitled to sustain against the respondent by reason of the requisition of the premises. In fact it was so mentioned by the petitioners in the correspondence which took place between the petitioners and the respondent in October-November 1944 when the respondent carried on correspondence with the petitioners with a view to the requisition of the Kokwah Chinese Restaurant under the Defence of India Act. That the petitioners would be entitled to claim compensation from the respondent or the military authorities in connection with such suspension or the destruction of the goodwill attached to the premises and the business of the Kokwah Chinese Restaurant conducted therein would, however, not convert the requisition order which is merely directed to the requisition of the premises into an order for the requisition also of the goodwill attached to the premises and the business. The goodwill attached to the premises and to the business of the Kokwah Chinese Restaurant, though it is a part and parcel of the premises sought to be requisitioned, would not, therefore, convert the order of the requisition of the premises into an order for the requisition of the goodwill also.

Mr. Taraporewalla contended that the goodwill attached to the premises and the business of the Kokwah Chinese Restaurant conducted therein was movable property and that, therefore, the respondent had no jurisdiction, power or authority to requisition the same under the powers vested in him by the notification of the Government of India, Defence Co-ordination Department, No. 1336/OR/1/42, dated 25th April 1942. If I had come to the conclusion that the requisition order dated 16th February 1945, was in fact also an order for the requisition of the goodwill of the premises and the business of the Kokwah Chinese Restaurant conducted therein, I would have considered whether under the terms of the notification the respondent had any power, authority or jurisdiction to requisition the same. As I have already stated there is no warrant for the contention of Mr. Taraporewalla that the respondent in fact under the terms of the requisition order dated 16th February 1945, also requisitioned the goodwill

attached to the premises and the business of the Kokwah Chinese Restaurant conducted therein. This contention of Mr. Taraporewalla, therefore, need not be dealt with by me. Mr. Taraporewalla further contended that the commercial undertaking which was being conducted by the petitioners in the premises was neither movable nor immovable property within the meaning of S. 2 (2) (xxiv), Defence of India Act. He relied upon the observations of Young C. J. in 24 Lah. 617<sup>30</sup> where the learned Chief Justice observed (p. 639):

“ . . . . an undertaking such as the Lahore Electric Supply Company, which was what has been called a ‘going concern’, was nothing but a collection of items of movable and immovable property. A careful examination of the provisions of Rule 75A shows conclusively that this rule is not applicable at all to the requisition or acquisition of an ‘undertaking’ [as a going concern such as the Electric Supply Co.]”

The learned Chief Justice thus came to the conclusion that the undertaking not being either movable or immovable property within the meaning of S. 2 (2) (xxiv), Defence of India Act, could not be made the subject-matter of either a requisition or acquisition within the meaning of R. 75A, Defence of India Rules. This judgment of the Lahore High Court was approved of and relied upon by Das J. in *In the matter of the Continental Hotel in Calcutta*,<sup>31</sup> where Mackertich John, the proprietor of the Continental Hotel, was the petitioner and H. C. Gupta, the Additional Land Acquisition Collector of Calcutta, was the respondent. In that judgment Das J. dealt with the argument that R. 75A did not authorise the requisition of any business or commercial undertaking, and that general control of industry, etc. was secured by R. 81, Defence of India Rules. He dealt with the case in 24 Lah. 617<sup>30</sup> as under:

“ In that case Young C. J. after reviewing some of the English decisions held at p. 638 that the Court could interfere if it was satisfied either that the order under R. 75A was *ultra vires* or that the order was not made *bona fide* but for some collateral purpose. Then at p. 639 the learned Chief Justice held that R. 75A was not applicable at all to the requisition or acquisition of an undertaking. I did not understand the learned Advocate General to controvert the principles laid down in the Lahore case.”\*

30. ('43) 30 A. I. R. 1943 Lah. 41 : I. L. R. (1943) 24 Lah. 617: 205 I. C. 337 (F. B.), *Lahore Electric Supply Co. Ltd., Lahore v. Province of Punjab*.

31. *Reported in* ('46) 33 A. I. R. 1946 Cal. 140 : 222 I. C. 48.

\*See ('46) 33 A. I. R. 1946 Cal. 140 at page 145, col. 2—*Ed.*



It, therefore, appears that the point as to whether the judgment of Young C. J. in 24 Lah. 617<sup>30</sup> was correct or not was not at all canvassed in that case before Das J. and the point was in fact conceded by the Advocate-General. It was pointed out by the Advocate-General here that this judgment of Das J. was under appeal. After the close of the arguments in this case the solicitor of the respondent with the consent of the petitioners furnished to me a certified copy of the judgment of the Appeal Court in Calcutta in this appeal which was filed by H. C. Gupta as the appellant against Mackertich John as the respondent. The appeal came before a Bench constituted by Derbyshire C. J. and Gentle J.<sup>31</sup> In his judgment Derbyshire C. J. observed with regard to the judgment of Young C. J. in 24 Lah. 617<sup>30</sup> as follows:

"Mr. Chatterjee then referred to 24 Lah. 617<sup>30</sup> mentioned above, where the Punjab Government who had powers to take over the Lahore Electric Supply Company under certain Acts, but found difficulties in its way of doing so, purported to act under R. 75A, Defence of India Rules, and requisitioned the whole of the undertaking. The learned Chief Justice after dealing with the circumstances came to the conclusion that the Punjab Government was not acting *bona fide* under R. 75A, but using it in order to acquire the undertaking which it found difficult in doing owing to its laches under the Acts which entitled the Government to acquire it. I can see no reason for doubting that part of the decision of the Lahore High Court. That was sufficient for the purpose of the Lahore case. The learned Chief Justice then went on to fortify the judgment by holding that R. 75A was not applicable at all to the requisition of an undertaking such as the Lahore Electric Supply Company. I regret I do not see my way to follow the reasoning in that matter. Rule 75A provides that for purposes of the defence of British India, public safety, the maintenance of public order, or the efficient prosecution of the War or for maintaining supplies essential to the life of the community, the Government may, by order in writing, requisition *any property movable or immovable* and may make such further orders as to the Government may have been necessary or expedient for requisitioning. The words 'any property, movable or immovable' must necessarily include all kinds of property, land, buildings, machinery and chattels of any kind, and anything that can be described as property. This *prima facie* covers a business and its goodwill."

With great respect to the learned Chief Justice of the Lahore High Court, I share the regret of Derbyshire C. J. in not seeing my way to follow his reasoning in this matter. There is no definition of property, movable or immovable, to be found in the Defence of India Act or the Defence of India Rules framed thereunder. The mean-

ing of those words, therefore, has to be got from the General Clauses Act, 10 [X] of 1897. In S. 3, cl. (25), General Clauses Act, "immovable property" is defined as including land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth; and in S. 3, cl. (34) "movable property" has been defined as meaning property of every description, except immovable property. In the result when the Legislature enacted in S. 2 (2) (xxiv), Defence of India Act, the power to make rules for requisitioning of any property, movable or immovable, it included within its scope all property whatever, movable or immovable, within the definitions thereof to be found in the General Clauses Act. I, therefore, endorse the view taken by Derbyshire C. J. that the words "any property, movable or immovable" used in S. 2 (2) (xxiv), Defence of India Act, must necessarily include all kinds of property, land, building, machinery and chattels of any kind, and anything that can be described as property, and that this would *prima facie* cover a business and its goodwill which are the essential ingredients of a commercial undertaking. I am fortified in this view of mine by the provisions of S. 2 (2) (xx), Defence of India Act, and R. 81, Defence of India Rules, framed thereunder. Section 2 (2) (xx), Defence of India Act, refers to the control of agriculture, trade or industry for the purpose of regulating or increasing the supply of, and the obtaining of information with regard to, articles or things of any description whatsoever which can be used in connection with the conduct of war or for maintaining supplies and services essential to the life of the community. It does not refer to the requisition of any property employed in agriculture, trade or industry. It merely refers to the control thereof for the purposes specified therein. Under the terms of S. 2 (2) (xx), Defence of India Act, and R. 81, Defence of India Rules, the Government controls and directs in what manner the particular property employed in agriculture, trade or industry should be dealt with by the owners thereof. These powers of control are certainly narrower in their scope than powers of requisition of such property vested in the Government under the provisions of S. 2 (2) (xxiv), Defence of India Act, and have been specially vested in the Government under S. 2 (2) (xx), Defence of India Act, for the purposes therein specified. I am, therefore, of opinion that even though S. 2 (2) (xx), Defence of India Act, and R. 81, Defence of

\* See ('46) 33 A. I. R. 1946 Cal. 140 at p. 151, Col. 2—Ed.



India Rules, deal with commercial or industrial undertakings, the mode which is therein prescribed is not the only mode in which the Government can deal with property employed in agriculture, trade or industry.

The wider powers which are vested in the Government under S. 2 (2) (xxiv), Defence of India Act, and R. 75A, Defence of India Rules, are not in any manner whatever curtailed by the provisions of S. 2 (2) (xx), Defence of India Act, and R. 81, Defence of India Rules. The powers which are vested in the Government under S. 2 (2) (xx), Defence of India Act, and R. 81, Defence of India Rules, can be exercised by the Government for the purposes therein mentioned and when the Government thinks it necessary or expedient to do so for the fulfilment of the purposes mentioned in R. 75A, Defence of India Rules, it can exercise the powers of requisitioning of property which have been vested in it under S. 2 (2) (xxiv), Defence of India Act. The powers which are vested in the Government under S. 2 (2) (xxiv), Defence of India Act, and R. 75A, Defence of India Rules, are quite distinct from the powers vested in the Government under S. 2 (2) (xx), Defence of India Act, and R. 81, Defence of India Rules. It cannot, therefore, be validly contended that the only manner in which the Government can deal with a commercial or business undertaking is under S. 2 (2) (xx), Defence of India Act, and R. 81, Defence of India Rules. If contrary to the conclusion which I have arrived at in the earlier portion of my judgment the enactment of S. 2 (2) (xxiv), Defence of India Act, and R. 75A, Defence of India Rules, was not *ultra vires* the Central Government, the Government would have by virtue of the powers vested in it under S. 2 (2) (xxiv), Defence of India Act, and R. 75A, Defence of India Rules, the power to requisition a commercial or business undertaking and to requisition a business like that of the Kokwah Chinese Restaurant as a running concern. The respondent in this view of mine would have the power to requisition even a commercial undertaking like the Kokwah Chinese Restaurant if he desired to do so, and the order in that behalf if any, passed by him would be an order not without jurisdiction, power or authority under R. 75A, Defence of India Rules, but with full jurisdiction, power or authority to do so and, therefore, valid and operative in law. I, therefore, negative this contention of Mr. Taraporewalla. The last contention of Mr. Taraporewalla was that in any event the requisition order dated 16th February

1945, was illegal, void and inoperative in law as contravening the provisions of S. 15, Defence of India Act. He drew my attention in this behalf to the provisions of S. 15, Defence of India Act, which laid down in terms that

"Any authority or person acting in pursuance of this Act shall interfere with the ordinary avocations of life and the enjoyment of property as little as may be consonant with the purpose of ensuring the public safety and interest and the defence of British India."

He urged that in the matter of this order dated 16th February 1945, the respondent very well knew that the business which was being carried on by the petitioners there was the business of the Kokwah Chinese Restaurant which, as I have already observed, is fitted up with costly fixtures, fittings and furniture, which employs about twentyfour servants, which commands a great reputation and caters for a large clientele, which enjoys considerable goodwill and is one of the leading Chinese restaurants in Bombay. He pointed out that as early as 13th November 1944, the petitioners had informed the respondent as to what the exact position was with respect to the Kokwah Chinese Restaurant in this connection. He contended that in view of all the above circumstances the order dated 16th February 1945, which directed that the possession of the premises occupied by the Kokwah Chinese Restaurant including landlord's fittings and fixtures should be delivered to the Commander, 167 L of C sub-area *forthwith* was passed by the respondent in flagrant disregard of the provisions of S. 15, Defence of India Act, which laid down upon him the duty of interfering with the ordinary avocations of life and enjoyment of property by the petitioners as little as might be consonant with the purpose of ensuring the public safety and interest and the defence of British India. With reference to the latter provisions of S. 15, Defence of India Act, that the interference should be as little as may be consonant with the purposes therein mentioned, he pointed out that the premises had been requisitioned by the respondent as appears from his affidavit dated 1st March 1945, for the purpose of opening a Detailed Issue Depot for the Royal Indian Navy therein, as far back as 31st May 1944, that since then nothing had been done by the respondent in the matter of the requisition of the premises until he for the first time thereafter addressed his letter dated 21st October 1944, to the proprietor of the Kokwah Chinese Restaurant regarding the proposed requisition of the premises under the Defence



of India Act asking for information on the various points therein mentioned, that in spite of the requisite information furnished by the petitioners to the respondent on 13th November 1944, the respondent had issued the requisition order only on 16th February 1945, that the very statement which the respondent had made in para. 7 of his affidavit that although the order required the petitioners to hand over possession "forthwith" of the premises in their occupation, he would, as in other cases, have given a reasonable time to the petitioners to vacate and give possession of the premises to the Commander 167 L of C sub-area if the petitioners had requested him to that effect instead of rushing to this Court, showed that the premises which had been requisitioned by the respondent were certainly not required forthwith by the respondent for the purpose mentioned in the said requisition order, that under the circumstances, therefore, the requisition order which had been issued by the respondent directing the petitioners to *forthwith* deliver possession of the said premises was such as interfered with the ordinary avocations of life and the enjoyment of the property by the petitioners in a manner contrary to the provisions and in any event the spirit and intendment of S. 15, Defence of India Act. He urged that the statement made by the respondent in para. 7 of his affidavit did not cure the defect in the order, that the order was such as to cause the greatest inconvenience and hardship to the petitioners even though due regard be had to the purpose of ensuring public safety and interest and the defence of British India, and that therefore, the order being in flagrant disregard of the provisions of S. 15, Defence of India Act, was illegal, void and inoperative in law.

The Advocate-General, on the other hand, contended that the provisions of S. 15, Defence of India Act, were directory or recommendatory and should not be read as mandatory, that they merely laid down recommendations or instructions as regards the mode in which the powers vested in the Government were to be exercised and any breach of the provisions, provided it did not amount to the exercise of the powers vested in the Government for collateral purposes or mala fide, could not be the subject-matter of adjudication by the Court, that S. 16 (1), Defence of India Act, which laid down that no order in the exercise of any power conferred by or under this Act should be called in question in any Court was a bar to the Court investigating whether the order which had

been passed by the respondent was in flagrant breach of the provisions of S. 15, Defence of India Act, as contended by the petitioners, that ss. 15 and 16, Defence of India Act, should be read together and the operation of S. 15, Defence of India Act, should be restricted only to those cases where the Government was guilty of having passed an order in exercise of the powers vested in them under the Act for collateral purposes or mala fide, that, therefore, the bona fides of the respondent in this case not having been successfully impeached at all by the petitioners it was not open to them to contend that the order dated 16th February 1945, was in contravention of the provisions of S. 15, Defence of India Act, and, therefore, illegal, void and inoperative in law. In this connection the Advocate-General relied upon the decision of the Lahore High Court in 24 Lah. 617,<sup>30</sup> where it was held that S. 16, Defence of India Act, was no bar to the jurisdiction of the civil Court if the order under R. 75A, Defence of India Rules, (as in that case) was *ultra vires* and was not made bona fide but for a collateral purpose and that S. 15, Defence of India Act, was not a statutory limitation of the powers conferred by the Act but that section could be used as a guide in considering whether the powers invoked by the Government were exercised bona fide or not. He also relied upon the decision of the Madras High Court in A.I.R. 1944 Mad. 285,<sup>32</sup> where it was held that S. 15, Defence of India Act, is directory and must be read in conjunction with S. 16, Defence of India Act, which says that no order made in exercise of any power conferred by or under the Act shall be called in question in any Court. Of course that does not preclude the Court from deciding whether a power has been conferred or whether a power which has been conferred has been abused.

I am not prepared to hold that the provisions of S. 15, Defence of India Act, are not mandatory but are merely directory or recommendatory. The language of S. 15, Defence of India Act, is very clear on the point. It provides that the authority or person acting in pursuance of the Act *shall* interfere with the ordinary avocations of life and the enjoyment of property as little as may be consonant with the purposes therein mentioned. Though the question whether the interference with the ordinary avocations of life and the enjoyment of property is in a

32. ('44) 31 A.I.R. 1944 Mad. 285 : I. L. R. (1944) Mad. 826 : 218 I. C. 271, Kewalram v. Collector of Madras.



particular case as little as may be consonant with the purposes therein mentioned may have to be determined by the authority or person who is passing the order in the exercise of the powers vested in him under the Defence of India Act and the Defence of India Rules framed thereunder, the provisions of S. 15, Defence of India Act are none the less mandatory. They have got to be complied with. I cannot accept the argument which was advanced by the Advocate-General that S. 15, Defence of India Act, merely contained recommendations or instructions for the guidance of the authority or the person acting in pursuance of the Act and that any breach of the provisions therein contained, howsoever flagrant the same might be, would not go to the root of the order but would have to be dealt with only by the attention of the Government being drawn to such breach by the subject suffering the hardship by reason of the issue of such an order. If that was the intention of the Legislature, I can only say that it has been very badly expressed. I cannot for a moment accept the suggestion that this provision was enacted in S. 15, Defence of India Act, for no other purpose than laying down such recommendations or instructions which might or might not be followed by the authority or the person concerned and the non-observance of which would involve no other consequences than some petition or supplication to the Government in the matter. I also cannot accept for a moment the suggestion that S. 15, Defence of India Act, was enacted merely as a sop to the public who were naturally clamouring against the drastic powers which were being vested in the executive under the terms of the Act. That suggestion if accepted would attribute to the Legislature motives which would be far from honest and straightforward. I am not prepared to hold that such were the motives which actuated the Legislature when enacting this provision contained in S. 15, Defence of India Act. I am prepared to take the provisions of S. 15, Defence of India Act, at their face value, as meaning that it is the bounden duty of any authority or person acting in pursuance of the Act to interfere with the ordinary avocations of life and the enjoyment of property as little as may be consonant with the purposes therein mentioned and that the provisions in that behalf enacted in the section are mandatory.

It remains to be seen how far the provisions of S. 16 (1), Defence of India Act, affect the position. That section enacts in

terms that no order made in exercise of any power conferred by or under this Act shall be called in question in any Court. In order that an order should not be called in question in any Court, that order must be made in exercise of the power conferred by or under the Act. If the order is in fact not made in exercise of the power conferred by or under the Act, or has been made in colourable exercise of the power conferred by or under the Act, or is made for a collateral purpose and not bona fide, it would certainly not be an order made in the exercise of the power conferred by or under the Act and will not be protected under the section. In this connection I may refer to the observations of Young C. J., at pp. 635 and 636 of the case in 24 Lah. 617<sup>30</sup> where he has discussed various authorities in this connection. He referred to the observations of Lord Thankerton in I.L.R. (1940) Mad. 599<sup>33</sup> (p. 614):

"It is settled law that the exclusion of the jurisdiction of the civil Courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also well settled that even if jurisdiction is so excluded, the civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure."

He also referred to the observations of Lord Reading C. J. in (1916) 2 K. B. 742<sup>34</sup> (page 749):

"If we were of opinion that the powers were being misused, we should be able to deal with the matter. In other words, if it was clear that an act was done by the Executive with the intention of misusing those powers, this Court would have jurisdiction to deal with the matter."

The observations of Low J. in that case also deserve to be quoted in this connection (page 752):

"I do not agree that if the Executive were to come into this Court and simply say 'A person is in our custody and, therefore, the writ of habeas corpus does not apply because the custody is at the moment technically legal,' the Court would have no power to consider the matter and, if necessary, deal with the application for the writ. In my judgment that answer from the Crown in reply to an application for the writ would not be sufficient if this Court were satisfied that what was really in contemplation was the exercise of an abuse of power. The arm of the law in this country would have grown very short, and the power of this Court very feeble, if it were subject to such a restriction in the exercise of its power to protect the liberty of the subject as that proposition involves."

33. ('40) 27 A.I.R. 1940 P. C. 105 : I.L.R. (1940) Mad. 599 : I.L.R. (1940) Kar. P. C. 194: 67 I.A. 222 : 188 I. C. 231 (P.C.), Secretary of State v. Mask & Co.

34. (1916) 2 K. B. 742 : 86 L. J. K. B. 62 : 115 L. T. 608, Rex v. Brixton Prison (Governor) : Ex parte, Sarmo.



He also referred to the observations of Farwell J. in (1903) 87 L. T. 732<sup>35</sup> (p. 734) :

"Lord Macnaghten there refers to a remark of the Master of the Rolls in (1898) 2 Ch. 603<sup>36</sup> and goes on : 'In a word, the only question is, Has the power been exceeded ? Abuse is only one form of excess . . . If the Legislature has given powers and those powers are being used for the purpose of carrying out the works authorised and it is admitted that the mode in which they are being used is unreasonable that is an abuse of power so given and is, therefore, *ultra vires*.'"

He lastly referred to the observations in (1886) L. R. 1 H. L. 34,<sup>37</sup> where it was stated that where persons had special powers conferred on them by Parliament for effecting a particular purpose, they could not be allowed to exercise those powers for any purpose of a collateral kind. These observations and the conclusion which he came to on the basis thereof, namely, that S. 16, Defence of India Act, was no bar to the jurisdiction of a civil Court if the order under R. 75A, Defence of India Rules, was *ultra vires* and was not made *bona fide* but for a collateral purpose really go to show that S. 16 (1), Defence of India Act, would not protect orders even though they might have been made in purported exercise of the powers conferred by or under the Act if the provisions of the Act were not complied with, if the powers were being misused, if what was really done was the exercise of an abuse of power, if the powers had been exceeded (abuse being only one form of excess) and if the exercise of the powers was not made *bona fide* but for a collateral purpose. The observations in A. I. R. 1944 Mad. 285<sup>32</sup> are also to the same effect in so far as they lay down that S. 16, Defence of India Act, does not preclude the Court from deciding whether a power has been conferred or whether a power which has been conferred has been abused. To the same effect again are the observations of Bose J. in I. L. R. (1943) Nag. 154<sup>38</sup> at p. 172 :

"It is to be observed that S. 16 requires that the order be passed in the exercise of the power conferred by the Act and not merely in colourable exercise of such power . . . It is not enough, therefore, that these orders should be passed under colour of the power conferred. They must be done in actual exercise of it and, as I read the law, no power is conferred to make such orders in bad faith, or in abuse of the Act, or for the purpose of

effecting a fraud on the Act, and consequently these issues must be investigated if they are raised."

A further illustration of this principle is to be found in 47 Bom. L. R. 42<sup>39</sup> in which a Full Bench of our High Court held that where, on a perusal of an order passed under R. 26, Defence of India Rules, it becomes clear that the authority or officer making the order has not applied its or his mind as required by the rule, the order is invalid, and that the obligation to consider reasons or grounds for making an order and to be satisfied upon materials laid before the officer or authority making it or within his cognizance is a condition precedent to the making of an order, which in absence of the condition is a nullity. The Appeal Court there at p. 54 referred to *Talpade's case*\* and the observations of Sir Maurice Gwyer therein, viz. :

"We are clearly of opinion that where the order is made under or by virtue of a rule which is invalid and, therefore, of no force or effect, the order is a nullity and S. 16 (1) has no application."

On a consideration of the above authorities, I am of opinion that S. 16 (1), Defence of India Act, would not protect an order made in the purported exercise of any power conferred by or under the Act from being called in question in any Court unless the order in question was made within the four corners of the provisions of that Act and was made in *bona fide* exercise of the power conferred by or under the Act, and that the Court will have jurisdiction to go into the question of the legality or validity of an order, even though made in purported exercise of the power conferred by or under the Act, if the provisions of the Act were not complied with or the powers conferred by the Act were being misused or the powers conferred by the Act had been exceeded or the powers conferred by the Act were being used *mala fide* and for a collateral purpose.

If this is the true position as regards the scope and effect of S. 16 (1), Defence of India Act, what would be the position if the Court in fact found that an order passed by the authority or person acting in pursuance of the Act was passed in flagrant disregard of or in contravention of the provisions of S. 15, Defence of India Act? Would it be possible to contend that even though the provisions of S. 15, Defence of India Act, were mandatory as I have already held the same to be, the Court on the construction of S. 16 (1),

39. ('45) 32 A.I.R. 1945 Bom. 212 : I.L.R. (1945) Bom. 317 : 219 I. C. 392 : 47 Bom. L. R. 42 (F.B.), *Emperor v. Keshav Gokhale*.

\* See ('43) 30 A. I. R. 1943 F. C. 1—Ed.

35. (1903) 87 L. T. 732, *Roberts v. Charing Cross, Euston and Hampstead Railway Co.*

36. (1898) 2 Ch. 603 : 79 L. T. 132 : 67 L. J. Ch. 657 : 47 W. R. 107, *Southwark & Vauxhall Water Co. v. Wands Board of Works*.

37. (1886) L. R. 1 H. L. 34, *Galloway v. Mayor and Commonalty of London*.

38. ('43) 30 A. I. R. 1943 Nag. 26 : I.L.R. (1943) Nag. 154 : 205 I. C. 5, *Prabhakar v. Emperor*.



Defence of India Act, which I have referred to above would not be able to call that order in question unless the breach of the provisions of S. 15, Defence of India Act, was such as would go to the root of the bona fides of that order? It was contended by the Advocate-General that unless the breach of the provisions of S. 15, Defence of India Act, complained of went to the root of bona fides of the order, the order could not be at all questioned in any Court. I am unable to accept that contention. In my opinion, it is not only in cases where the bona fides of the particular order are questioned that the order can be called in question in any Court. In addition to the impeaching of the bona fides it is also open to a party to contend that the order complained of is such that the provisions of the Act have not been complied with, that the powers vested in the authority or the person acting in pursuance of the Act are being misused, that the powers vested in such authority or person have been exceeded or that the power conferred on such authority or person has been abused. In the cases I have just mentioned it would be open to a party to challenge the order and the order would not be protected from being called in question in any Court by virtue of the provisions of S. 16 (1), Defence of India Act.

Looking at the requisition order dated 16th February 1945, from this point of view, I have come to the conclusion that the order passed by the respondent to deliver possession of the premises of the Kokwah Chinese Restaurant together with the landlord's fittings and fixtures therein *forthwith* to the Commander 167-L of C sub-area was, under the circumstances which I have already referred to, in flagrant breach of the provisions of S. 15, Defence of India Act, was an abuse of the power conferred on the respondent by virtue of the notification of the Government of India, Defence Co-ordination Department No. 1236/OR/1/42, dated 25th April 1942, was passed by the respondent in excess of and in abuse of the powers conferred upon him by or under the Act, was, therefore, not protected by the provisions of S. 16 (1), Defence of India Act, and was illegal, void and inoperative in law.

Holding as I do that the enactment of S. 2 (2) (xxiv), Defence of India Act, and R. 75A, Defence of India Rules, with respect to requisition of immovable property without a public notification by the Governor-General under S. 104, Government of India Act, was *ultra vires* the Central Legislature and that,

therefore, the requisition order dated 16th February 1945, was illegal, void and inoperative in law and that in any event the order was illegal, void and inoperative in law as contravening the provisions of S. 15, Defence of India Act, I now proceed to consider whether the Court has power to issue an order against the respondent under S. 45, Specific Relief Act, 1877, under the circumstances. The Advocate-General contended that even though the respondent herein was a public officer, the conditions of Proviso (b) to S. 45, Specific Relief Act, were not satisfied because the forbearing from executing the requisition order dated 16th February 1945, and/or enforcing delivery of possession of the premises of the Kokwah Chinese Restaurant as directed by the requisition order and/or from taking any other steps or proceedings under or in respect of the order which was prayed for in prayer (a) of the petition was not under any law for the time being in force clearly incumbent on the respondent in his public character. He urged that there was no statutory provision which enacted that such forbearing was clearly incumbent on him in his public character and unless there was any statutory obligation cast upon the respondent to forbear from doing so or unless it was shown that a duty towards the petitioners had been imposed upon the respondent by statute so that he could be charged thereon, the Court had no jurisdiction to issue an order and injunction directing the respondent to forbear from doing the acts mentioned in prayer (a) of the petition. In this connection he relied upon a passage in Halsbury's Laws of England, Hailsham Edition, Vol. IX, p. 744, para. 1269 :

"The writ of *mandamus* is a high prerogative writ of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation, or inferior Court, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to supply defects of justice; and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing such right; and it may issue in cases where, although there is an alternative legal remedy, yet such mode of redress is less convenient, beneficial and effectual."

He also relied upon the observations of Sir Lawrence Jenkins in 40 Cal. 588<sup>40</sup> where the learned Chief Justice observed (p. 597) :

40. (13) 40 Cal. 588 : 18 I. C. 527, In re Provas Chandra Roy.



".. in dealing with an application under Chap. VIII, Specific Relief Act, the principles applicable to a writ of *mandamus* should generally speaking, be followed, and it was laid down by the Privy Council in 32 Bom. 466<sup>41</sup> at p. 476 that 'one of these principles is this, that the writ will not be allowed to issue unless the applicant shows clearly that he has the specific legal right to enforce which he asks for the interference of the Court, that he had claimed to exercise that right and none other, and that his claim has been refused.' This is in substantial accord with S. 46 of the Act."

He also relied upon the observations of Sir Norman Macleod in 28 Bom. L. R. 264<sup>42</sup> where the learned Chief Justice observed (p. 268) :

"The conditions under headings (a) to (e) of the proviso are cumulative so that no order can be made under the section unless they are all satisfied."

Proceedings under this section are in substitution for proceedings by writ of *mandamus* and writ of prohibition according to English practice.

In England the writ of *mandamus* is a high prerogative writ of a most exclusive remedial nature and is in form a warrant issuing from the High Court of Justice, directed to any person, corporation or inferior Court, requiring him or them to do some particular thing therein specified which appertains to his or their office, is in the nature of a public duty, and is consonant to right and justice. Its purpose is to supply defects of justice . . .

The principles by which the Courts will be guided in such matters are laid down by Lord Cottenham C. in (1838) 4 My. & Cr. 249<sup>43</sup> at p. 254 in the following words: 'The limits within which this Court interferes with the acts of a body of public functionaries . . . are perfectly clear and unambiguous. So long as those functionaries strictly confine themselves within the exercise of those duties which are confided to them by the law, this Court will not interfere. The Court will not interfere to see whether any alteration or regulation which they may direct is good or bad; but, if they are departing from that power which the law has vested in them, if they are assuming to themselves a power over property which the law does not give them, this Court no longer considers them as acting under the authority of their commission, but treats them, whether they be a corporation or individuals, merely as persons dealing with property without legal authority.'"

He also relied upon the observations of their Lordships of the Privy Council in 39 Bom. L. R. 18<sup>44</sup> (p. 31) :

"The doctrine is well illustrated by that decision and by the cases therein mentioned, but is even more fully expounded in (1872) 7 Q.B. 387.<sup>45</sup> The principle is that the Court cannot claim

41. ('08) 32 Bom. 466 : 35 I. A. 130 (P.C.), *Bank of Bombay v. Suleman Somji*.

42. ('26) 13 A.I.R. 1926 Bom. 247 : 50 Bom. 394 : 93 I. C. 918 : 28 Bom. L. R. 264, *Mahomedalli v. Jafferbhoy*.

43. (1838) 4 My. & Cr. 249, *Frewin v. Lewis*.

44. ('36) 23 A.I.R. 1936 P. C. 269 : 60 Bom. 900 : 63 I. A. 408 : 164 I. C. 18 : 39 Bom. L. R. 18 (P. C.), *Commissioner of Income-tax, Bombay v. Bombay Trust Corporation, Ltd.*

45. (1872) 7 Q. B. 387 : 41 L. J. Q. B. 178 : 26 L. T. 64 : 20 W. R. 336, *The Queen v. Lords Commissioners of the Treasury*.

even in appearance to command the Crown, and where an obligation is cast upon the principal the Court cannot enforce it against the servant merely as such. Before *mandamus* can issue to a public servant it must, therefore, be shown that a duty towards the applicant has been imposed upon the public servant by statute so that he can be charged thereon, and independently of any duty which as servant he may owe to the Crown, his principal."

He lastly relied upon the observations of B. J. Wadia J. in 41 Bom. L. R. 911<sup>46</sup> (p. 917) :

"The jurisdiction of this Court is limited to cases where there is a clear breach of duty to do or forbear from doing, as the case may be. What is or is not clearly incumbent must be determined by reference to the provisions of the statute or regulation under which the act complained of should have been done or forborne. The words of S. 45, sub-cl. (b), are 'under any law for the time being in force', and the law for the time being in force is the law laid down in the Municipal Act."

[This was a case against the Municipal Commissioner, Bombay, where an order was sought to be obtained under S. 45, Specific Relief Act, restraining the Municipal Commissioner from doing certain things which he was enjoined to do under the relevant provisions of the Municipal Act.]

"The Municipal Commissioner could only forbear to do those acts if the election was declared invalid. An applicant under S. 45, Specific Relief Act, however, cannot ask for such a declaration nor can the Court make it, as a relief by way of declaration is neither contemplated by nor directed under the section; see 40 Cal. 588.<sup>40</sup> In my opinion, therefore, the Municipal Commissioner cannot be restrained from doing that, which, until the election is set aside, is clearly incumbent upon him to do under the Act."

On the basis of those observations of B. J. Wadia J., the Advocate-General also contended that though the petitioners ostensibly sought to obtain an order under S. 45, Specific Relief Act, directing the respondent to forbear from doing the various acts mentioned in prayer (a) of the petition, the real motive of the petitioners was to obtain a declaration that the requisition order dated 16th February 1945, was illegal, void and inoperative in law, a declaration which they would not obtain in proceedings taken by them under S. 45, Specific Relief Act.

Mr. Taraporewalla, on the other hand, contended that the expression "under any law for the time being in force," should not be restricted in its operation to a statute or an Act of the Legislature which laid down the duties to be performed by the public

46. ('39) 26 A. I. R. 1939 Bom. 431 : 186 I. C. 203 : 41 Bom. L. R. 911, *Shankarlal v. Municipal Commissioner of Bombay*.



officer in his public character but should be interpreted by the Court to mean any duty which is laid down on such person in his public character under any law for the time being in force, viz., common law, statute law, or even the personal law of the party complaining against the act of such public officer, that even though S. 45, Specific Relief Act, could not be invoked by an applicant unless the respondent was a public officer and purported to do the act complained of in his public character, the question whether it was clearly incumbent on him to forbear from doing the act complained of in his public character should be determined not merely by investigating what were the duties laid down upon such person under any statute which created the public officer or which laid down the duties to be performed by him as such, but regard should also be had in that connection to what may be called the general provisions of the law of the land including the provisions of common law in that behalf, that, therefore, the Court should not restrict itself to inquiring whether a duty towards the petitioners had been imposed upon the respondent in his public character by statute so that he could be charged thereon or that the question whether it was clearly incumbent upon him to forbear from doing the acts mentioned in prayer (a) of the petition should not be determined merely by reference to the provisions of any statute or an act of the Legislature under which the act complained of should have been forborne. He conceded that the principles applicable to a writ of *mandamus* should generally speaking be followed in dealing with an application under Chap. VIII, Specific Relief Act, and that the Court should only interfere if the public officer was departing from the power which the law had vested in him and was assuming to himself power over property which the law did not give him as observed by Lord Cottenham C. in the passage quoted by Sir Norman Macleod in 28 Bom. L. R. 284.<sup>42</sup> He, however, contended that the observations to be found in 39 Bom. L. R. 18<sup>44</sup> at p. 31 and 41 Bom. L. R. 911<sup>46</sup> at p. 917 should be read with reference to the facts of those particular cases and should not be extended beyond what was warranted thereby. He relied upon a passage in Halsbury's Laws of England, Hailsham Edition, Vol. IX, pp. 761-762, para. 1293 :

"In like manner all other persons acting as servants of the Crown are exempt from the prerogative jurisdiction of the Court, and no writ of

*mandamus* can accordingly issue against them to do any act within the scope of the duties discharged by them on behalf of the Crown.

Where, however, Government officials have been constituted agents for carrying out particular duties in relation to subjects, whether by royal charter, statute, or common law, so that they are under a legal obligation towards such subjects, a writ of *mandamus* will lie for the enforcement of such duties."

He urged that Proviso (b) to S. 45, Specific Relief Act, was taken from the law in England as stated in this passage from Halsbury's Laws of England and that the expression "under any law for the time being in force" should be understood as meaning "Royal Charter, statute or common law" as understood in England. He, therefore, urged that there was no warrant for reading the expression "any law for the time being in force" in the restricted manner in which the Advocate-General contended it should be read. He also pointed out that the petitioners here were not asking for any declaration. He further urged that even though the expression "under any law for the time being in force" be read by the Court as contended for by the Advocate-General, there was in S. 299 (1), Government of India Act, a duty laid down upon every person including persons filling the role of public officers not to deprive any person of property except by authority of law, and that if he succeeded in establishing before the Court that the requisition order dated 16th February 1945, was illegal, void and inoperative in law by reason of the enactment of S. 2 (2) (xxiv), Defence of India Act, and R. 75A, Defence of India Rules, being *ultra vires* the Central Legislature, he was entitled to ask for an order against the respondent under S. 45, Specific Relief Act, directing him to forbear from doing the various acts mentioned in prayer (a) of the petition. He, therefore, urged that the ratio of the decisions cited by the Advocate-General, viz., 39 Bom. L. R. 18<sup>44</sup> and 41 Bom. L. R. 911,<sup>46</sup> did not apply to the present case. In this connection he relied upon the observations of Tyabji J. in 7 Bom. L. R. 161<sup>47</sup> where the learned Judge observed (p. 163) :

"Now, there is no specific provision in *any Act* that the Commissioner of Police shall cancel any notice that may have been given by him. But it does seem to me, that although there is no specific direction yet if these women are shown to be respectable women to whom S. 28, Police Act, does not apply, it would be clearly incumbent on the Commissioner of Police to cancel or withdraw the notice which he had given under a misapprehension."

47. ('05) 7 Bom. L. R. 161, In re Tarabai.



He also relied upon a decision of our Appeal Court in 29 Bom. 480,<sup>48</sup> where the Appeal Court consisting of Russell and Batty JJ. held that the order which was entirely *ultra vires* the Executive Government was a mere nullity and no suit was necessary to set it aside. He further relied upon a decision of a Full Bench of our Court in 42 Bom. 638<sup>49</sup> and the observations of Batchelor Ag. C. J. at pp. 656 to 658, where the learned Acting Chief Justice after discussing various decisions of the Privy Council held that (p. 658):

"On the same principle the Indian High Courts, especially here and in Calcutta, have held that it is not necessary in the case of a void deed to sue to have it set aside or cancelled."

On the strength of the last two decisions relied upon by him, he contended that in the case of the enactment of S. 2 (2) (xxiv), Defence of India Act, and R. 75A of the Defence of India Rules, which he contended were *ultra vires* the Central Legislature it was not necessary for the petitioners to sue for a declaration that the said enactment was *ultra vires* the Central Legislature and that it should be treated as a nullity. He further contended that in the case of the requisition order dated 16th February 1945, also it was similarly not necessary for the petitioners to sue for a declaration that the said order was illegal, void and inoperative in law before the petitioners could obtain the relief which they claimed in prayer (a) of the petition under S. 45, Specific Relief Act.

There is no doubt that Chapter. VIII, Specific Relief Act deals with the enforcement of public duties. Section 45, Specific Relief Act enacts that any of the High Courts of Judicature at Calcutta, Madras and Bombay might make an order requiring any specific act to be done or forborne, within the local limits of its ordinary original civil jurisdiction, by any person holding a public office, whether of a permanent or a temporary nature, or by any corporation or inferior Court of Judicature: provided the conditions laid down in Provisos (a) to (e) are fulfilled. Section 50, Specific Relief Act provides that neither the High Court nor any Judge, thereof shall thereafter issue any writ of *mandamus*. The effect of those provisions is to take away the jurisdiction of the High Courts of Judicature of Calcutta,

Madras and Bombay to issue the high prerogative writ of *mandamus* and to enact the relevant provisions in Chap. VIII, Specific Relief Act commencing with S. 45 of the Act. It is not necessary for me at this stage to go into the question whether any provisions of the high prerogative writ of prohibition were also enacted in S. 45, Specific Relief Act by the Indian Legislature, and if so, how far the jurisdiction of the High Courts of Judicature at Calcutta, Madras and Bombay to issue the high prerogative writ of prohibition was taken away by the enactment of such provisions in S. 45, Specific Relief Act. Suffice it to say that the provisions enacted in Chap. VIII, Specific Relief Act do take away the jurisdiction of the High Courts of Judicature at Calcutta, Madras and Bombay to issue the high prerogative writ of *mandamus* which they enjoyed prior to the enactment of Chap. VIII, Specific Relief Act, and that the power to issue orders of the nature which used hitherto to be passed by the High Courts of Judicature at Calcutta, Madras and Bombay exercising their jurisdiction to issue high prerogative writs of *mandamus* and prohibition (the latter to the extent they are incorporated in S. 45, Specific Relief Act) are now to be found within the four corners of S. 45, Specific Relief Act. The question which has got to be considered, therefore, is whether "any law for the time being in force" under which the doing or forbearing of the act complained of by an applicant is clearly incumbent on a public officer in his public character under the terms of Proviso (b) to S. 45, Specific Relief Act, is the statute law or an enactment of the Legislature as contended by the Advocate-General or "Royal Charter, Statute Law, or Common Law" as contended by Mr. Taraporewalla. Even though the two cases cited by the Advocate-General in this behalf, viz., 39 Bom. L. R. 18<sup>44</sup> and 41 Bom. L. R. 911,<sup>46</sup> appear on a literal reading of the observations relied upon by him to support his contention that before an order could be made against the public officer under S. 45, Specific Relief Act, it must be shown that the duty towards an applicant has been imposed upon him by the statute so that he could be charged thereon and that what is or is not clearly incumbent must be determined by reference to the provisions of the statute or regulations under which the act complained of should have been done or forborne, I accept the argument of Mr. Taraporewalla

48. ('05) 29 Bom. 480, Balvant Ramchandra v. Secretary of State.

49. ('18) 5 A.I.R. 1918 Bom. 188 : 42 Bom. 638 : 47 I. C. 581 (F.B.), Narasagounda v. Chawagounda.



that the observations in those two cases should be read with regard to the facts of those particular cases.

In the case before their Lordships of the Privy Council in 39 Bom. L. R. 18,<sup>44</sup> the question whether it was clearly incumbent upon the public officer, viz., the Commissioner of Income-tax, Bombay, to do a particular act, had come up for decision with reference to the provisions of the Income-tax Act, 11 [XI] of 1922. In the case before B. J. Wadia J., in 41 Bom. L. R. 911,<sup>46</sup> also the question whether it was incumbent upon the public officer, viz., the Municipal Commissioner of Bombay, to forbear from doing the acts complained of, had come up for decision with reference to the provisions of the City of Bombay Municipal Act. I am, therefore, of opinion that the observations contained in those two cases which have been called upon by the Advocate-General should be read with reference to the facts of those particular cases and should not be extended beyond what was warranted thereby. I do not think that in making those observations their Lordships of the Privy Council or B. J. Wadia J., intended to lay down that the expression "any law for the time being in force" was to be limited in its construction to the statute or the enactment of the Indian Legislature as the only laws laying down the duties to be performed by such public officers in their public character. It may also be remembered in this connection that, as in this case, the public officer against whom an order is sought may not be the creature of any particular statute, with the result that one cannot find in the body of any statute or enactment any duty laid down upon him as such. If that were so, even though the public officer acting in his public character might be guilty of any act which would not be justified or authorized by any law for the time being in force, the Courts would have no jurisdiction to make an order against such public officer under S. 45, Specific Relief Act. That could certainly not be intended by the Legislature in the enactment of the provisions of Proviso (b) to S. 45, Specific Relief Act. I am, therefore, of opinion that the expression "any law for the time being in force" used in Proviso (b) to S. 45, Specific Relief Act, should be read as "Royal Charter, Statute or Common Law" as known in England, i.e., not only the statute or the enactments of Indian Legislature but also the common law of the land which is being administered by the Courts in British India.

If the expression "any law for the time being in force" used in Proviso (b) to S. 45, Specific Relief Act, is to be read in the manner aforesaid, let us consider what are the provisions of common law that have got to be followed in this connection. It is one of the cardinal principles of British jurisprudence that no person shall be deprived of his property except by authority of law, a principle which I have already stated before, finds its statutory recognition in S. 299 (1), Government of India Act, 1935. That is the principle which would be enforced by Courts in British India as a part of the common law to be administered by them in the course of the administration of justice, and would be equally applicable to private individuals as to public officers acting in their public character. If a public officer acting in his public character acted contrary to that principle of law, it would be certainly open to the Courts to direct him to forbear from doing any act contrary thereto, it being under that law for the time being in force clearly incumbent on the public officer acting in his public character to forbear from doing an act contrary to that well-recognized principle of common law. Apart, however, from this argument of Mr. Taraporewalla, we have the statutory recognition of this principle in S. 299 (1), Government of India Act; and even if a restricted interpretation of the expression "any law for the time being in force" used in Proviso (b) to S. 45, Specific Relief Act, be adopted as contended by the Advocate-General, we have in S. 299 (1), Government of India Act, laid down a statutory duty on private citizens as well as public officers acting in their public character to forbear from doing acts which would be contrary to the provisions of that section. It would be clearly incumbent under the terms of that section upon a private citizen as well as a public officer acting in his public character to forbear from doing an act which would deprive a subject of his rights of property except under the authority of law; and if a public officer acting in his public character issued an order which would not constitute any authority in law for depriving a subject of his rights to property or was illegal, void and inoperative in law, the Court would have jurisdiction to issue an order directing such public officer to forbear from acting upon such order. I am, therefore, of opinion that on either construction of the expression "any law for the time being in force" used in Proviso (b) to S. 45, Specific Relief Act, it



is clearly incumbent on the respondent herein to forbear from doing the acts prayed for in prayer (a) of the petition, viz., from enforcing and/or executing the said requisition order dated 16th February 1945, and/or from enforcing delivery of possession of the said premises as directed by the said requisition order and/or from taking any other steps or proceedings under or in respect of the order, the order being illegal, void and inoperative in law by reason of the circumstances hereinbefore referred to.

The further objection urged by the Advocate-General is equally untenable. The petitioners are not in this petition asking for any declaration that the enactment of S. 2 (2) (xxiv), Defence of India Act, and R. 75A, Defence of India Rules, is *ultra vires* the Central Legislature, or that the requisition order dated 16th February 1945, is illegal, void and inoperative in law. They are only seeking to obtain an order against the respondent herein who is a public officer acting in his public character and on whom it is clearly incumbent under the law for the time being in force to forbear from doing an act contrary either to the principles of British jurisprudence or contrary to the statutory provisions of S. 299 (1), Government of India Act, directing him to forbear from doing the various acts mentioned in prayer (a) of the petition. No doubt the relief mentioned in prayer (a) of the petition is based on the contentions that the enactment of S. 2 (2) (xxiv), Defence of India Act and R. 75A, Defence of India Rules, is *ultra vires* the Central Legislature and the requisition order dated 16th February 1945, is illegal, void and inoperative in law. These are, however, the grounds for the relief which is prayed for by the petitioners against the respondent in prayer (a) of their petition. The substantive relief which the petitioners are asking for against the respondent under the terms of prayer (a) of the petition would be competent to them to obtain only if they substantiate those grounds. But it is not necessary for them to ask for a declaration to that effect in order to obtain such relief. As has been laid down by our Appeal Court in 29 Bom. 480<sup>48</sup> and by the Full Bench of our Court in 42 Bom 638,<sup>49</sup> it would be open to the petitioners to treat the enactment of S. 2 (2) (xxiv), Defence of India Act and R. 75A, Defence of India Rules, which I have already held to be *ultra vires* the Central Legislature as void and a mere nullity and to treat the requisition order dated 16th February 1945, which also I have already

held to be illegal, void and inoperative in law, as void and a mere nullity; and no suit or proceedings to have the same declared void or to set them aside would be necessary to be taken by the petitioners before they would be entitled to the relief prayed for by them in prayer (a) of their petition.

The Advocate-General also argued in this connection that Proviso (b) to S. 45, Specific Relief Act, was based on the assumption that the statute under which it was clearly incumbent on the public officer acting in his public character to do or forbear from doing any specific act was a valid statute and no argument could be urged, as was done in this case, that such statute was invalid. He, therefore, urged that the argument which had been addressed by Mr. Taraporewalla that the enactment of S. 2 (2) (xxiv), Defence of India Act, and R. 75A, Defence of India Rules, with respect to requisition of immovable property was *ultra vires* the Central Legislature was not available to him in these proceedings under S. 45, Specific Relief Act. I am unable to accept this contention of the Advocate-General. The acceptance of that contention would mean that the Court might have jurisdiction to issue an order under S. 45, Specific Relief Act, against the public officer if he is contravening any provisions of that particular statute, but would have no jurisdiction to issue any such order in the event of the public officer doing an act under a statute which might itself be invalid and would, therefore, confer upon the public officer no authority whatever in law to do the specific act or forbear from doing the same, a result which could never be within the contemplation of the Legislature. If the Court came to the conclusion that what the public officer was doing was certainly not warranted by any valid provisions of law, the Court would certainly have jurisdiction to issue an order against the public officer asking him to do or forbear from doing any specific act which it would be clearly incumbent on that public officer in his public character, under the law for the time being in force, viz., the general law of the land, or the provisions of the common law in that behalf. Apart from the above considerations, there is also a further consideration which obtains in this particular case. As I have already held the requisition order dated 16th February 1945, is illegal, void and inoperative in law as contravening the provisions of S. 15, Defence of India Act. If that were so, it would be clearly incumbent on the respondent who is a public officer acting in



his public character in the matter of the requisition order not to exercise the power which is vested in him by the notification of the Government of India, Defence Co-ordination Department, No. 1336/OR/1/42, dated 25th April 1942, issued under S. 2 (4), Defence of India Act, in the manner he has purported to do. This will surely bring the action of the respondent within the four corners of Proviso (b) to S. 45, Specific Relief Act, even if contrary to what I have held above the contention of the Advocate-General in the matter of the construction of the expression "any law for the time being in force" were correct. I am, therefore, of opinion that the objection of the Advocate-General as to the maintainability of this petition against the respondent herein based on his contentions on the construction of Proviso (b) to S. 45, Specific Relief Act, fails.

The Advocate-General further contended that the petitioners herein could not maintain this petition against the respondent because the provisions of Proviso (d) to S. 45, Specific Relief Act, were not fulfilled. He contended that the petitioners had other specific and adequate legal remedy in that they could file a suit against the Government of India for a declaration that the enactment of S. 2 (2) (xxiv), Defence of India Act and R. 75A, Defence of India Rules, was *ultra vires* the Central Legislature and obtain the relief which they are asking for in prayer (a) of their petition and that, therefore, it could not be said that there are no other specific and adequate legal remedies. I have only got to observe in this behalf that even though that legal remedy, viz., the institution of a suit for such declaration against the Government of India might be available to the petitioners, the same, however, could not be an adequate legal remedy available to them, for the simple reason that before any such suit could be instituted by the petitioners against the Government of India the requisite notice in writing would have to be given by the petitioners to the Secretary to the Government of India under the provisions of S. 80, Civil P. C., 1908, and before any such suit could be instituted after the expiration of two months next after such notice in writing had been given to the Secretary to the Government of India the mischief which was sought to be prevented, viz., the execution of the requisition order which was illegal, void and inoperative in law, might be done by or at the instance of the respondent herein. It could not under the circumstances be contended

that the petitioners had other specific and adequate legal remedy and that they were not entitled to maintain this petition by reason of the provisions of Proviso (d) to S. 45, Specific Relief Act. I am fortified in this conclusion of mine also by the observations in the passage in Halsbury's Laws of England, Hailsham Edition, Vol. IX, p. 744, para. 1269, which I have quoted above, where it is stated

"and it may issue in cases where, although there is an alternative legal remedy, yet such mode of redress is less convenient, beneficial and effectual."

There are also observations of Bowen L. J. to the same effect in (1884) 12 Q. B. D. 461<sup>50</sup> (p. 468) :

"A writ of *mandamus*, as everybody knows, is a high prerogative writ, invented for the purpose of supplying defects of justice. By Magna Charta the Crown is bound neither to deny justice to anybody, nor to delay anybody in obtaining justice. If, therefore, there is no other means of obtaining justice, the writ of *mandamus* is granted to enable justice to be done. The proceeding, however, by *mandamus*, is most cumbrous and most expensive; and from time immemorial accordingly the Courts have never granted a writ of *mandamus* when there was another more convenient, or feasible remedy within the reach of the subject."

There is also a decision of the Madras High Court in 40 Mad. 125,<sup>51</sup> in which Kumar-swami Sastriyar J., observed (p. 165) :

"As regards the contention that Mr. Natesan has got other adequate legal remedy, I find it difficult to see what other adequate legal remedy he has. It is well settled by a series of decisions that where a corporation or public body has a statutory duty of a public nature towards another person a *mandamus* will lie to compel its performance at the suit of any person aggrieved by the refusal to perform the duty unless there is another remedy 'equally convenient, speedy, beneficial and effectual' as the *mandamus* and that by remedy is meant not a remedy by act of the party but *remedium juris* or some specific legal remedy for a legal right. I need only refer to (1861) 30 L.J.Q.B. 271,<sup>52</sup> (1812) 15 East 117<sup>53</sup> at p. 136, (1899) 2 Q. B. 632,<sup>54</sup> (1871) 6 Q. B. 411,<sup>55</sup> (1892) 1 Q. B. 426<sup>56</sup> and (1884) 12 Q. B. D. 461<sup>50</sup>."

Greaves J., in 48 Cal. 916,<sup>57</sup> also observed (p. 924) :

50. (1884) 12 Q. B. D. 461 : 53 L.J.Q.B. 229 : 51 L. T. 46 : 32 W. R. 543, In re Nathan.

51. (18) 5 A.I.R. 1918 Mad. 763 : 40 Mad. 125 : 38 I.C. 847 (F.B.), In the matter of G.A. Natesan and K. B. Ramanathan.

52. (1861) 30 L. J. Q. B. 271 : 5 L. T. 289, In re Barlow.

53. (1812) 15 East 117, The King v. The Archbishop of Canterbury and the Bishop of London.

54. (1899) 2 Q. B. 632 : 68 L. J. Q. B. 945 : 81 L. T. 559, Reg. v. Leicester Guardians.

55. (1871) 6 Q. B. 411 : 24 L. T. 387, The Queen v. Price.

56. (1892) 1 Q. B. 426 : 61 L. J. M. C. 141 : 66 L. T. 289 : 40 W. R. 478, The Queen v. Thomas.

57. (21) 8 A.I.R. 1921 Cal. 159 : 48 Cal. 916 : 66 I.C. 600, Manick Chand Mahata v. Corporation of Calcutta.



"With regard to the second point I think 'specific and adequate remedy' in sub-s. (d) of S. 45, Specific Relief Act, refers not to a general right of suit which must unless expressly barred, always exist, but to some specific remedy expressly given by a particular Act."

Though one may not go to the length of accepting these observations of Greaves J., in their entirety, there is no doubt that he considered a general right of suit as not within the meaning of the specific and adequate remedy mentioned in Proviso (d) to S. 45, Specific Relief Act. The observations in the various cases which I have referred go to show that the specific and adequate remedy referred to in proviso (d) to S. 45, Specific Relief Act, should be equally convenient, speedy, beneficial and effectual, and if no such specific and adequate legal remedy did exist, it will be open to an applicant to file a petition for obtaining an order under S. 45, Specific Relief Act. I am, therefore, of opinion that this contention of the Advocate-General based on the construction of Proviso (d) to S. 45, Specific Relief Act, also fails. The Advocate-General further contended that the granting of prayer (a) of this petition would mean that the High Court would make an order binding on the Central Government in the matter of the requisition order dated 16th February 1945. He urged that the respondent herein was exercising the powers which had been vested by the Central Government in him under the terms of the Notification of the Government of India, Defence Co-ordination Department, No. 1336/OR/1/42 dated 25th April 1942, that in the matter of the making of the said requisition order he was acting as the agent or servant of the Central Government, that if the Court passed an order as prayed for by the petitioners against the respondent, it would be making an order which would be binding on the Central Government and that, therefore, the petition was barred under the provisions of Proviso (f) to S. 45, Specific Relief Act.

Mr. Taraporewalla, on the other hand, contended that the Central Government were not parties to this petition, that in exercising the powers which had been vested in him under the notification of the Government of India, Co-ordination Department, No. 1336/OR/1/42 dated 25th April 1942, the respondent was not acting as an agent of the Government but was exercising the authority which had been delegated by the Government to him under S. 2 (4), Defence of India Act, that even assuming that the respondent was the agent of the Govern-

ment in the matter of the making of that requisition order, merely because the respondent was acting in the matter of the making of that requisition order dated 16th February 1945, as the agent of the Central Government, the Court was not deprived of its jurisdiction to pass an order under S. 45, Specific Relief Act, against him because even as the agent of the Central Government, apart from the duty which he owed to the Central Government, he also owed duties to the petitioners to forbear from doing any act contrary to the principles of common law or contrary to the provisions of section 229 (1), Government of India Act, and that even though the Court could not pass any order against the Crown, the Court had jurisdiction to pass an order against the public officer who was acting as the agent of the Central Government in the issue of the requisition order dated 16th February 1945, which was complained of in the petition. The Government of India is not made a party to this petition, and whatever order be passed by the Court against the respondent herein would not be as such binding on the Central Government. As a matter of fact the Court here would not be passing any order against the Central Government, as the Central Government is not a party to this petition. The respondent in this case is not acting as the agent of the Government. He has delegated to him under S. 2 (4), Defence of India Act, and by the notification of the Government of India, Defence Co-ordination Department, No. 1336/OR/1/42 dated 25th April 1942, certain powers specified in the notification which are purported to be exercised by him not as an agent of the Government but as a public officer empowered in that behalf by the Government. Assuming, however, that he was not exercising such delegated authority but was in the exercise of the powers which he purported to do merely as an agent of the Government, is his position such that he is exempt from the jurisdiction of the Court to issue an order against him under S. 45, Specific Relief Act? As has been observed by their Lordships of the Privy Council in 39 Bom. L. R. 18<sup>44</sup> (page 31):

"the doctrine is well established by that decision and by the case therein mentioned but is even more fully expounded in (1872) 7 Q. B. 387.<sup>45</sup> The principle is that the Court cannot claim even in appearance to command the Crown, and where an obligation is cast upon the principal the Court cannot enforce it against the servant merely as such. Before *mandamus* can issue to a public servant it must, therefore, be shown that a duty towards the applicant has been imposed upon the



public servant by statute so that he can be charged thereon, and independently of any duty which as servant he may owe to the Crown, his principal."

If, as I have already held, the respondent herein independently of any duty which he owed to the Central Government as his principal, also owed a duty to the petitioners by reason of the principles of common law or by reason of the provisions of S. 299 (1), Government of India Act, any breach of such duty would give the petitioners a cause of action against the respondent herein and the petitioners would be entitled to sustain a petition for an order against the respondent under S. 45, Specific Relief Act. It may be that by reason of the respondent herein acting as the agent of the Central Government and by reason of the conclusion of the Court that the enactment of S. 2 (2) (xxiv), Defence of India Act and R. 75A, Defence of India Rules, is *ultra vires* the Central Legislature being the foundation for making the requisite order against the respondent herein, the Central Government might respect the decision of the Court within the meaning of the observations of Lord Reading in (1916) 1 K.B. 595<sup>58</sup> (p. 610):

"The second ground proceeds upon the assumption that if the Court were to pronounce a judgment of ouster in this case we should be making an order upon the Sovereign. If that were the true view of such a judgment I should, of course, agree, as this Court could not make an order upon the Sovereign. To use the words of Cockburn C. J. in (1872) 7 Q. B. 387<sup>45</sup> p. 394 'we must start with this unquestionable principle, that when a duty has to be performed (if I may use that expression) by the Crown; this Court cannot claim even in appearance to have any power to command the Crown the thing is out of the question. Over the Sovereign we can have no power.' But a judgment against the respondents would have effect against them only; it would be an order upon the subject, not upon the Crown. It is then argued that this Court would be powerless to enforce a judgment of ouster in this case, that we could not order the Clerk to the Privy Council, who is the servant of the King, to remove the names from the roll of Privy Councillors, neither could we prevent the immediate reinstatement of the names if the King thought fit to alter it. It is sufficient for the present purpose to say that a judgment pronounced in favour of the relator would not involve the making by this Court of an order upon the Clerk, neither would this Court be powerless to enforce the judgment if it were disobeyed by those against whom it was made. Although it may be interesting and useful for the purpose of testing the propositions under consideration to assume the difficulties suggested by the Attorney-General, none of them would in truth occur. This is the King's Court; we sit here to administer justice and to interpret the laws of the realm in the King's name. It is respectful and proper to assume that once the law is declared by

a competent judicial authority it will be followed by the Crown."

These observations of Lord Reading were quoted with approval by Greaves J. in 48 Cal. 916.<sup>57</sup> I may also in this connection refer to a decision of the Madras High Court in A.I.R. 1927 Mad. 22<sup>59</sup> and the observations therein at p. 33, col. 1:

"Mr. Rangaswami Aiyangar argued that even though the order in this case may only be directed to the Commissioner restraining him from holding the election on a particular date, since the Government has fixed the date, any such order restraining him must be regarded as an order binding on the Government and, therefore, not capable of being passed by the Court. The expression 'binding on the Government' is a somewhat curious expression. It is not quite clear that by that expression the Legislature intended anything more than merely orders passed against the Government, following in that respect the English law. When we speak of an order being passed binding on a person, it can only be because he was a party to the order or else is so otherwise circumstanced as to have obligation cast on him by reason of the order to carry it out. When an order does not purport to be against a party and cannot of its own force oblige any party to do any act or to refrain from doing any act, it cannot be said that the order is binding on such party. So understood, it seems to me, that any order that the Court may pass restraining the respondent from holding an election on a particular date cannot be said to be binding on the Government; because the Government are under no obligation by reason of the order to do anything or to omit to do anything. If, however, any other construction of the expression should be adopted, it will result in the Court being unable in most matters to make any order against any public servant of Government who may also be under statutory obligations towards the public as in this case to conduct himself in a particular manner. The order, if and when made, will only be against the Commissioner requiring him to do an act or refrain from doing an act and it is impossible to see that such an order can be regarded as an order binding on the Government, except in the sense that the Government may have no power to direct the Commissioner to the contrary."

I adopt the reasoning of the learned Judges of the Madras High Court in this decision. As I have already held the respondent in this case owed a duty to the petitioners laid down upon him by the principles of common law or by the provisions of S. 299 (1), Government of India Act, to forbear from doing the acts mentioned in prayer (a) of the petition apart from whatever duty he owed to his principal the Government of India. To the same effect is the passage from Halsbury's Laws of England, Vol. IX, p. 762, in para. 1293:

"Where, however, Government officials have been constituted agents for carrying out particular duties in relation to subjects, whether by royal charter, statute, or common law, so that they are under a legal obligation towards such subjects,

58. (1916) 1 K.B. 595 : 85 L.J.K.B. 630 : 114 L.T. 463, *Rex v. Speyer* : *Rex v. Cassel*.

59. (27) 14 A.I.R. 1927 Mad. 22 : 99 I.C. 18, *Ekambara v. Madras Corporation*.



a writ of *mandamus* will lie for the enforcement of such duties."

The Advocate-General also in this connection drew my attention to the fact that according to the terms of S. 45, Specific Relief Act, the procedure by way of making an order under that section was available only against persons holding a public office, whether of a permanent or a temporary nature, or any corporation or inferior Court of Judicature. He urged if that was so, the Secretary of State, the Central Government, the Crown Representative, or any Provincial Government, which have been mentioned in cl. (f) of S. 45, Specific Relief Act, would certainly not be parties to such proceedings and no order passed by the Court under S. 45, Specific Relief Act, would, if the contention of Mr. Taraporewalla was correct, be ever binding on them because they were certainly not to be parties to the proceedings. The enactment of Proviso (f) to S. 45, Specific Relief Act, would thus, the Advocate-General submitted, be absolutely nugatory. I do not, however, accept this contention of the Advocate-General. Proviso (f) to S. 45, Specific Relief Act, is enacted to meet those cases where the party against whom an order under S. 45, Specific Relief Act, is sought was merely acting as the agent of the Secretary of State, the Central Government, the Crown Representative, or any Provincial Government, and besides owing his duty to the principal, owed no duty whatever to the subject. In those cases where, apart from such agent owing a duty to his principal, he also owed a duty to the subject within the meaning of the observations of their Lordships of the Privy Council in 39 Bom. L. R. 18<sup>44</sup> at p. 31, the Court would certainly have jurisdiction to issue an order against him under S. 45, Specific Relief Act, having regard to the observations which I have quoted above from the decisions in (1918) 1 K. B. 595,<sup>58</sup> 48 Cal. 916<sup>57</sup> and A. I. R. 1927 Mad. 22.<sup>59</sup>

I am, therefore, of opinion that it is competent to the petitioners, under the authorities which I have hereinbefore cited, to maintain a petition against the respondent and it is impossible to hold under the circumstances of the present case that in passing an order against the respondent herein the Court would be making an order binding on the Central Government, which would come within the mischief of Proviso (f) to S. 45, Specific Relief Act. It may be noted in this connection that neither the Central Government made any application before

me to be made parties to this petition nor did I order this petition and the rule nisi which I granted against the respondent herein to be served on the Central Government in exercise of my discretion under R. 584, High Court Rules. I am, therefore, of opinion that this contention of the Advocate-General based on the construction of Proviso (f) to S. 45, Specific Relief Act, also fails. The Advocate-General lastly contended that the granting of an order as prayed for by the petitioners in prayer (a) of the petition would also contravene the provisions of Proviso (g) to S. 45, Specific Relief Act, which says that the High Court shall not be deemed to be authorised to make any order on any other servant of the Crown, as such, merely to enforce the satisfaction of a claim upon the Crown. I am, however, unable to appreciate this contention of the Advocate-General. There is no claim made by the petitioners herein against the Crown, nor are any proceedings taken by them for enforcing the satisfaction of a claim upon the Crown. The proceedings which they are taking by this petition are, therefore, not to enforce the satisfaction of a claim upon the Crown in the sense in which those words are used in Proviso (g) to S. 45, Specific Relief Act. This position has been considered in Halsbury's Laws of England, Hailsham Edition, Vol. IX, p. 761, para. 1293:

"As no Court can compel the Sovereign to perform any duty, no writ of *mandamus* will lie to the Crown. Where it is sought to establish a right against the Crown the appropriate procedure is by way of petition of right."

As was observed by Blackburn J. in (1872) 7 Q. B. 387<sup>45</sup> (p. 398):

"The general principle, not merely applicable to *mandamus* but running through all the law, is, that where an obligation is cast upon the principal and not upon the servant, we cannot enforce it against the servant as long as he is merely acting as servant. To take a familiar instance, if a *mandamus* were applied for against the secretary of a railway company to do something, it would not be granted, merely because the railway company his masters had an obligation to perform the duty, and it makes no difference that the master, or the principal, or the sovereign is only suable by petition of right, or perhaps not at all. There is the familiar case of the surveyor of highways who is the servant of the inhabitants of the parish; the inhabitants of the parish cannot be sued, because they are not a body corporate, but the surveyor of the highways is not to be responsible for the non-performance of their duties, or the negligence of their servants, though he is the person who acts for them. The same principle applies to *mandamus*, if the duty is by statute, though perhaps 'duty' is hardly the word to employ with regard to Her Majesty; where the intention of the Legislature shews that Her Majesty should be advised to do a thing, and where the obligation, if I may use the



word, is cast upon the servants of Her Majesty so to advise, we cannot enforce that obligation against the servants by *mandamus* merely because the sovereign happens to be the principal."

The observations of their Lordships of the Privy Council in 39 Bom. L. R. 18<sup>44</sup> are also to the same effect (p. 31):

"But in any case cl. (g) in S. 45, Specific Relief Act, does not mean that orders can be made to enforce the satisfaction of a claim upon the Crown provided that the Court acts with some additional motive or has some further intention. The words of the clause have been taken *verbatim* from a well-known judgment on *mandamus*, the judgment of Coleridge J. in (1838) 6 Dowl 776<sup>60</sup> at p. 792: 'But, against the servants of the Crown, as such, and merely to enforce the satisfaction of claims upon the Crown, it is an established rule that a *mandamus* will not lie. I call this an established rule, and I believe it has never been broken in upon.' The doctrine is well illustrated by that decision and by the cases therein mentioned, but is even more fully expounded in (1872) 7 Q. B. 387.<sup>45</sup> The principle is that the Court cannot claim even in appearance to command the Crown, and where an obligation is cast upon the principal the Court cannot enforce it against the servant merely as such. Before *mandamus* can issue to a public servant it must, therefore, be shown that a duty towards the applicant has been imposed upon the public servant by statute so that he can be charged thereon, and independently of any duty which as servant he may owe to the Crown, his principal."

If one has regard also to the cases which have been noted in footnote (d) appended to the passage from Halsbury's Laws of England, which I have above referred to, one finds that they were all cases where though the public servants were ostensibly proceeded against, the object of the pursuers was to reach the funds or property which had gone into the hands of the Crown and that the motive of the pursuers was, through the public servants who were proceeded against ostensibly, to reach such funds or property in the hands of the Crown. There is also another passage in Halsbury's Laws of England, Hailsham Edition, Vol. 9, p. 752, para. 1281, which may be noted in this connection:

"A *mandamus* will issue to Government officials in their capacity as public officers exercising executive duties which affect the rights of private persons."

That is really the genesis of the principle which has been enunciated in Proviso (g) to S. 45, Specific Relief Act. If the object of these proceedings started by the petitioners in this petition was to obtain an order on the respondent as a public officer and servant of the Crown, merely to enforce satisfaction of a claim upon the Crown, within the meaning of the expression I have ad-

opted above, then certainly it would not be open to the petitioners to maintain this petition. I may repeat here what I have stated erstwhile that the respondent in the present case is not acting merely as a servant of the Crown. Though he happens to be a public officer in the employ of the Government, he is not acting as the agent of the Government in the matter of the exercise of the powers which have been delegated to him by the Government under the provisions of S. 2 (4), Defence of India Act, and the notification of the Government of India, Defence Co-ordination Department, No. 1338/OR/1/42 dated 25th April 1942. I am, therefore, of opinion that this contention of the Advocate-General based on the construction of the provisions of Proviso (f) to S. 45, Specific Relief Act, also fails. I, therefore, hold that in view of my findings that the enactment of S. 2 (2) (xxiv), Defence of India Act, and R. 75A, Defence of India Rules, with respect to the requisition of immovable property without a public notification by the Governor-General under S. 104, Government of India Act, is *ultra vires* the Central Legislature and that in any event the requisition order dated 16th February 1945, is illegal, void and inoperative in law as contravening the provisions of S. 15, Defence of India Act, the petitioners are entitled to maintain this petition to obtain the order prayed for by them in prayer (a) of their petition under S. 45, Specific Relief Act.

In the result, I do order and direct the respondent to forbear from enforcing and/or executing the said requisition order dated 16th February 1945, and/or enforcing delivery of possession of the said premises, viz. the premises of the Kokwah Chinese Restaurant including the landlord's fittings and fixtures therein, as directed by the requisition order and/or from taking any other steps or proceedings under or in respect of the order as prayed for in prayer (a) of the petition.

As regards the costs of the petition, the respondent has failed in all the contentions which have been urged on his behalf, except the one whether the requisition order was illegal, void and inoperative in law by reason of the respondent having no jurisdiction, power or authority to issue the same under the provisions of R. 75A, Defence of India Rules. The arguments on that point, however, have not taken any considerable time before me and I see no reason to deprive the petitioners of their costs of

60. (1838) 6 Dowl 776, In re Baron de Bode.



this petition merely because they have failed only in that contention of theirs. I, therefore, order that the respondent do pay the petitioners' costs of this petition taxed on a long cause scale. Two counsel allowed. There will, therefore, be an order in terms of prayer (a) of the petition. The respondent will pay the petitioners' costs of this petition taxed on a long cause scale. Two counsel allowed.

**Per Curiam.**—The Advocate-General asks for a certificate under S. 205 (1), Government of India Act, that the case involves a substantial question of law as to the interpretation of the Government of India Act. I accordingly grant that certificate.

G.N./D.H.

*Petition allowed.*

[Case No. 60.]

\* A. I. R. (33) 1946 Bombay 266

FULL BENCH

DIVATIA, SEN AND WESTON JJ.

*Raychand Vanmalidas*

v.

*Maneklal Mansukhbhai.*

Second Appeal No. 365 of 1943, Decided on 30th August 1945, from decision of First Class Sub-Judge, with appellate powers, Ahmedabad, in Appeal No. 140 of 1941.

\* (a) Easements Act (1882), Ss. 4 and 15—Prescriptive easement—Person claiming right of easement over property must have been conscious that property belonged to another—Claim to property as owner during prescriptive period if precludes him from claiming easement over it.

To prove that a right was exercised by a person as an easement it is necessary to establish that the right was exercised by him on somebody else's property and not as an incident of his ownership of that property. For that purpose his consciousness during the statutory period that he was exercising that right on the property treating it as somebody else's property is a necessary ingredient in proof of the establishment of that right as easement. If the owner of the dominant tenement has during part of the period of prescription exercised the rights which he claims as an easement under the assertion or belief that he was the owner of the servient tenement then his exercise of those rights is not exercise "as easement" and he must fail in a claim to easement. [P 269 C 2]

If a person has actually claimed ownership of the servient tenement in a previous litigation within the statutory period of twenty years it may be regarded as an important piece of evidence to show that he did not exercise that right as an easement. No doubt the outward indication of the exercise of the right by virtue of ownership and easement may in most cases be the same but where there is evidence of his previous conduct of the right of ownership, it is for him to show that notwithstanding that conduct he did all the acts of enjoyment of the right as an easement. His conduct is not quite conclusive against him. At the same time it lays a heavy burden on him to prove that his

assertion of ownership was not merely untenable but known to be false and inconsistent with his conduct : 16 Bom. 592 and ('32) 19 A. I. R. 1932 Bom. 513 *Approved* ; *Observations to the contrary* in ('33) 20 A. I. R. 1933 Bom. 122 and ('39) 26 A. I. R. 1939 Bom. 149, *Not approved*.

[P 270 C 1]

(b) Easements Act (1882), Ss. 4 and 15 — Prescriptive easement and ownership by adverse possession—Distinction.

Prescriptive easement, as opposed to easement by grant, is always hostile. It is in fact an assertion of a hostile claim of certain rights over another man's property and as such it resembles in some respects the claim to ownership by adverse possession of property. Both are of hostile origin and are, therefore, prescriptive rights obtained by adverse enjoyment for a certain period, the difference being that while in the case of adverse possession the possessor must assert his own ownership, in the case of easement he must assert limited rights of user on a property and acknowledge its ownership in some one else. [P 270 C 1]

(c) Easements Act (1882), Ss. 4 and 15 — Inconsistent pleas of ownership and easement in alternative can be taken in same suit — Civil P. C. (1908), Or. 6, R. 2.

It is open to a party in a litigation to raise inconsistent pleas of ownership and easement in the alternative in the same suit and an election to prove one of the two alternative pleas may be made when evidence is to be led or even after the evidence is over. The party may contend that though the evidence is not satisfactory to establish ownership, it is sufficient to prove the right of easement. If he relies on the plea of ownership and leads evidence on that point and fails in doing so, and if he thereafter relies on the same evidence for easement rights, he will be met with a serious difficulty in establishing a claim of easement because of the plea of ownership for which he led evidence and failed. However, it does not necessarily follow that if a person takes inconsistent pleas he should not be allowed to lead evidence on those pleas. A party, if he chooses, is entitled to lead evidence on both the alternative pleas; and it is for the Court to decide whether he is entitled to succeed on either of the pleas. Certainly he cannot succeed on both. [P 270 C 1, 2]

C. P. C. —

('44) Chitale, O. 6, R. 2, N. 5, Pt. 8.

('41) Mulla, P. 575, Pts. (m), (w).

G. M. Joshi — for Appellant.

R. J. Thakore and M. H. Chhatrapati —  
for Respondent.

**Divatia J.** — This appeal has been referred to a Full Bench on account of certain conflicting observations in 35 Bom. L. R. 144<sup>1</sup> and I. L. R. (1939) Bom. 140,<sup>2</sup> on the one hand and 56 Bom. 427<sup>3</sup> and 16 Bom. 592<sup>4</sup> on the

1. ('33) 20 A.I.R. 1933 Bom. 122 : 144 I. C. 998 : 35 Bom. L. R. 144, *Tamanbhat v. Krishtacharya*.

2. ('39) 26 A.I.R. 1939 Bom. 149 : I. L. R. (1939) Bom. 140 : 183 I. C. 139 : 41 Bom. L. R. 168, *Rau Rama v. Tukaram Nana*.

3. ('32) 19 A.I.R. 1932 Bom. 513 : 56 Bom. 427 : 139 I. C. 571 : 34 Bom. L. R. 1015, *Marghabhai v. Motibhai Mithabhai*.

4. ('92) 16 Bom. 592, *Ohunilal Fulchand v. Mangaldas Govardhandas*.



other hand. The facts which have given rise to the point in appeal are shortly these: The respondent-plaintiff was the owner of certain houses in Ahmedabad, City Survey Nos. 651, 653B and 655, as ancestral property. In 1919 he purchased another house, namely, Survey No. 652. The case for the defendant, who is the maternal uncle of the plaintiff, was that houses Nos. 653B and 655 and a terrace on a part of house No. 651 were given to him in gift by the plaintiff's father about fifty years ago and since then he was in possession of the same. The terrace on house No. 651 is surrounded by three houses, Survey Nos. 651 and 652, which are in the plaintiff's possession, and Survey No. 653B, which is in the defendant's possession. All the three houses have doors connecting them with the terrace, and there are four small windows in the wall of house No. 652 for which the plaintiff claims light and air, and also two windows in the southern wall of house No. 651 abutting on the terrace for which also he claims the right of light and air. This litigation has a previous history. The present plaintiff had filed a suit in 1933 against the present defendant to recover possession of Survey Nos. 653B, 655 and the terrace on Survey No. 651 on the ground that they were given by the plaintiff's father to the defendant merely as a licensee, that there was no gift, and that the plaintiff was the owner of the same. The defendant's case was that he was not the licensee, but that the property had been gifted to him by the plaintiff's father in consideration of his sister being given in marriage to the plaintiff's father. The trial Court as well as the lower appellate Court granted a decree in favour of the plaintiff on the finding that the defendant was merely a licensee of these properties. In second appeal this Court, however, reversed that decision and held that the plaintiff had not proved that the defendant was a mere licensee and that he was not therefore entitled to eject the defendant from the premises.

The decision of this Court was given on 2nd August 1939. Thereafter the plaintiff brought the present suit on 3rd February 1940, in which he based his claim on certain easement rights over the terrace on City Survey No. 651 treating the terrace as of the ownership of the defendant. The plaintiff claimed not only the right of way over the terrace for his two houses, Nos. 651 and 652 from the doors opening on the terrace, but, as I said before, he claimed the right of light and air through all the windows which abutted on

that terrace. He also claimed the right of conveying rain water on the terrace from his house No. 651, the right of dropping water on the terrace from the eaves of the said house, for using the staircase which abuts into the terrace, and also for depositing loose articles on the same. We are not now concerned with the rights for passing rain water and the right for opening the staircase and the storing of the goods because they have been given up by the parties. The dispute was confined in the trial Court to the right of way through the two doors of the houses of the plaintiff abutting on the terrace and the right of light and air from the apertures in the walls of the two houses and the right of opening the two doors on the terrace. The trial Court held that the plaintiff was not (*sic*) entitled to those rights in view of the fact that in the former litigation of 1933 he claimed the terrace as of his own ownership and, in the present suit, he claims certain easement rights over the same terrace treating it as of the ownership of the defendant. In doing so the learned trial Judge purported to follow two decisions of this Court in I. L. R. (1939) Bom. 140<sup>2</sup> and 35 Bom. L. R. 144<sup>1</sup> and did not follow the decision in 56 Bom. 427<sup>3</sup> on the ground that the latter decision was practically dissented from in the later two rulings. According to him the decision in I. L. R. (1939) Bom. 140<sup>2</sup> laid down that where a party shows that for the statutory period he had openly exercised certain rights which were in themselves sufficient to establish an easement, *prima facie* he was entitled to the easement and it was not necessary to show that during the whole of the prescriptive period he was consciously asserting a right to an easement. On the evidence, which consisted of two teachers who were occupying the two houses of the plaintiff, the learned Judge held that the plaintiff had through his agents enjoyed the easement rights which he now claims for the statutory period and the fact that he claimed ownership of the terrace in the previous litigation during that period did not matter at all as it was not necessary that he should be conscious throughout that the terrace was of the defendant's and not of his ownership. He, therefore, granted to the plaintiff the reliefs which he claimed in respect of the right of way as well as the right of light and air. On appeal the First Class Subordinate Judge with appellate powers confirmed that decree. He was also of the opinion that the observations of Baker J. in 56 Bom. 427<sup>3</sup> went too far as



observed in the later decision in I. L. R. (1939) Bom. 140<sup>2</sup> and he agreed with the trial Judge that the plaintiff had through his agents enjoyed rights which he claimed for the statutory period, and even though he asserted his ownership of the terrace in the previous litigation, it did not come in his way of proving the right of easement. He, therefore, confirmed the decree of the trial Court and gave permission to the plaintiff to amend his plaint by asking for relief for light and air for four *jalis* instead of three *jalis* as he claimed in his plaint, because on the evidence it was held that there were four *jalis* and that the plaintiff had enjoyed light and air through all of them for the statutory period.

The defendant has filed this second appeal against the decree of the lower appellate Court, and it is contended on his behalf that the lower Courts were wrong in following the two decisions of this Court in I.L.R. (1939) Bom. 140<sup>2</sup> and 35 Bom. L. R. 144,<sup>1</sup> because the learned Judges below only relied on certain observations in the nature of *obiter dicta* which were not necessary for the purpose of the actual decision. On the other hand, the decision in 16 Bom. 592<sup>4</sup> which was followed in 56 Bom. 427<sup>3</sup> established the proposition that a person claiming the rights as an easement must be conscious of the fact that the property over which he was exercising the rights was not his own and that it belonged to another person; and as the plaintiff in this case had asserted his own right of ownership over the terrace in the previous litigation for the statutory period, he cannot be held to have acquired them by way of easement. It is also contended that the decisions of the other High Courts, namely, Madras, Allahabad, Rangoon and Nagpur, as well as the Chief Court of Karachi, have also taken the same line as the decision of our Court in 16 Bom. 592<sup>4</sup> and that we should follow those decisions rather than the observations in I.L.R. (1939) Bom. 140.<sup>2</sup> 16 Bom. 592<sup>4</sup> is the earliest decision of our High Court on this point and, although that case was not governed by S. 15, Easements Act, 1882, but by S. 26, Limitation Act of 1877, the provisions of both the sections so far as they bear on this point are the same. In that case it was held that in order to acquire an easement under S. 26, Limitation Act, the enjoyment must have been by a person claiming title thereto as an easement as of right for 20 years. Evidence of immemorial user adduced in support of a right founded on ownership, does

not, when that right is negatived, tend to establish an easement. The plaintiff had in that case also claimed the ownership of the land, for which the easement was claimed, in a previous suit, and it was observed that from the case the plaintiff had made in his previous suit that he never claimed the right to use the *nul*, gutter and *kothi* as an easement, but by right of ownership of the land itself, the lower Court of appeal was right in holding that his claim to an easement failed in so far as it was based on S. 26, Limitation Act. That decision was followed in 56 Bom. 427.<sup>3</sup> Baker J. sitting singly held that no claim of easement can be made with reference to the land over which a person claimed ownership or which belonged jointly to him along with others. He followed the decision in 16 Bom. 592<sup>4</sup> and also a Full Bench decision of the Madras High Court in 49 Mad. 820.<sup>5</sup> He also referred to two English cases on that point, namely, 1915 A. C. 599<sup>6</sup> and (1914) 3 K. B. 911.<sup>7</sup> In the opinion of the learned Judge the English law was the same as that was adopted in the two Indian decisions in 16 Bom. 592<sup>4</sup> and 49 Mad. 820<sup>5</sup> and that, therefore, a party who claims a right of easement cannot succeed unless he established that he had consciousness of the knowledge that property over which he was claiming easement did not belong to him.

In 35 Bom. L. R. 144,<sup>1</sup> it was held that where one of the issues on which the parties go to trial is an issue of easement, the mere fact that the defendants claim in their pleading ownership of the land does not affect the suit. In that case there was no previous litigation in which ownership was pleaded by the party claiming easement in the subsequent suit but there were inconsistent and alternate pleadings in the same suit, and it was held that it was open to a party to put up inconsistent defences. Beaumont C. J., who decided that case, was of the opinion that certain observations made by Baker J. in 56 Bom. 427<sup>3</sup> went too far inasmuch as it was stated that there must be consciousness on the part of the person who claims as an easement that all along he was claiming the right treating the property as belonging to somebody else. The same criticism was repeated by Beaumont C. J. in

5. ('26) 13 A.I.R. 1926 Mad. 728 : 49 Mad. 820 : 96 I. C. 968 (F. B.), Subba Rao v. Lakshmana Rao.

6. ('15) 2 A.I.R. 1915 P. C. 131 : 1915 A.C. 599 : 84 L. J. P. C. 98 : 112 L.T. 955, Attorney General for Nigeria v. Holt and Co.

7. (1914) 3 K. B. 911 : 84 L. J. K. B. 251, Lyell v. Hothfield (Lord).



I. L. R. (1939) Bom. 140.<sup>2</sup> In that case there was no previous litigation but there was an alternative inconsistent defence of ownership and easement. The plea of ownership was not pressed at the time of framing issues and, therefore, there was no issue about ownership. The only issue framed was about the right of easement. The learned Chief Justice held, as he did in the previous case in 35 Bom. L. R. 144,<sup>1</sup> that it was open to a party to raise inconsistent pleas in the alternative and that the suit should not be dismissed on that account. In doing so, however, he again repeated the criticism in 56 Bom. 427<sup>3</sup> and observed (p. 142) :

"It is not in my judgment the law that a person cannot acquire an easement unless during the whole prescriptive period he acts with the conscious knowledge that it is a case of a dominant and servient tenement and that he is exercising a right over property which does not belong to him."

It was further observed (p. 142) :

"In my opinion, where a party shows that for the statutory period he has openly exercised certain rights which are in themselves sufficient to establish an easement, *prima facie* he is entitled to the easement, and it is not necessary to show that during the whole of the prescriptive period he was consciously asserting a right to an easement. Most laymen do not know exactly what their legal rights may be. They do certain acts without formulating, even mentally, a legal claim, and, in my opinion, a right to an easement by prescription cannot be defeated merely by showing that during the whole or part of the period of prescription the plaintiff was not consciously claiming an easement."

At the same time, however, the learned Chief Justice observed, summarising the effect of the two English decisions in (1914) 3 K. B. 911<sup>7</sup> and 1915 A. C. 599<sup>8</sup> (p. 143) :

"... if it be shown that the owner of the dominant tenement has in fact exercised all the rights which he says go to constitute an easement in pursuance of a perfectly definite and well recognised claim of ownership, then it is not open to him to turn round and say 'now that my claim to ownership on which I always relied has failed, I rely on some of the acts of ownership as being sufficient to constitute an easement.' But these cases must all turn on the particular facts proved."

All these observations were not necessary for the purpose of the decision in that case. Even so, they do not, in my view, amount to a definite opinion that in no case can an assertion of ownership over a property during the prescriptive period prevent the acquisition of easement rights over the said property. In my judgment, the authority in 16 Bom. 592<sup>4</sup> is not shaken by any subsequent authority of this Court. It is not necessary to enter into an elaborate enquiry as to whether the law which is laid down in Ss. 4 and 15, Indian Easements Act, was based upon English common law or upon the English Prescription Act. For the purpose

of this case we have to construe Ss. 4 and 15, Indian Easements Act. Section 4 says, among other things, that an easement is a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do something or to prevent something being done upon certain other land not of his own. So that it is necessary that the right must be exercised upon a land which does not belong to the person who is exercising that right, and S. 15, which deals with the acquisition of that right, clearly says that the right must be exercised among other things as an easement. In considering this question it is necessary to keep in mind the distinction between a rule of pleading and a rule of proof. That inconsistent pleadings can be pleaded in the alternative is a well-established rule of pleading, but the proof of a plea depends on the provisions of substantive law. Therefore, although it is permissible to plead inconsistent defences in the alternative, such as right of ownership and right of easement, it does not necessarily follow therefrom that when a person has unsuccessfully pleaded his right of ownership of property in a previous litigation he can in a subsequent suit succeed by merely proving enjoyment of a certain right over the property for the statutory period without also proving the enjoyment of that right as an easement under S. 15, Easements Act. To prove that the right was exercised as an easement, it is necessary to establish that it was exercised on somebody else's property and not as an incident of his own ownership of that property. For that purpose his consciousness, that he was exercising that right on the property treating it as somebody else's property, is a necessary ingredient in proof of the establishment of that right as an easement. If a person has actually claimed ownership of the servient tenement in a previous litigation within the statutory period of twenty years, it may be regarded as an important piece of evidence to show that he did not exercise that right as an easement.

It is true that the outward indication of the exercise of the right by virtue of ownership and easement may in most cases be the same, but where there is evidence of his previous conduct of the right of ownership, it is for him to show that notwithstanding that conduct he did all the acts of enjoyment of the right as an easement. His conduct is not quite conclusive against him. At the same time it lays a heavy burden on him to prove that his assertion of owner-



ship was not merely untenable but known to be false and inconsistent with his conduct. Where there is no such assertion in a previous litigation but alternative pleas of ownership and easement are taken in the same suit, the election to prove one of the two alternative pleas may be made when evidence is to be led or even after the evidence is over. The party may contend that though the evidence is not satisfactory to establish ownership, it is sufficient to prove the right of easement. In any case, it must be shown that the right was enjoyed as an easement, that is, as an assertion of a hostile claim of certain limited rights over somebody else's property. Such an assertion cannot be held proved without satisfactory proof of the requisite consciousness. Prescriptive easement, as opposed to easement by grant, is always hostile. It is in fact an assertion of a hostile claim of certain rights over another man's property and as such it resembles in some respects the claim to ownership by adverse possession of property; both are of hostile origin and are, therefore, prescriptive rights obtained by adverse enjoyment for a certain period, the difference being that while in the case of adverse possession the possessor must assert his own ownership, in the case of easement he must assert limited rights of user on a property and acknowledge its ownership in some one else. It must, therefore, follow, in my opinion, that a person who asserts such a hostile claim must prove that he had the consciousness of exercising that hostile claim on a property which is not his own, and where no such consciousness is proved, he cannot prove the prescriptive acquisition of the right. Mr. Thakore has relied on the decision of this Court in 46 Bom. 200,<sup>8</sup> where there was observation by Sir Norman Macleod C. J. as follows (p. 203) :

"Whether in previous years they merely exercised rights of way over that strip against the true owner, or did so because they thought it had belonged to their ancestors, it does not seem to me to make very much difference."

This, however, does not support the contention urged by Mr. Thakore that the question of consciousness, or *animus* as he calls it, is entirely irrelevant. All that is observed is that in appreciating the evidence it does not make much difference. The Court was only concerned with the question as to whether a person can assert a right which was inconsistent with the right alleged in

the previous litigation. Inconsistent pleas were raised in the alternative in the written statement. It appears, however, as observed by Shah J. that at the time when the issues were framed the question of ownership was given up, and the only issue framed was about the right of easement. The same appears to be the case in I. L. R. (1939) Bom. 140.<sup>2</sup> It is certainly open to a party to raise inconsistent defences in the alternative, but at the time when evidence is led he has got to elect as to which of the two alternative inconsistent defences he is going to prove. If he relies on the plea of ownership and leads evidence on that point and fails in doing so, and if he thereafter relies on the same evidence for easement rights, he will be met with a serious difficulty in establishing a claim of easement because of the plea of ownership for which he led evidence and failed. However, it does not necessarily follow that, if a person makes inconsistent pleas he should not be allowed to lead evidence on those pleas. A party, if he chooses, is entitled to lead evidence on both the alternative pleas; and it is for the Court to decide whether he is entitled to succeed on either of the pleas. Certainly he cannot succeed on both.

The principle underlying the decisions of our High Court in 16 Bom. 592<sup>4</sup> and 56 Bom. 427<sup>3</sup> has been followed by other Courts in 49 Mad. 820,<sup>5</sup> I.L.R. (1943) ALL. 792,<sup>9</sup> I.L.R. (1939) Nag. 580,<sup>10</sup> I.L.R. (1939) Kar. 307<sup>11</sup> and A.I.R. 1939 Rang. 34.<sup>12</sup> In my opinion, the decisions in 16 Bom. 592<sup>4</sup> and 56 Bom. 427<sup>3</sup> are correct. The learned Judge below was wrong in relying only on some observations in 41 Bom. L. R. 168<sup>2</sup> and in holding that it was not necessary for the plaintiff to show that during the whole of the prescriptive period he was consciously asserting a right of easement.

It is contended by Mr. Thakore that, although the plaintiff has led the evidence of two teachers who were occupying the two houses, Nos. 651 and 652, an opportunity should be given to him to prove that during the statutory period he was consciously asserting the rights which he claims in this

8. ('22) 9 A. I. R. 1922 Bom. 199 : 46 Bom. 200 : 64 I. C. 517, Dharamdas Kaushalyadas v. Ranchhodji Dayabhai.

9. ('43) 30 A.I.R. 1943 All. 362 : I.L.R. 1943 All. 792 : 209 I.C. 578, Lalit Kishore v. Ram Prasad.

10. ('39) 26 A.I.R. 1939 Nag. 197 : I.L.R. (1939) Nag. 580: 186 I. C. 155, Rajlu Naidu v. M. E. R. Malak.

11. ('39) 26 A.I.R. 1939 Sind 110 : I.L.R. (1939) Kar. 307: 181 I. C. 961, Khanchand Jethamal v. Naraindas Pahlajrai.

12. ('39) 26 A.I.R. 1939 Rang. 34 : 180 I. C. 477, Murugappa Chettiar v. Chettyar Firm.



suit on the basis that the terrace belonged to the defendant. As the case has not been approached from that point of view in the lower Courts, in my opinion, it is fair that the plaintiff should be given an opportunity to prove that he was asserting those rights during the statutory period with the knowledge that the terrace belonged to the defendant. I am, therefore, of the opinion that the appeal should be allowed, the decree of the lower appellate Court should be reversed and the following issue should be sent down to the trial Court:

"Whether it is proved that during the period of prescription the plaintiff has exercised the rights which he now claims as easements?"

Both the parties will be at liberty to produce additional evidence. The finding should be returned to this Court, after it is certified by the District Court, within three months after the record reaches the trial Court.

**Sen J.**—I agree. As I was a party to the decision in I.L.R. (1939) Bom. 140,<sup>2</sup> I shall add a few remarks. It seems that the observations on which reliance has been placed by both the Courts below were not necessary for the purpose of deciding the point that arose in that case. In that case the defendant raised alternative defences, one of ownership and the other of an easement. There was an issue only as to the easement; and both the trial Court and the lower appellate Court held the claim to the easement proved and the plaintiff's suit was dismissed. All that was really decided by this Court in that case was that a plaintiff may claim an easement and ownership in the alternative and that the mere setting up of a claim to ownership does not prevent him from establishing a right to an easement, Beaumont C. J., also referred to (1914) 3 K. B. 911,<sup>7</sup> (1915) A. C. 599<sup>6</sup> and stated their effect; and it seems to me that in view of this there is perhaps not so much divergence between those decisions and the view of Beaumont C. J., as would first appear. In 49 Mad. 820<sup>5</sup> which is also based on the said English cases, there is no actual reference to any specific kind of knowledge or belief; the reference is rather to the claimant's attitude or state of the mind. In 34 Bom. L. R. 1015<sup>3</sup> Baker J. seems rather to have overstated the requirement of law when he spoke of the "knowledge that is a case of a dominant and servient tenement and that he (the dominant owner) is exercising a right over property which does not belong to him." With reference to an easement like a right to light or air it would perhaps be inappro-

priate to speak of *animus* or knowledge, for it is in the nature of a "negative" easement which is capable only of passive enjoyment. It is also true that in most English cases prior to 1914 not much emphasis seems to have been laid on this element in easement acquired by prescription. For instance, in (1879) 11 Ch. D. 852,<sup>13</sup> it was said that consent or acquiescence lies at the root of a claim for prescription, a proposition that was repeated in (1914) 3 K. B. 911.<sup>7</sup> But in (1915) 6 A.C. 599,<sup>6</sup> it was clearly laid down (p. 618):

"In substance the owner of the dominant tenement throughout admits that the property is in another, and that the right being built up or asserted is the right over the property of that other. In the present case this was not so. For these reasons their Lordships are of the opinion that the grounds upon which the judgment appealed from are put cannot be maintained."

There is in this conclusion a clear reference to the attitude or mental condition of the dominant owner, and that is in consonance with the meaning of the words "as an easement" in S. 15, Easements Act. That attitude of the dominant owner must involve the consciousness that the right is over the property of another person, a consciousness obviously inconsistent with a genuine claim of ownership of such property. As Beaumont C. J. observed in I. L. R. (1939) Bom. 140<sup>2</sup> each case must depend on the particular facts proved, but it will be necessary in every case in which acquisition of easement by prescription is claimed to establish that such an attitude or unconsciousness in the dominant owner can be inferred from the circumstances of that case. If such an inference is impossible, for instance, owing to the fact that he had been making definite and *bona fide* claims of ownership, it would not be open to him to claim an easement.

**Weston J.**—As I was one of the referring Judges in the case, I desire to add a few words. We referred this matter to a Full Bench, because, although the decisions of all the High Courts in India, including this Court, which had considered the question, appeared to lie one way, yet the subordinate Courts have relied upon certain observations made by the late Chief Justice in two cases, 35 Bom. L. R. 144<sup>1</sup> and I. L. R. (1939) Bom. 140<sup>2</sup> as going the other way, and it seemed desirable that a Full Bench should consider whether in those observations was to be found any statement of law other than that accepted in earlier cases of this Court, and by other High Courts, and,

13. (1879) 11 Ch. D. 852 : 48 L. J. Ch. 785 : 41 L. T. 219 : 28 W. R. 200, *Sturges v. Bridgman*,



if so, whether that statement of law should be adopted. The question which arises for our consideration may, I think, be put in these terms: "Whether a person can be said to establish a right of easement, when it is shown that during part of the prescriptive period this person has exercised the right he now claims as easement, not as a right over the property of another, but as a right over property which at the time he considered to belong to himself?"

On the authority of the decisions of this Court and other High Courts, this question would have to be answered in the negative. The observations of the late Chief Justice in the two Bombay cases do, however, suggest that the consciousness during the period of prescription on the part of the person claiming the easement that the property over which he claims the easement is the property of another, and not of himself, is entirely irrelevant. The cases of the other High Courts, which have been set out by my brother Divatia, to one of which, I.L.R. (1939) Kar. 307,<sup>11</sup> I was a party, proceed, except 16 Bom. 592,<sup>4</sup> which was a case under the Limitation Act, on the wording of sections 15 and 4, Easements Act, and upon observations in certain English cases, particularly the observations of the Privy Council in (1915) A. C. 599.<sup>6</sup> The important words in the sections of the Easements Act are the words in S. 15 "as an easement," and that these words should be taken to mean that the person exercising those acts must do so with the consciousness that he is not the owner receives substantial support from the observations of their Lordships of the Privy Council in the case referred to above. These are (p. 618):

"An easement, however, is constituted over a servient tenement in favour of a dominant tenement. In substance the owner of the dominant tenement throughout admits that the property is in another, and that the right being built up or asserted is the right over the property of that other."

I think, therefore, that there can be no doubt that in this country if the owner of the dominant tenement has during part of the period of prescription exercised the rights which he now claims as an easement, under the assertion or belief that he was the owner of the servient tenement, then his exercise of those rights is not exercise "as easement," and he must fail in a claim to easement. If the remarks in 35 Bom. L. R. 144<sup>1</sup> and I.L.R. (1939) Bom. 140,<sup>2</sup> which remarks, it may be noted, were in no way necessary for the decisions of those cases,

were intended to lay down a contrary proposition, then with respect I think they were wrong. I agree, therefore, that the case must be disposed of in the manner proposed.

G.N.

*Appeal allowed.*

[Case No. 61.]

**A. I. R. (33) 1946 Bombay 272**

**FULL BENCH**

**DIVATIA, SEN AND WESTON JJ.**

*Chimanlal Hargovinddas — Appellant*  
v.

*Gulamnabi — Respondent.*

Second Appeal No. 228 of 1942, Decided on 20th August 1945, from decision of District Judge, Ahmedabad, in Appeal No. 280 of 1940.

Civil P. C. (1908), O. 21, R. 16 — Partition suit by A — Reference to arbitration through Court — Award holding A entitled to half share in suit property — A assigning by registered deed not merely his share but all rights under award to C — Decree subsequently passed in favour of A in terms of award — C held entitled to execute decree as transferee of same by assignment in writing within O. 21, Rule 16.

Certain property was held by A and B as tenants-in-common. A agreed to sell his half share in the property to C and filed a partition suit to recover his share. The suit was referred to arbitration through Court. The arbitrators held that A was entitled to a half share in the property with mesne profits. A then sold all his rights under the award (which was called a decree) to C by a registered deed. Subsequently the Court passed a decree in terms of the award and under that decree A was held entitled to a half share in the property. C had not made any application to the Court for being brought on the record on account of his assignment but after the decree was passed he applied for execution of the decree alleging that he had taken the assignment of the decree from A. C's right to execute the decree was challenged on the ground that he was not a transferee of the decree under O. 21, Rule 16:

*Held* that (1) C was entitled to execute the decree. The transfer in his favour operated as a transfer of the decree by assignment in writing within O. 21, R. 16, because what was transferred by the deed in favour of C was not merely a half share of A in the property but all his rights under the award including the right to take a decree on its terms and all the rights which A would have in the decree which was to be subsequently passed and in equity the decree which was passed subsequent to the deed of assignment must be taken to have been assigned by the deed on the principle that where a contract to assign property which is to come into existence in future is made and that property comes into existence, equity, treating as done that which ought to be done fastens upon that property, and the contract to assign thus becomes a complete assignment: 11 Bom. 506, *Approved*; 16 Mad. 429, *Rel on*; (26) 13 A.I.R. 1926 Bom. 406, *Disting.*; *Case law discussed.*

[P 275 C 1, 2]

(2) if the deed of assignment had assigned only the property, namely, the half share of A or had assigned only the right to take a decree in terms



of the award, A, no doubt, could not have applied for execution of the decree unless there was a separate deed of transfer of the decree : ('26) 13 A. I. R. 1926 Bom. 406, *Approved*. [P 275 C 1]

**C. P. C. —**

('44) Chitaley O. 21, R. 16, N. 3, Pts. 6, 12.

('41) Mulla Page 767, Pt. (i); Page 768, Pts. (m), (n) Page, 769, Pt. (w).

*J. C. Shah and N. C. Shah* — for Appellant.

*I. I. Chundrigar and K. M. Pathak*

— for Respondent.

**Divatia J.**—This second appeal has been referred to a Full Bench on account of an apparent conflict between two decisions of this Court. The material facts on which the point for decision arises are shortly these: One Najubhai and Gulam Nabi were cousins. The suit property, which consisted of a shop, was held by them as tenants-in-common. On 24th May 1936, Najubhai agreed to sell his half share in the property to one Chimanlal, who is the present appellant, for Rs. 1,350. Rupees 300 were paid at the time of the agreement and Najubhai was to file a suit and obtain partition and thereafter execute a conveyance to the appellant. According to that arrangement Najubhai filed a partition suit against his cousin Gulam Nabi on 16th January 1937. The suit was referred to the arbitration of two persons through Court. The arbitrators did not agree and the matter was, therefore, referred to an umpire. The umpire gave his award on 16th January 1939. He held that Najubhai was entitled to a half share in the property and was also entitled to a certain amount of mesne profits and future mesne profits at a certain rate. Thereafter, on 7th March 1939, Najubhai sold all his rights under the award, which was called a decree, to the present appellant by a written deed which was registered on 4th August of the same year. The Court passed a decree in terms of the award on 1st September 1939, and under that decree Najubhai was held entitled to a half share in the property. It may be noted that the present appellant had not filed any application in the lower Court for being brought on the record on account of his assignment, but after the decree was passed he applied on 24th November 1939, for execution of the decree stating that he had taken the assignment of the decree from the decree-holder Najubhai. The judgment-debtor, i.e. present respondent, challenged the appellant's right to execute the decree inasmuch as he was not a transferee of the decree under O. 21, R. 16, Civil P. C., and also on the ground that the deed of assignment taken by him

was fraudulent and without consideration. The learned Judge held on the first issue that by virtue of the deed of assignment, which the appellant had taken from Najubhai, he had become the transferee of the decree itself, and that he was, therefore, entitled to file the darkhast and after making that finding, he fixed the darkhast for evidence to be led on the second issue about the alleged fraudulent and nominal character of the assignment. Thereafter, Gulam Nabi appealed against the order of the trial Judge, and the learned District Judge held that although the present appellant had taken the deed of assignment of the property which would have fallen to the share of Najubhai, he had not taken an assignment of the decree itself under O. 21, R. 16, and that he was not, therefore, entitled to file the darkhast.

The learned Judge referred to two decisions of this Court, one in 11 Bom. 506<sup>1</sup> and the other in 28 Bom. L. R. 761.<sup>2</sup> According to him there appeared to be some conflict between these two decisions and he preferred to follow the later decision in 28 Bom. L. R. 761,<sup>2</sup> especially because it was in accordance with the decisions of the Calcutta High Court in 51 Cal. 703<sup>3</sup> and 51 Cal. 297.<sup>4</sup> He was of the opinion, following the decision in 28 Bom. L.R. 761,<sup>2</sup> that it was not enough for the present appellant to take an assignment of the property, but he ought to have thereafter taken a transfer of the decree itself, because under R. 16 of O. 21 the only persons who can apply for execution of the decree are either the decree-holder himself or the persons who have become transferees from the decree-holder either by operation of law or by assignment in writing, and that the appellant did not come under any of these three classes. The learned Judge thought that but for the decision in 28 Bom. L. R. 761<sup>2</sup> in which, however, the previous decision in 11 Bom. 506<sup>1</sup> was not referred to, he would have followed the latter decision. He was also of the opinion that the decision in 11 Bom. 506<sup>1</sup> depended on its own facts. There the persons who had passed the deed of assignment in favour of

1. ('87) 11 Bom. 506, Purmananddas Jiwandas v. Vallabhdas Wallji.

2. ('26) 13 A. I. R. 1926 Bom. 406 : 96 I. C. 833 : 28 Bom. L. R. 761, Genaram v. Hanmantaram.

3. ('24) 11 A. I. R. 1924 Cal. 661 : 51 Cal. 703 : 80 I. C. 881, Mathurapore Zamindary Co., Ltd. v. Bhasaram Mandal.

4. ('32) 19 A. I. R. 1932 Cal. 439 : 59 Cal. 297 : 137 I. C. 857, Prabashinee Debi v. Rasiklal Banerji.



one Purmananddas were his trustees and by the will of Purmananddas's father they were directed to transfer all his property with the rights connected therewith to Purmananddas when he came of age. The latter attained majority while a litigation in connection with one of the properties was pending, and the assignment by the trustees in favour of Purmananddas during the pendency of the litigation was held to be operative in equity as an assignment of the decree itself which was passed in favour of the trustees. In the present case, according to the opinion of the learned Judge, there was no question of equity, and the matter was, therefore, governed by the principle of the decision in 28 Bom. L. R. 761,<sup>2</sup> according to which even though the property was assigned during the pendency of the suit, it would not entitle the transferee to apply in execution unless he became the transferee of the decree itself. Accordingly the learned District Judge allowed the appeal and dismissed the darkhast with costs.

The darkhastdar has now filed the present appeal, and Mr. J. C. Shah on his behalf has contended that the learned Judge below was wrong in holding that what was sold by the assignment was only the property itself and that it ought to have been held that the decree, which was ultimately passed in the litigation, was itself transferred by the deed of assignment. He further contended that even if it be held that he was not the transferee of the decree by operation of law or by assignment in writing, he was by virtue of the provisions of S. 146, Civil P. C., entitled to file this darkhast because he claimed through the original decree-holder. A large number of authorities have been cited before us by both the learned counsel. In my opinion, however, it is not necessary to refer to all of them, because most of them can be distinguished on the construction which I place on the terms of the deed of assignment. There is a distinction between the assignment of the property in the suit and the assignment of an award with all the rights thereunder. Moreover, in the present case the terms of the sale-deed are to the effect that the vendor transfers the decree itself in favour of the present appellant. It appears that both the parties were under the impression that the award passed by the umpire was itself a decree, and it is expressly stated at two places in the sale-deed that a decree had been passed in favour of Najubhai and that he purported to convey to the present appellant all

the rights which he had obtained under that decree. In the operative part of the deed the vendor says :

"I have sold my half undivided share in the same according to the decree passed in Suit No. 58 of 1937 including all the rights under the said order, absolutely to you for an amount of Rs. 1350."

and at the end of the document he says further :

"I have assigned the right under the said decree also to you together with the sale of my said half share and hence you are the owner of the same."

It is, therefore, clear that Najubhai intended to sell the decree in favour of the appellant who also intended that he was purchasing Najubhai's right under the decree. As a matter of fact, there was no decree of the Court at that time. It was an award made by the umpire which ripened into a decree later on. Mr. Shah on behalf of the appellant has contended that on these facts the principle underlying the decision of this Court in 11 Bom. 506<sup>1</sup> applies. It was there held on equitable grounds that although the decree was passed subsequent to the deed of assignment by the trustees in favour of Purmananddas, the latter must be deemed to be the transferee of the decree. Sargent C. J. observed (p. 511) :

"By the deed of assignment the trustees transfer to Purmananddas 'all movable property, debts, claims, and things in action whatsoever vested in them,' which would include the claim which was the subject-matter of the then pending suit ; and the effect of this assignment was, in equity, to vest in Purmananddas the whole interest in the decree which was afterwards obtained."

The learned Chief Justice further proceeded to state (p. 512) :

"There is no doubt that, in a Court of equity, in England the decree would be regarded as assigned to Purmananddas, and he would be allowed to proceed in execution in the name of the assignors. Here there is no distinction between 'law' and 'equity,' and by the expression 'by operation of law' must be understood the operation of law as administered in these Courts. We think under the circumstances that we must hold that the decree has been transferred to Purmananddas 'by operation of law.' In the present case the decree has been transferred by an assignment in writing as construed in these Courts."

This case has been criticised by the Calcutta High Court in 51 Cal. 703<sup>3</sup> and also by our own Court in 41 Bom. L. R. 371.<sup>5</sup> The criticism in the latter case mainly proceeds on the ground that it is not quite correct to say that the transfer is both by operation of law as well as by assignment in writing. There is no doubt something to be said in favour of the view that the transfer cannot

5. ('39) 26 A.I.R. 1939 Bom. 221 : I. L. R. (1939) Bom. 271 : 182 I. C. 779 : 41 Bom. L. R. 371, Asundi v. Virappa.



be by operation of law which can only mean that the rights have been transferred on account of devolution of interest on death, etc. This criticism does not, however, affect the decision that in equity a decree, which was subsequently passed, may be regarded as already having been transferred during the pendency of the litigation, and that, therefore, the decree had been transferred by assignment in writing within the meaning of that expression in S. 232, Civil P. C., 1882, which corresponds to O. 21, R. 16 of the present Civil Procedure Code.

The other decision of our Court on which the learned Judge below has relied, viz., 28 Bom. L. R. 761,<sup>2</sup> can, in my opinion, be distinguished from the facts of the present case on the ground that what was transferred in that case was the property itself and not the vendor's right in the award. It is no doubt true that where only property is assigned and nothing more, a deed of transfer of the decree would be necessary. But, in my opinion, what was transferred in the present case was not merely a half share of the vendor in the shop but all his rights under the decree, meaning thereby the award and all the rights which were appurtenant to the award including the right to take a decree on its terms. In my opinion the equitable principle, which is embodied in 11 Bom. 506<sup>1</sup> though on somewhat different facts, would also apply to the present case. It is true that the decree was passed after the deed of assignment was made, but the rights which were conveyed to the present appellant were the rights under the award which the parties treated as a decree. There is no doubt a distinction between an assignment of a right to take a decree and an assignment of the decree itself. Several authorities have been cited before us to show that where what was said to be transferred was only a right to take decree, the party cannot apply for execution unless there is a separate deed of transfer of the decree. But the present deed of assignment, which is a registered document and for which the appellant has paid a consideration of Rs. 1350, i. e. the value of the half share of Najubhai's interest in the shop, creates, in my opinion, the same right in favour of the appellant which Najubhai had when the decree was passed. This principle of equity is not entirely foreign to the provisions of the Transfer of Property Act. It has been embodied in S. 43, T. P. Act, although that section would operate only where a person fraudulently or erroneously

represented that he was authorized to transfer the property. That equitable principle applies to the present case, because the document of assignment is passed for proper consideration and it assigns all the rights which Najubhai would have in the decree which was to be subsequently passed. The same principle of equity has been applied by the Madras High Court in 16 Mad. 429,<sup>6</sup> relying on (1881) 19 Ch. D 342<sup>7</sup> where it was observed (p. 351) :

"A man can contract to assign property which is to come into existence in the future, and when it has come into existence, equity, treating as done that which ought to be done, fastens upon that property, and the contract to assign thus becomes a complete assignment."

Acting on this principle, the learned Judges of the Madras High Court observed (p. 434) :

"As for the contention that such assignment is recognised neither by the Transfer of Property Act nor by the Contract Act, the transaction is not invalidated by either of those enactments and it falls under the rule of Equity which the Courts have to administer in this country."

It is true that the appellant could have applied, if he liked, under O. 22, R. 10, Civil P. C., for being brought on the record, but it was not obligatory on him to do so, if he got by transfer all the rights which he would have in the decree.

Mr. Chundrigar has relied on the decisions in 26 Bom. L. R. 333,<sup>8</sup> 27 Bom. L. R. 1109<sup>9</sup> and 41 Bom. L.R. 371.<sup>5</sup> In the first case it was held that the only persons who can apply for execution are those who fall under O. 21, R. 16. We may take it that it is so, but if the present appellant is a transferee of the decree by assignment in writing, as in my opinion he is, he is entitled to file the *dar-khast*. In 27 Bom. L. R. 1109,<sup>9</sup> there was no deed of assignment, but only a right under a decree to obtain an assignment from the holder of another decree. In 41 Bom. L. R. 371<sup>5</sup> the question for decision was whether the words "operation of law" in O. 21, R. 16, should receive a restrictive interpretation or not. The decision in that case does not touch the point which is before us, viz., the assignment of all the rights in the litigation including the decree to be passed thereunder. Mr. Shah has relied on a decision of the Calcutta High Court in I.L.R. (1939) 2 Cal.

6. ('93) 16 Mad. 429, *Palaniappa v. Lakshmanan*.

7. (1881) 19 Ch. D. 342: 51 L. J. Ch. 14: 45 L.T. 567 : 30 W. R. 70, *Collyer v. Isaacs*.

8. ('24) 11 A.I.R. 1924 Bom. 426 : 80 I.C. 249 : 26 Bom. L. R. 333, *Vithal v. Mahadev*.

9. ('25) 12 A.I.R. 1925 Bom. 472 : 90 I. C. 561 : 27 Bom. L. R. 1109, *Pandu v. Savla*.



341.<sup>10</sup> In that case the defendant had executed a mortgage bond in favour of the plaintiff assigning by way of security the decree that would be passed in a suit instituted by him against a third party for recovery of money due on unpaid bills for work done. The suit resulted in a decree in favour of the defendant, and the plaintiff thereafter instituted a suit for a declaration that as assignee of the decree passed in favour of the defendant, he was entitled to realise the decretal amount either amicably or by execution. It was held that the plaintiff was not an assignee of a mere right to sue, and the transfer being of a claim to a debt was valid in law, and that though it was in the form of a mortgage the plaintiff was entitled to execute the decree. In this case it was held, relying upon the decisions in (1861-62) 10 H. L. C. 191<sup>11</sup> and (1881) 19 Ch. D. 342<sup>7</sup> as well as the Indian decision in 16 Mad. 429,<sup>6</sup> which I have quoted above, that an assignment of future or non-existing property is valid and the transfer becomes operative as soon as the property comes into existence.

The learned District Judge below has relied on the decisions in 51 Cal. 703<sup>3</sup> and 59 Cal. 297.<sup>4</sup> Both those cases were cases of assignment of property itself and not of assignment of the nature which we have in the present case. I do not think, therefore, that those decisions would apply to the present case. I think, therefore, that the present case falls within the equitable principle laid down in 11 Bom. 506<sup>1</sup> and 16 Mad. 429<sup>6</sup> and it is not governed by the decision in 28 Bom. L. R. 761<sup>2</sup> where only the property in suit was transferred. The appellant is, therefore, entitled to maintain the darkhast. In view of this decision, it is not necessary to refer to the other argument urged by Mr. Shah that in any case he is entitled to maintain the darkhast by virtue of the provisions of S. 146, Civil P. C. It appears that the appellant's vendor Najubhai died sometime after the decree was passed. It is the respondent's own contention that he is the only legal representative of Najubhai, and that it is at his instance that the second issue was framed, viz., whether the deed of assignment is fraudulent and without consideration. If Najubhai had been alive, a notice would have been issued to him under O. 21, R. 16, 10. ('39) 26 A.I.R. 1939 Cal. 715 : I.L.R. (1939) 2 Cal. 341 : 187 I. C. 806, *Purna Chandra Bhowmik v. Barna Kumari Debi*.  
11. (1860-62) 10 H. L. C. 191 : 33 L. J. Ch. 193 : 7 L. T. (N.S.) 172 : 11 W. R. 171, *Holroyd v. Marshall*.

and he could have contested the valid nature of the assignment. In the present case as the respondent himself contends that he is Najubhai's legal representative and as the issue is already framed, he will have an opportunity to contest the assignment taken by the appellant, and I do not think, therefore, that the mere fact that no notice was issued to Najubhai during his lifetime would operate to the prejudice of the respondent. The learned trial Judge has still to make a finding on that issue, and this matter will, therefore, go back to the trial Court for a finding on the second issue and disposal according to law. As a result the appeal is allowed, the order of the lower appellate Court is set aside, and the case is sent back to the trial Court to be disposed of according to law. The appellant will be entitled to his costs in this Court and in the District Court. Costs in the trial Court will be costs in the cause.

**Sen J.**—I agree.

**Weston J.**—I agree.

G.N.

*Appeal allowed.*

[Case No. 62.]

**\*\* A. I. R. (33) 1946 Bombay 276**

**FULL BENCH**

**DIVATIA, SEN AND RAJADHYAKSHA JJ.**

*Nandlal Chunilal Bodiwala*  
*Petitioner*

**v.**

*Emperor.*

Criminal Revn. Appln. No. 652 of 1944, Decided on 18th September 1945.

**\*\* (a) Criminal P. C. (1898), Ss. 369 and 439—Reference under S. 438—Order without notice, viz., 'No order on this reference' is judgment within S. 369—No application in revision lies on same matter: Crim. Rev. Appln. No. 496 of 1943, OVERRULED.**

The term judgment is not defined either in the Criminal Procedure Code or in the Penal Code. It is described as the expression of the opinion of the Court arrived at after due consideration of the evidence and of the arguments, if any. This, however, applies to the judgment of a trial Court. As provided in S. 424, S. 367, which prescribes what the form and contents of the judgment of a trial Court ought to be, does not apply to the judgment of a High Court. There are no definite rules as to what the judgment of a High Court acting in its appellate as well as revisional jurisdiction should contain, because the judgment of the High Court in its criminal jurisdiction is ordinarily final and does not, therefore, require the statement of any reasons, especially in a revisional application where the parties are not bound to be heard. There is, therefore, practically no distinction between an order and a judgment of a High Court disposing



of a proceeding before it. Hence where on a reference made by the Sessions Judge under S. 438, a Division Bench of the High Court passes an order, without issuing notice, viz., 'No order on this reference,' the applicant at whose instance the Sessions Judge made the reference is not entitled to make an application in revision to the High Court in the same matter, in view of the provisions of S. 369, Criminal P. C.: *Crim. Revn. Appln. No. 496 of 1943, OVERRULED*; ('22) 9 A.I.R. 1922 All. 502; ('28) 15 A.I.R. 1928 Oudh 292; 3 I. C. 393 (Cal.) and ('24) 11 A. I. R. 1924 Lah. 310, *Disting.* [P 278 C 1; P 279 C 1]

In view of the hardship caused to a party by R. 26 of the Appellate Side Rules of the High Court, the Full Bench suggested the addition of a new rule to the effect that a reference made by a Sessions Judge recommending the setting aside of an order of the trial Court should always be placed for hearing after issuing notices to all the parties concerned. [P 279 C 2]

**Cr. P. C. —**

('41) Chitale, S. 369, N. 5, and S. 439, N. 3.

('41) Mitra, Page 1220, N. 1055 and Page 1380, N. 1170.

(b) Criminal P. C. (1898), S. 439 (2)—Applicability—Sub-section applies to case of enhancement of sentence of accused—Reference under S. 438 by person who is not accused—Order without hearing—Order is valid and binds petitioner.

The provision of sub-s. (2) of S. 439 that no order shall be made to the prejudice of the accused unless he had an opportunity of being heard either personally or by pleader applies to a case of enhancement of sentence of the accused and not to a case where the petitioner is not an accused person and the order of the lower Court is only confirmed. Consequently, in the case of such a petitioner, the fact that the order in a reference under S. 438 was made without hearing the petitioner does not affect its validity or its binding nature on the petitioner. [P 277 C 2; P 278 C 1]

**Cr. P. C. —**

('41) Chitale, S. 439, N. 45.

('41) Mitra, Page 1446, N. 1216.

*J. C. Shah and N. C. Shah*—for Petitioner.

*S. G. Patwardhan*, Assistant Government Pleader— for the Crown.

**Divatia J. —** This application has been referred to the Full Bench particularly for the determination of the following question, viz.,

"When on a reference made by the Sessions Judge under S. 438, Criminal P. C., a Division Bench of this Court passes an order without issuing notice, viz. 'No order on this reference,' whether the applicant at whose instance the Sessions Judge made the reference is entitled to make an application in revision to this Court in the same matter, in view of the provisions of S. 369, Criminal Procedure Code?"

The facts are shortly these : The Additional District Magistrate at Ahmedabad issued an order on 26th January 1944, under R. 40, Defence of India Rules, prohibiting a daily paper called *Sandesh* from publishing, selling or distributing its special issue to be published on 26th January in connection with

the celebration of the 'Independence Day.' In a revisional application against the said order filed by the editor and publisher of the paper, the learned Sessions Judge was of the opinion that the Additional District Magistrate had no jurisdiction to pass the order, and that in any case R. 40 did not apply to a case where, as was found in this case, the document was only likely to contain a prejudicial report, etc., when published. For these reasons he made a reference to this Court under S. 439, Criminal P. C., with a recommendation that the said order should be quashed. The said reference No. 101 of 1944 came up before a Division Bench of this Court and without issuing any notice to the parties it passed an order 'No order on this reference.' Thereafter the present petitioner, the Editor and Publisher of *Sandesh*, filed this revisional application to this Court on 30th November 1944, praying that the order of the Additional District Magistrate should be quashed.

An objection of a preliminary nature was taken by the Assistant Government Pleader that this application was incompetent under S. 369, Criminal P. C., after the order passed by this Court in the reference. Under that section no Court, when it has signed its judgment, shall alter or review the same, except to correct a clerical error. The contention is that the question about the legality of the order of the Additional District Magistrate, which arises in this revisional application, is the same question which was the subject-matter of the reference which also came before this Court in its revisional jurisdiction, and the order of this Court "No order on this reference" in the latter proceeding is a judgment within the meaning of that term in S. 369, which, after it was signed, cannot be altered or reviewed in this application. It is clear that the powers which this Court exercises in a reference under S. 438 are revisional powers under S. 439 as the matter "has been reported for orders" of this Court. It is also rightly conceded on behalf of the petitioner that under S. 440 no party has a right to be heard before this Court in revision and that the provision of sub-s. (2) of S. 439 that no order shall be made to the prejudice of the accused unless he had an opportunity of being heard either personally or by pleader applies to a case of enhancement of sentence of the accused and not to a case like the present where the petitioner is not an accused person and the order of the lower Court is only confirmed. The result is that this Court is acting in



revision in both the proceedings and that the fact that the order in the reference was made without hearing the petitioner does not affect its validity or its binding nature on the petitioner.

The next question is whether the order is a judgment under S. 369. The term judgment is not defined either in the Criminal Procedure Code or in the Indian Penal Code. It is described as "the expression of the opinion of the Court arrived at after due consideration of the evidence and of the arguments, if any": 21 Cal. 121.<sup>1</sup> This applies to the judgment of a trial Court and S. 367 prescribes what the form and contents of the judgment of a trial Court ought to be. Section 424 dealing with the judgment of the appellate Courts says that the rules relating to the judgments of a trial Court shall apply, so far as may be practicable, to judgments of appellate Courts other than a High Court. It must follow, therefore, that there are no definite rules as to what the judgment of a High Court acting in its appellate as well as revisional jurisdiction should contain. This is quite natural because the judgment of the High Court in its criminal jurisdiction is ordinarily final and does not, therefore, require the statement of any reasons, especially in a revisional application where the parties are not bound to be heard. There is, therefore, practically no distinction between an order and a judgment of a High Court disposing of a proceeding before it. That being so, the order in the reference 'No order on this reference' is a judgment under S. 369 and as such cannot be altered or reviewed. That judgment means that this Court does not see any reason to set aside the order of the Additional District Magistrate as recommended by the Sessions Judge. In the present application the petitioner really asks us to alter or review that judgment by urging that although the Court did not set aside the order of the Additional District Magistrate on the grounds given by the Sessions Judge in his order of reference, it should do so because the petitioner had no opportunity to address this Court on his reasons in support of the grounds given by the Sessions Judge or by urging fresh grounds for setting aside the order. That, in our opinion, comes within the prohibition of S. 369 as the previous order of the High Court is a judgment which could be passed in its revisional jurisdiction without hearing a party.

1. ('94) 21 Cal. 121, *Damu Senapati v. Sridhar Rajwar*.

Mr. Shah relies on some decisions of this and other High Courts in support of his argument that this application is competent. The first is an unreported decision of our High Court in Cri. Revn. Appln. No. 496 of 1943.<sup>2</sup> The facts in that case were no doubt similar to those in the present case. There also the order was that no order was to be made in the reference and a subsequent revisional application by the party was held to be competent. It was observed:

"We do not think that it can be accepted as a rigid rule, merely because the High Court on a previous occasion has had before it a case upon which it had power to take action under s. 439, Criminal P. C., and did not consider on the facts as then appeared to it that it was necessary to take action, that, when the case again comes before the High Court on a future occasion, it is debarred from exercising the power of interference in revision, which earlier it did not consider necessary to exercise. The order of the Bench of this Court, as already mentioned, is really not an order under S. 439, Criminal P. C. It is not more than a note that, as at present advised, no order under that section is proposed."

The provisions of S. 369 were not brought to the notice of the Court, and it was taken for granted that the order passed in the reference was not more than a note that no order under S. 439 was proposed. In our opinion it is difficult to hold this formal order disposing of the reference as a mere note. In law the order amounted to a judgment, and, therefore, was not open to review under S. 369. We do not think, therefore, that that decision is in accordance with law. The next decision relied upon is 45 ALL. 11.<sup>3</sup> But it is clearly distinguishable from the present case. There the revisional application was maintainable because the previous reference was only for enhancement of sentence and the subsequent application was on the merits and not on the point raised in the reference. There was, therefore, no question there whether the order on the reference was a judgment on the merits and as such governed by the provisions of S. 369. In A. I. R. 1928 Oudh 292<sup>4</sup> the reference was not rejected on the merits but on the ground that the Sessions Judge had no power to make it at an interlocutory stage. There was, therefore, no judgment on the merits of the points involved in the subsequent revision application. In the present case the order of this Court was on the merits and not on the ground that

2. Cri. Revn. Appln. No. 496 of 1943, decided on 20th January 1944 by Wadia and Weston JJ., *Chamanlal Kevalchand v. Bai Ruxmani*.

3. ('22) 9 A.I.R. 1922 All. 502 : 45 All. 11 : 68 I. C. 32, *Emperor v. Kohna Ram*.

4. ('28) 15 A.I.R. 1928 Oudh 292 : 110 I. C. 209, *Sheo Saran v. Jitendra Nath*.



the reference was not competent. In 10 C. L. J. 80,<sup>5</sup> the order on the reference was made in default of appearance of both parties without considering the merits of the case. It was open to the Court to set aside the order passed in default of appearance on proper grounds when notice was issued to the parties and it is in accordance with the principles of natural justice that if the parties are asked to appear, the case should not be decided till they are heard, and that if the matter is disposed of in their absence, they should have an opportunity to show that they were prevented from appearing on account of a reasonable cause. On that principle, a subsequent revisional application would lie on the same ground on which an application to restore a case dismissed for default would lie. That, however, is not the case here. The last decision relied on by the petitioner is A.I.R. 1924 Lah. 310<sup>6</sup> and that also was a case of default of appearance and the decision was not on the merits.

No authority has been brought to our notice in which an order of the High Court similar to the one we have here was not held to be a judgment under S. 369. In the absence of anything to show that the order was passed on a preliminary ground without going into the merits of the point raised in the reference, it must, in our opinion, be presumed that the order is a final order on the merits and as such amounts to a judgment. Accordingly we hold that the present revision petition really seeks us to alter or review a judgment already passed in a former proceeding and is, therefore, barred by the provisions of S. 369.

Although we are constrained to come to this conclusion on the provisions of law, we are not unaware that the applicant has a grievance that his position has been worsened and not improved by the Sessions Judge being in his favour, because if the recommendation of the Sessions Judge is turned down without hearing the petitioner as has happened in this case, he is worse off, while if the Sessions Judge would have been against him he could have still applied to this Court in revision and got an opportunity to put his case before us. This is no doubt an anomaly, and it is caused by the provisions of R. 26, Appellate Side Rules, which compels a party to apply to a lower revisional Court before applying in revision to

the High Court. Under S. 439 it is open to a party to apply in revision to the High Court against the order of any inferior Court which is not appealable. Under S. 435 it is open to him to apply in revision to any Court superior to the trial Court and inferior to the High Court in a matter in which he can also directly apply in revision to the High Court. Such revision Court, however, if it is of the opinion that the decision of the trial Court is illegal or improper, cannot itself set it aside but has to make a reference for doing so to the High Court under S. 438. There is thus a concurrent remedy to the aggrieved party. Thus, if R. 26 had not been there, the petitioner could have applied to this Court directly under S. 439 against the order of the Additional District Magistrate and would have had an opportunity to place his arguments before the High Court, but under R. 26 he has got to apply in revision first to the Sessions Court. If the Sessions Judge had dismissed his application he could then have applied to and argued his case before this Court, but because the Sessions Judge was in his favour and had, therefore, got to make a reference to this Court recommending it to set aside the order and because this Court was not satisfied with the reasons for the recommendation, and disposed of it without issuing a rule, the petitioner is now debarred from arguing his arguments before this Court. It may be that the reasons given by the Sessions Judge for the recommendation may be weak or may be insufficient, whereas the petitioner, if he appears, may be able to urge cogent and sufficient reasons for setting aside the original order. He thus suffers on account of the provisions of the rule which deprives him of an opportunity to come to this Court in revision in the first instance.

We think this position does cause hardship to the party and it should be effectively remedied. We do not see any reason to delete R. 26 altogether from the Appellate Side Rules. It is a salutary provision and has otherwise worked well, but we think a new rule should be added to the effect that a reference made by a Sessions Judge recommending the setting aside of an order of the trial Court should always be placed for hearing after issuing notices to all the parties concerned. Such a rule would remove the hardship like the one in the present case by enabling the party to urge his arguments in support of the reference. It is true that this procedure will involve delay and expense in cases where references are made on obviously

5. (1909) 3 I. C. 393 : 10 C. L. J. 80, *Bibhutya Mohun Roy v. Dasimoni Dassi*.

6. (1924) 11 A.I.R. 1924 Lah. 310 : 69 I. C. 638, *Kishen Singh v. Girdhari Lal*.



untenable grounds, but the balance of convenience is in favour of hearing all such references after notice to the parties. If the proposed rule is adopted, it may be hoped that a good deal of time and expense would be saved if the lower revisional Courts take care in making references to this Court only in cases where the decisions involve a point of law of general importance which may govern other cases or where in their opinion there has been substantial injustice and not merely where a different view of the case can be taken on appreciation of evidence. The application is dismissed.

V.R./D.H. *Application dismissed.*

[Case No. 63.]

**A. I. R. (33) 1946 Bombay 280**

**BHAGWATI J.**

*Firm Juggilal Kamlat—Petitioners*

*v.*

*Collector of Bombay and another—*

*Respondents.*

O. C. J. Misc. No. 37 of 1945, Decided on 9th August 1945.

(a) Defence of India Act (1939), S. 2 (2) (xxiv) — Enactment of S. 2 (2) (xxiv) and R. 75A, Defence of India Rules, without notification under S. 104, Government of India Act, is *ultra vires*.

The enactment of S. 2 (2) (xxiv), Defence of India Act, and R. 75A, Defence of India Rules, with respect to the requisition of immovable property without a public notification by the Governor General under S. 104, Government of India Act, is *ultra vires* the Central Legislature: ('46) 33 A.I.R. 1946 Bom. 216, *Foll.* [P 285 C 2]

(b) Defence of India Act (1939), S. 19 — Defence of India Rules, R. 75A — Provision is made for compensation in respect of requisition of immovable property.

There is nothing in the terms of R. 75A, Defence of India Rules, or S. 19, Defence of India Act, to support the contention that no provision has been made therein for compensation in respect of the requisition of immovable property. If the requisition of immovable property is validly made, there is due provision for awarding the compensation to the owner of that property by the Government in the event of a requisition of such property being made from the owner thereof. [P 285 C 2; P 286 C 1]

(c) Defence of India Rules (1939), R. 75A — Requisition for period of present war and six months thereafter — Period is not vague.

If the requisition order states that the requisition of immovable property is to continue during the period of the present war and six months thereafter the period cannot be said to be vague and indefinite. [P 286 C 2]

(d) Defence of India Rules (1939), R. 75 A — Flat requisitioned for duration of war — Order delegating power to determine this term to officer for whom requisition is made is not illegal.

Where a flat is requisitioned for the duration of the war and six months thereafter, the order delegating the power to determine this term to the officer for whose use the flat is requisitioned is not illegal and void. [P 286 C 2]

(e) *Certiorari* — Writ of — Writ of *certiorari* and writ of prohibition should not be claimed simultaneously.

Reliefs for the writ of *certiorari*, writ of prohibition and order under S. 45, Specific Relief Act, should not be claimed simultaneously but alternatively. Where a person claims a writ of *certiorari*, Court will not issue a writ of prohibition also merely because the applicant desires it for the sake of greater caution. [P 288 C 1, 2]

(f) *Certiorari* — Writ of — When granted, stated — Writ can be issued also in those cases where tribunal or officer acted without authority or jurisdiction.

There is no difference in principle between the writ of *certiorari* and the writ of prohibition except that the latter may be invoked at an earlier stage. [P 290 C 2]

The conditions precedent for the High Court exercising its jurisdiction to issue the writs of *certiorari* and prohibition are that there should be a body of persons, or to use another expression, a tribunal or officer:—(1) having legal authority, (2) to determine questions affecting rights of subjects, and (3) having a duty to act judicially and (4) they should act in excess of their legal authority, or without authority or jurisdiction at all. The Collector acting under R. 75A, Defence of India Rules, and S. 15, Defence of India Act, and requisitioning immovable property is a tribunal or officer having legal authority to determine questions affecting the rights of the subjects and having authority to act judicially and if he acts in excess of his legal authority or without any authority or jurisdiction at all it would be competent to the High Court to issue a writ of *certiorari* or a writ of prohibition against him: *Case law discussed.* [P 290 C 2; P 292 C 1]

(g) *Certiorari* — Writ of — 'Judicial act' explained — Order of Collector requisitioning immovable property on materials gathered after proper inquiries is judicial act.

The general principles which afford a guide to the determination of the question whether an act which is done by a tribunal or competent authority is a judicial act or an executive, administrative, or a ministerial act, are that the tribunal or competent authority should have power by its determination within jurisdiction to impose liability or affect rights of others, that it should act in exercise of some right or duty to decide, that the act should be done by it upon consideration of facts and circumstances and imposing liability or affecting the rights of others, that it decides on the materials before it as between a proposal and an opposition, even though it is not bound to treat as though it was a trial, though it has no power to administer oath and need not examine witnesses and though it can obtain information in any way it thinks best always giving a fair opportunity to those parties in controversy for correcting or contradicting statements prejudicial to their view. [P 295 C 2]

Regard must also be had to the terms of the particular rule, the nature, scope and effect of the particular power in exercise of which an act may be done read with the provisions of S. 15, Defence of



India Act. An order of Collector acting under R. 75A, Defence of India Rules and S. 15 of Defence of India Act, requisitioning immovable property on the material gathered after proper inquiries is a judicial order and if it is in excess of power or without jurisdiction it is amenable to the jurisdiction of the High Court to issue a writ of *certiorari* or prohibition. [P 296 C 1 ; P 297C 2]

(h) Specific Relief Act (1877), S. 45 — Enactment of S. 45 has not abolished writ of prohibition — Subject is entitled to both these remedies as alternative remedies.

In those cases where only a part of the provisions of a particular prerogative writ is embodied in the enactment of a statute, the prerogative is not merged *pro tanto* in the statute but continues to exist in its full glory, the only thing which is done by the statute being that in the cases covered by the statute the subject or the applicant would have a concurrent or alternative remedy also under the statute apart from his right to invoke the jurisdiction of the Court to issue a prerogative writ in his favour. Hence the enactment of some of the provisions of the writ of prohibition under S. 45, Specific Relief Act, also would not take away the right of the subject or applicant to invoke the jurisdiction of the Court to issue the writ of prohibition even in those cases which are covered within the four corners of the provisions of S. 45, Specific Relief Act. The subject or the applicant would be entitled to both the remedies as alternative remedies and would be entitled to invoke the jurisdiction of the High Court to grant him the one or the other of these two remedies. *Observations of Macleod C. J. in* ('26) 13 A.I.R. 1926 Bom. 247, *held obiter*; *Observations of Cojajee J. in* ('45) 32 A.I.R. 1945 Bom. 419; *Dissent*.

[P 299 C 2 ; P 300 C 2]

(i) Civil P. C. (1908), S. 115—S. 115 has not taken away High Court's jurisdiction to issue writ of *certiorari* (*Obiter*).

The jurisdiction to issue a writ of *certiorari* can only be taken away by express negative words and not by the enactment of certain of the provisions therein in a statute by the Legislature. The fact that in those cases which are covered by S. 115, Civil P. C., the subject or the applicant has an alternative remedy of invoking the revisional powers of the High Court cannot take away the jurisdiction of the Court to issue the prerogative writ of *certiorari* in proper cases even though the same might be covered within the four corners of S. 115, Civil P. C. Both these are treated as alternative remedies and the subject is entitled to have resort to either the one or the other: ('39) 26 A.I.R. 1939 Bom. 471, *Rel. on*.

[P 300 C 2]

*M. P. Amin and R. J. Kolah*—for Petitioners.

*Sir Jamshedji Kanga and G. N. Joshi*

— for Respondents.

**Order.** — The petitioners are a firm carrying on business at Bombay, Cawnpore, Calcutta and several other places. The partners of the petitioners' firm are three brothers, viz., Sir Padampat Singhanian, Lala Kailashpat Singhanian and Lala Lakshmpat Singhanian. In paras. 1 and 2 of their petition the petitioners set out the various businesses and industrial concerns in which they are interested and also set out the manner

in which the partners of the petitioners' firm as well as the directors, managers and representatives of one or more of the concerns of the petitioners in India are obliged to and do in fact come down to Bombay very frequently. They say that for the purpose of housing them as well as the offices of their several businesses they have rented since 1941 flat No. 4 on the third floor of the premises known as Ganga Bihar at Marine Drive in Bombay. The petitioners say that they have no other place in Bombay where they can have any accommodation for the aforesaid purposes and that the flat is indispensable to them for their business purposes and for the purposes of the residence of their representative and the other persons when they come down to Bombay. In para. 3 of their petition, they also point out the activities of Sir Padampat Singhanian and Lala Kailashpat Singhanian, the partners of the petitioners' firm, and the manner in which they are obliged to come down to Bombay from time to time and put up at the flat whenever they happen to come down to Bombay. After describing their multifarious activities and the needs as I have above described, the petition proceeds to state that in the beginning of January 1945 respondent 1 served an order No. CPWD/69 purporting to have been issued on behalf of the Central Government under R. 75A, Defence of India Rules, read with the Notification of the Government of India Defence Co-ordination Department No. 1336/OR/1/42 dated 25th April 1942, whereby the flat was requisitioned from the date of the order and the petitioners were directed to deliver possession of the flat to the Superintending Engineer, Western Circle, Central P. W. D., respondent 2, on 16th February 1945.

On receipt of the order a letter was addressed on behalf of Sir Padampat Singhanian, the partner of the petitioners' firm, by his advocate to the respondent contending in the first instance that the said order was not good in law and was null and void as the person in whose name the requisition order was issued was dead and gone long ago and that the flat was actually in the name of J. K. Cotton Spinning and Weaving Mills, Ltd. Without prejudice to his contention, Sir Padampat Singhanian wrote to say that the particular flat was required for their business purposes and for the purposes of residence of the various persons who came down to Bombay and the only accommodation available to the J. K. Directors was the flat in question. He pointed



out that so far as Bombay was concerned, the J. K. S. had no other premises available to them for occupation except a cottage at Juhu known as "Kamla Cottage" which was in the sole occupation of Mr. N. C. Mehta, I. C. S., former Sugar Controller, but now in the employ of the J. K. S. He stated that the flat was not vacant and was continually occupied and used by the J. K. S. Directors (one of the rooms being used for the office purposes) and that they had no other place of accommodation in Bombay. He pointed out that an inquiry regarding the flat had been made by the Special Officer, Requisitioning, sometime in November 1944 and it was presumed that he was satisfied about the genuineness of his case that the flat was necessary for the residential accommodation of the directors. He further pointed out that there would be no dearth of vacant flats in Bombay, many of which would be available for Government purposes and that there was scarcely any necessity for the Government to deprive the genuine occupiers of their flats like him of the flats in their use and occupation. By his letter dated 16th January 1945, Sir Padampat Singhanian through his advocate corrected the misstatement which he had made in his earlier letter dated 9th January 1945, that the person in whose name the requisition order was issued was dead and gone long ago. He stated that the flat did not stand in the name of the J. K. Cotton Spinning and Weaving Mills, Ltd., but stood in the name of Seth Juggilal Kamlapat in which name the requisition order had been issued. Sir Padampat Singhanian through his advocate addressed a further letter dated 19th January 1945, to respondent 1, wherein he elucidated and added some further points for the consideration of respondent 1. He recounted therein the various qualifications and activities of his and those of Mr. Bharatia, Lala Kailashpat Singhanian, Lala Sohanlal Singhanian and other directors of the J. K. Industries. He stated that most of the concerns in which he was concerned were doing genuine war work and reiterated his request for the cancellation of the requisition order. Respondent 1, however, replied, on 5th February 1945, that he had considered the representations which Sir Padampat Singhanian had made in his letters dated 9th January 1945, and 19th January 1945, and regretted to state that the requisition order could not be withdrawn. The petitioners' firm, therefore, by their attorneys' letter dated 12th February 1945, wrote a letter to the Adviser to

His Excellency the Governor of Bombay putting on record the various facts and representations which they had made in the said letters dated 9th January 1945, and 19th January 1945, above referred to, and which they had addressed to respondent 1. After setting out therein with great elaboration the facts and representations above mentioned, the letter stated in para. 16 thereof that the said flat was entirely indispensable to them and to their business, that they were doing considerable war work through their various concerns therein mentioned, particularly the Eastern Chemical Co. and the Raymond Woollen Mills, Ltd., of Bombay, and J. K. Cotton Spinning and Weaving Mills, Ltd., that all the other concerns of Bombay as well as Cawnpore and Calcutta were mostly doing war work, that all the said work would suffer immensely and they would be put to immense loss if the said flat were not allowed to remain in their possession and they were prevented from locating their permanent manager and other representatives in Bombay and from themselves coming to Bombay. They added that if the said flat was not derequisitioned the Government alone would be responsible for the aforesaid consequences and they would have no alternative but to proceed further according to law. This letter also had not the desired effect. The Government were absolutely uninfluenced by the threat held out in para. 16 of that letter that the war work which the petitioners were doing would suffer immensely if the flat was not derequisitioned as asked for and a letter was addressed by the Under Secretary to the Government of Bombay, Revenue Department, to the petitioners' attorneys on 16th February 1945, whereby the petitioners were informed that Government saw no reason to interfere in the matter.

When these representations which the petitioners made to respondent 1 as well as to the Adviser to His Excellency the Governor of Bombay had not their desired effect, the petitioners filed this petition in this Court. In para. 7 of their petition the petitioners submitted that respondent 1 was not competent to issue the said order of requisition. They stated that R. 75A, Defence of India Rules, appeared to have been framed by the Central Government in exercise of their powers under ss. (2) 2 (xxiv), Defence of India Act, that "requisition" was a distinct and separate category of legislative power and that "requisitioning" of property was not covered by or included in any entry in the



three lists contained in Sch. VII, Government of India Act and that neither the Central Legislature nor the Provincial Legislature was competent to legislate in respect thereto and that, therefore, R. 75A, Defence of India Rules, was *ultra vires* and bad. In para. 8 of their petition, they stated that there was no provision for compensation made anywhere in the Defence of India Act for requisition of immovable property and that condition No. 4 of the said purported order had no application to the case of requisition of immovable property. In para. 9 of their petition they further submitted that by the said order the said flat was moreover purported to be requisitioned for an indefinite term, which, in any event, it was not competent for respondent 1 to do. They further stated that the power to determine the said indefinite term was by the said order delegated to and vested in respondent 2 which delegation or vesting was illegal and unauthorised and that the whole order was therefore vitiated and was illegal and void. They further submitted that for each of the reasons therein mentioned the said purported order issued by respondent 1 was without jurisdiction and was *ultra vires*, illegal and inoperative in law.

Without prejudice to their submission the petitioners further submitted in para. 11 of their petition that having regard to the facts mentioned above and having regard to S. 15, Defence of India Act, it was not competent for respondent 1 to issue the said requisition order when there were and still are many and numerous large bungalows in the occupation of various persons in Bombay who might not and in fact do not need the entire bungalow or bungalows and any one of which latter premises or a portion or portions thereof could well have been requisitioned by respondent 1 after due inquiries. The petitioners further submitted that the Government had put up and could still put up numerous sheds and quarters on very large pieces of land in possession of the Government wherein the officer or officers of the Central P. W. D. could be accommodated without the least inconvenience and the object of respondent 1 in requisitioning the said premises of the petitioners was not the efficient prosecution of the war as alleged in the order. They submitted that the order in question was not made bona fide for the purpose for which it purported to have been made. In para. 12 of their petition they also submitted that the order of respondent 1 was made without calling upon the petitioners for explanations

and inquiries and as such it was also against the principles of natural justice and was passed by respondent 1 as a result of the denial of natural justice to the petitioners. Based on those submissions of theirs contained in those paragraphs of this petition the petitioners submitted that this Court should issue a writ of *certiorari*, calling for the records of the papers and proceedings or inquiry, if any, made by respondent 1 before he issued the said order to enable this Court to determine the legality of the said order and if necessary to quash the same. They also submitted that this Court should issue a writ of prohibition, it being necessary in the interest of justice and consonant with right and justice that respondent 1 should be prohibited from proceeding with or taking any steps to execute, enforce or carry into effect the said order passed by him in the manner threatened in the said order or in any other manner whatsoever. They also submitted that this Court should issue an order under S. 45, Specific Relief Act, directing respondent 1 to forbear from exercising jurisdiction and from proceeding to execute or take any steps for the execution or enforcement of or carrying into effect of the said order. Prayers (a), (b) and (c) of the petition were respectively in respect of the said reliefs by way of a writ of *certiorari*, a writ of prohibition and an order under S. 45, Specific Relief Act, which they had submitted should be granted by the Court in their favour against the respondents.

This petition was filed by the petitioners on 1st March 1945. On 2nd March 1945, they made an application before me for the granting of a rule *nisi* in terms of prayers (a), (b) and (c) of the petition which I granted on that day, giving the petitioners liberty to apply for an interim order on forty-eight hours' notice in that behalf if respondent 1 was going to take steps towards execution of the said requisition order in the meanwhile.

Respondent 1 filed an affidavit on 2nd April 1945, contending in the first instance that the petition was misconceived and incompetent and that the same should be dismissed with costs. Without prejudice to his said contentions he stated in para. 8 of his affidavit that according to his information and the investigations made by the Government officers before the requisition order was made, and after receiving the representations made on behalf of the petitioners, he was informed that the said flat was on occasions used by the petitioners' representatives visit-



ing Bombay and not by any person regularly resident in Bombay. He stated that his information was that the petitioners' representatives visiting Bombay who were making use of the said flat could make other arrangements for their casual stay in Bombay and that the petitioners were the owners of a large bungalow at Juhu. He stated that it was pointed out to him that it should not be difficult for the petitioners to obtain accommodation in the said bungalow at Juhu whenever they or their representatives happened to come to Bombay for the purposes of their business. Without prejudice to the above, respondent 1 stated in para. 4 of his affidavit that he had been informed by his Special Requisition Officer, Mr. Gupte, that quite recently the petitioners had purchased for themselves a palatial bungalow at Warden Road completely furnished and had secured possession thereof and submitted that in view of this purchase the whole of the petitioners' complaint as contained in the petition and in the representations made by them to the Government of Bombay fell to the ground. Respondent 1 stated in para. 7 of his affidavit that the action complained of was taken by him after fully considering the facts placed before him and that the order for requisition was served on the petitioners for the purpose mentioned in the said requisition order, viz., for the efficient prosecution of the war. In para. 8 of his affidavit, he denied that explanations were not called for from the petitioners' representatives who were in the said flat in Bombay or that inquiries were not made from them and from other quarters. He stated that the inquiries prior to the making of these orders were departmental inquiries and the facts placed before him were fully considered by him before any requisition order was made by him. He also stated that far from taking any precipitate action against the petitioners in respect of this flat both the Government of Bombay and himself had considered the petitioners' representations from every point of view.

An affidavit in rejoinder was filed on 6th April 1945, by Sadanand Motiram Nevgi, the representative of the petitioners. He stated that as the representative of the petitioners he had been regularly staying in the said flat, that respondent 1 had merely relied upon information supplied to him by other persons and investigations made by other Government officers, which information was not first-hand and was incorrect and misleading. He stated that respondent 1 did not

appear to know that the petitioners had several concerns not only in Bombay but as nearly as 40 concerns in Cawnpore and other places and the representatives of the said concerns were coming to Bombay from time to time so that the flat in question remained completely occupied throughout the year. He stated that there was no accommodation at all available for housing the representatives of the other various concerns when they came down to Bombay from time to time as also for locating the offices of the said various concerns. As regards the bungalow referred to as having been purchased at Warden Road, he denied that it was a palatial bungalow as was sought to be made out. It could only accommodate the director in charge and another director of the said concern but the remaining partners of the petitioners and the managers, representatives and managing and other directors of the petitioners' numerous concerns could not be accommodated in the said bungalow. The flat in question was still required for the purpose of accommodating them. He further denied that any explanations were ever called for from the petitioners or their representatives. He stated that none of them was asked to answer any of the allegations made against them, that all the inquiries were *ex parte* inquiries without giving any opportunity to the petitioners to challenge the veracity thereof, and that respondent 1 had acted against the principles of natural justice in not giving an opportunity to the petitioners to answer the said inquiries.

These are the respective contentions of the parties in the petition and the affidavits which they have made in these proceedings. No evidence was led by Mr. M. P. Amin in support of his various allegations of fact even though the same were controverted by respondent 1; and he relied solely upon the points of law which arose in the petition in order to obtain the reliefs which the petitioners had prayed for in their petition. I, therefore, take it that the whole superstructure which the petitioners have based on their multifarious business activities and the requirements of their representatives and the various directors and managers of their various concerns in Bombay and elsewhere in India who require to come down to Bombay and occupy the premises in question was merely put forward in order to make out a case as if respondent 1 had in the matter of the issue of the requisition order in question acted in flagrant disregard of the provisions of S. 15, Defence of India Act,



1939, and that the requisition order in question was, therefore, illegal, void and inoperative in law. The absence of any evidence led by the petitioners in that behalf, in spite of the said allegations having been contravened by respondent 1, leads me to the conclusion that there was absolutely no substance in that contention of the petitioners, that the said allegations had been trotted out by the petitioners merely with a view to exaggerate their needs and requirements and it was not thought worth their while by the petitioners to lead any evidence in support of the same in view of what had been pointed out by respondent 1 that besides the said flat in Bombay which was sought to be requisitioned by him, the petitioners had a bungalow at Juhu named Kamala Cottage and a palatial bungalow situate at Warden Road where they could easily and with convenience house all their partners and the representatives and directors and managers of the various industries in which they were concerned whenever they happened to come down to Bombay. The only purpose of the petitioners in putting forward these various allegations was to show to the authorities concerned as well as to the Court the importance of their business connections, the magnitude of their business and the war work which they alleged they had been doing in the course of their management of the said various businesses of theirs. All these allegations and representations had no effect on the Government, they had also no effect on the Court in the matter of the appreciation of their contention as regards respondent 1 having acted in contravention of the provisions of S. 15, Defence of India Act, in the absence of any evidence led by them in support of the same. In the result, I hold that the petitioners have failed to substantiate their contention that the requisition order in question was passed by respondent 1 in flagrant disregard of the provisions of S. 15, Defence of India Act, and was, therefore, illegal, void and inoperative in law.

Equally baseless was the other contention of the petitioners that the order made by respondent 1 was made by him without calling upon the petitioners for explanations and inquiries and as such was against the principles of natural justice and was passed by him with the denial of natural justice to the petitioners. Even though the said allegations had been controverted by respondent 1 the petitioners did not lead any evidence on the point. In the result I hold

that the petitioners have also failed to establish this contention of theirs. Having disposed of the two contentions which required evidence to be led by the petitioners in support of the allegations in that behalf before they could ever substantiate the same, I shall now proceed to consider the contentions which the petitioners have raised in their petition which involved consideration of points of law. The petitioners contended first that the enactment of S. 2 (2) (xxiv), Defence of India Act, and R. 75A, Defence of India Rules, was *ultra vires* the Central Legislature. This contention I have already dealt with *in extenso* in my judgment in 47 Bom. L. R. 1010,<sup>1</sup> and for the reasons stated therein I am of opinion that the enactment of S. 2 (2) (xxiv), Defence of India Act, and R. 75A, Defence of India Rules, with respect to the requisition of immovable property without a public notification by the Governor-General under S. 104, Government of India Act, was *ultra vires* the Central Legislature. I may state here that in this petition also we are only concerned with the requisition of immovable property by respondent 1. The petitioners further contended that no provision for compensation was made anywhere in the Defence of India Act, for requisition of immovable property and that condition No. 4 of the purported order had no application to the case of requisition of immovable property. This contention was not seriously pressed by Mr. M. P. Amin for the petitioners. I may, however, point out in this connection that condition No. 4 of the requisition order in question says:

"Such compensation as may be settled by agreement shall be paid to the owner of the property and, in the event of failure to reach agreement, such compensation as may be determined under the provisions of the Defence of India Act, 1939, or the rules thereunder."

This is in accordance with the terms of S. 19, Defence of India Act, which enacts the provisions for compensation to be paid in accordance with certain principles for compulsory acquisition of immovable property, etc. I see nothing in the terms of R. 75A, Defence of India Rules, or S. 19, Defence of India Act, which goes to support the contention of the petitioners that no provision has been made therein for compensation in respect of the requisition of immovable property, nor do I see any force in the contention of the petitioners that condition No. 4 of the requisition order in

1. ('46) 33 A.I.R. 1946 Bom. 216 : 47 Bom. L. R. 1010, *Tan Bug Taim v. Collector of Bombay*.



question has no application to the case of requisition of immovable property. If the requisition of immovable property was validly made, there is due provision for awarding the compensation to the owner of that property by the Government in the event of a requisition of such property being made from the owner thereof. I, therefore, reject this contention of the petitioners.

The petitioners further contended that the requisition order in question purported to requisition the immovable property for an indefinite term which it was not competent for respondent 1 to do. In support of this contention of the petitioners, Mr. M. P. Amin urged that according to the first condition therein mentioned the property was to continue in requisition during the period of the present war and six months thereafter. He urged that that period was an indefinite period and, therefore, the requisition order being vague and indefinite was not a valid order but was illegal and inoperative in law. If the argument of Mr. M. P. Amin was to be accepted, the requisition order in question should have stated that the requisition was to continue for a determinate period, say four months, six months, eight months and so on. The requisitioning authority should have either by a sort of foresight or prevision determined within itself what was going to be the period of the duration of the present war and ought to have stated that period as the period of requisition or should have resorted to approximations in that behalf and stated the approximate period so arrived at as the duration of the present war, but should not have had resort to the expression which according to Mr. M. P. Amin was vague in so far as it said that the requisition order was to be for the period of the present war and six months thereafter. He contended that his clients were not in a position to know what was the period during which this requisition order was going to be in operation. They could not know whether it was for two months or two years or for any indefinite period beyond the same. How could they, therefore, make any arrangements for housing their various representatives, directors and managers of the various industries in which they had been interested as also the offices of those various concerns with any degree of certainty? This argument of Mr. M. P. Amin has only got to be stated in order to be discarded. It was not within the bounds of human possibility for any party howsoever shrewd, intelligent or invested with

commonsense and foresight it may be to predict what was going to be the duration of the present war. The Court is certainly not going to expect that any party before it was going to hazard any such prediction and if it was not humanly possible to do so state with definiteness any period of requisition when the requisition of the property itself was going to be made for the efficient prosecution of the war which would mean for the duration of the war and as stated in the order for a period of six months thereafter. Nothing more need be said in order to demonstrate the absurdity of this contention urged on behalf of the petitioners. The period of the present war though indefinite in duration was definite in itself in so far as the petitioners were given in as clear terms as it could be an indication of the period for which their property was sought to be requisitioned by respondent 1, viz., the duration of the present war. The user of this term was as definite as the user of the expression "the life time of A" which is used when settling or bequeathing a remainder in favour of B. B could not be heard to say that the lifetime of A which was the period prescribed as the one which was to come to an end before the remainder would vest in possession in his favour was a term which was vague or indefinite. It was as a clear and definite as it could be, having regard to the fact that the period of the lifetime of an individual is indeterminate, though that life is of necessity going to come to an end sometime or other. The present war also was going to come to an end and is going to end sometime or other though the period of duration of the present war might be indeterminate. The user of the term "during the present war" could, therefore, not render that expression vague or indefinite as contended by the petitioners. It is as clear and definite as it could be. In my opinion, therefore, there is no substance whatever in this contention of the petitioners.

The last contention urged by the petitioners in this connection was that the power to determine the said indefinite term, viz., "the duration of the present war and six months thereafter" is by the order delegated to and vested in respondent 2 which delegation or vesting is illegal and unauthorised and the whole order is, therefore, vitiated and is, therefore, illegal and void. There are no merits in this contention of the petitioners also. This is a term which has been provided in the requisition order in question



which would enable the requisitioning authority to determine the period of requisitioning earlier than the expiration of the period of the present war and six months thereafter. It is a provision for the benefit of the petitioners themselves, so that they may not be deprived of the use and possession of their property which was sought to be requisitioned beyond what was necessitated by the needs of the situation, viz., the efficient prosecution of the war. If by any chance the theatre of war shifted from Bombay to any other place in this country or the exigencies of the situation required that the various officers or members of fighting forces who were housed in the properties which had been the subject-matter of requisition needed those properties no more by reason of their having been transferred to other theatres of war or for any other reason which was considered sufficient by the authorities in that behalf, possession of the immovable property which has been so requisitioned should be restored by the authorities to the owner of that property. One could not convert the beneficial provision of this sort into an oppressive provision or an illegal provision in the manner it is sought to be done by the petitioners. In its very nature the power of requisitioning immovable property is drastic. It deprives the owner of the immovable property of the use and possession thereof by him.

It causes not a little inconvenience to the owner of the immovable property and therefore if the requisitioning authority in the order itself which was served on the owner of the immovable property stated that if the needs of the situation warranted it, he would restore the property to the possession of the owner, the owner could have nothing to complain about the same. The immovable property in question was being requisitioned by the respondent for the use of the officer of the P. W. D. That officer might not require it for the period of the war and six months thereafter and might relinquish possession of the property which has been so requisitioned even before the expiration of that period. If that were done, the last persons to ever complain about the restoration of such possession to them of the immovable property in question should be the petitioners themselves. I do not see my way to accept this contention of the petitioners also. Under the circumstances mentioned above, but for the fact that I have come to the conclusion that the enactment of S. 2 (2) (xxiv), Defence of India Act, and

R. 75A, Defence of India Rules, with respect to the requisitioning of immovable property without a public notification by the Governor-General under S. 104, Government of India Act, is *ultra vires* the Central Legislature, I would have dismissed this petition of the petitioners. My finding, however, on that point leads me to the consideration whether on that finding the petitioners are entitled to any of the reliefs prayed for by them in the petition.

In regard to the reliefs which the petitioners are entitled to, one has got to consider what are the actual reliefs that have been prayed for by them. In prayer (a) of their petition the petitioners ask for an issue of a writ of *certiorari* against the respondents calling for the records, if any, of the proceedings before respondent 1 wherein respondent 1 purported to pass the order complained of and after looking into the same quash the same. In prayer (b) of their petition the petitioners asked for an issue of a writ of prohibition against the respondents prohibiting them from proceeding with or continuing to proceed with the execution or enforcement of or carrying into effect the order in a manner threatened in the order or in any other manner whatsoever and from passing any further order or taking any further steps therein to the prejudice of the petitioners. In prayer (c) of their petition, the petitioners asked for an order under S. 45, Specific Relief Act, 1877, directing the respondents to forbear from further exercising any jurisdiction or doing any act or further taking or commencing or continuing to take or commence any proceedings in enforcement or execution of the order complained of. It is significant to observe that the petitioners are entitled to none of these reliefs against respondent 2 and it has been so conceded by Mr. M. P. Amin for the petitioners.

As regards respondent 1, therefore, it remains to consider what are the reliefs which the petitioners are entitled to against him. If one has regard to the averments in the petition in that behalf commencing with para. 13 of the petition, one finds that all these remedies and prayers are sought for by the petitioners as simultaneous and not in the alternative. The petitioners have really got three strings to the bow. They first of all ask for a writ of *certiorari*. If one has due regard to the fact that the submission in respect of the same is the first of the submissions set out by them in the petition and the prayer in respect of the same



is the first prayer, viz., prayer (a) of the petition, not being, however, satisfied with the submission and the asking for a relief by way of a writ of *certiorari*—which if granted would certainly render it absolutely unnecessary that a writ of prohibition should also be issued, by the Court against respondent 1—the second submission in the order in which it has been made in the petition is in respect of the writ of prohibition and it has been followed up by the second relief which they have prayed for, viz., prayer (b) of the petition. The relief by way of a writ of prohibition is not stated by them either in the averments in the petition or in the body of the prayers as in the alternative to a writ of *certiorari*. The submission in respect of an order under S. 45, Specific Relief Act, is the third submission in the petition following after the submission for the writ of prohibition and the prayer in that behalf is also the third prayer, viz., prayer (c) which again is not asked for in the alternative. It would appear, therefore, that the petitioners want all the three prayers, viz., prayers (a), (b) and (c) of the petition not saying what they would prefer to have and what they would be prepared to forgo in certain events. I asked Mr. M. P. Amin in the course of his arguments what it is really that his clients were asking for. Did they want a writ of *certiorari* if the Court considered that the case for the issue of the writ of *certiorari* was substantiated by them? His answer was in the affirmative. I then asked him if in spite of the issue of the writ of *certiorari* his clients also wanted a writ of prohibition to issue against the respondents. He was not quite sure of his position there. At one time it seemed as if he conceded that if the Court issued a writ of *certiorari* it was no use issuing a writ of prohibition, but at another time he stated that his clients would desire that a writ of prohibition also should issue against respondent 1 for sake of greater caution. I for myself do not understand why the Court should make any orders for the sake of greater caution at the instance of a litigant before it. If an order requires to be passed under the circumstances of a particular case, the Court should feel no hesitation in passing the same. But it is certainly not the business of the Court to pass orders at the instance of parties who want these orders to be passed merely for the sake of greater caution. I then asked Mr. M. P. Amin whether if a writ of *certiorari* was issued against the respondents

his clients wanted an order under S. 45, Specific Relief Act, as prayed for in prayer (c) of their petition. I asked this question to him particularly because if I granted prayer (a) of the petition and issued a writ of *certiorari* against respondent 1 calling for the papers and proceedings before him and quashed the order as asked for in that prayer, there was nothing left for me to do by way of directing respondent 1 to forbear from doing any act as asked for in prayer (c) of the petition. If the order was quashed, there was nothing which respondent 1 could execute or take steps for executing. Even though this was the position and the petitioners could not make up their minds whether they wanted to press the one relief or the other, being naturally in doubt whether they would succeed in convincing the Court that they should be granted one relief or the other even in the event of the Court holding that the requisition order in question was illegal, void and inoperative in law on one or more of the grounds mentioned in the petition, their counsel was not in a position to tell the Court, as I think he should have, that he asked for the reliefs in the alternative the one to the other. I should have thought there was no objection to his doing so. He could have and should have stated to the Court that his clients asked for the relief by way of a writ of *certiorari* against the respondents as prayed for in prayer (a) of the petition in the first instance, for the relief by way of a writ of prohibition as prayed for in prayer (b) of the petition in the alternative, and for a relief by way of an order under S. 45, Specific Relief Act, as prayed for in prayer (c) of the petition in the further alternative; but for some reason which I have not been able to probe, he would not and did not say so. I shall, therefore, deal with all these reliefs which are the subject-matters of prayers (a), (b) and (c) of the petition respectively in the order in which they have been mentioned therein.

It will be convenient to deal with the writ of *certiorari* and the writ of prohibition together. The nature of the writ of *certiorari* is thus described in Halsbury's Laws of England, Hailsham Edition, Vol. IX, p. 888, Para. 1420 :

"The writ of *certiorari* issues out of a superior Court, and is directed to the Judge or other officer of an inferior Court of record. It requires that the record of the proceedings in some cause or matter depending before such inferior Court shall be transmitted into the superior Court to be there dealt with, in order to insure that the applicant for the



writ may have the more sure and speedy justice. It may be had in either civil or criminal proceedings. The object of the writ, particularly in civil proceedings, is to give relief from some inconvenience or error supposed, in the particular case, to arise from a matter being disposed of before an inferior Court less capable than the High Court of rendering complete and effectual justice."

The jurisdiction to issue a writ of *certiorari* has been extended to judicial bodies and we find at p. 852, Para. 1443 :

"The writ can also be issued to remove, for the purpose of quashing, the determinations of persons or bodies who are by statute or charter entrusted with judicial functions."

It is further stated at p. 855, Para. 1449 :

"*Certiorari* lies only in respect of judicial, as distinguished from administrative, acts. Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in the writ."

The writ of prohibition is thus defined in Halsbury's Laws of England, Hailsham Edition, Vol. IX, p. 819, Para. 1394 :

"The writ of prohibition is a prerogative writ, issuing out of the High Court of Justice, and directed to an ecclesiastical or inferior temporal Court, which forbids such Court to continue proceedings in excess of its jurisdiction or in contravention of the laws of the land."

At page 820, Para. 1397, it is stated when the writ of prohibition lies :

"Prohibition lies not only for excess of or absence of jurisdiction, but also for the contravention of same statute of the principles of the common law ; it does not, however, lie to correct the course, practice, or procedure of an inferior tribunal, or a wrong decision on the merits of proceedings."

It is further stated at p. 833, Para. 1411 :

"Although prohibition does not lie against a body which is not and does not claim to be a Court or judicial tribunal in any legal sense, the High Court will issue the writ to a body exercising judicial functions, though that body cannot be described as being in any ordinary sense a Court. Prohibition will not issue against the ministerial or executive acts of the Government ; but wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in exercise of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in the writ, and the High Court will exercise as widely as possible the power of controlling such bodies, if those bodies attempt to exceed their legal authority. A proceeding may be a judicial proceeding subject to prohibition, even though it is subject to confirmation or approval and the approval has to be that of the Houses of Parliament."

The nature and the scope of the two writs, viz., the writ of *certiorari* and the writ of prohibition have been the subject-matter of judicial pronouncements. In (1906) 2 K. B. 501<sup>2</sup> Fletcher-Moulton L. J. observed (p. 534):

2. (1906) 2 K. B. 501 : 75 L. J. K. B. 745 : 95 L. T. 399, *Rex v. Woodhouse*.

"The writ of *certiorari* is a very ancient remedy, and is the ordinary process by which the High Court brings up for examination the acts of bodies of inferior jurisdiction. In certain cases the writ of *certiorari* is given by statute, but in a large number of cases it rests on the common law. It is frequently spoken of as being applicable only to 'judicial acts', but the cases by which this limitation is supposed to be established shew that the phrase 'judicial act' must be taken in a very wide sense, including many acts that would not ordinarily be termed 'judicial'. For instance, it is evidently not limited to bringing up the acts of bodies that are ordinarily considered to be Courts . . . . Other instances could be given, but these suffice to shew that the procedure of *certiorari* applies in many cases in which the body whose acts are criticized would not ordinarily be called a Court, nor would its act be ordinarily termed 'judicial acts'. The true view of the limitation would seem to be that the term 'judicial act' is used in contrast with purely ministerial acts. To these latter the process of *certiorari* does not apply, as for instance to the issue of a warrant to enforce a rate, even though the rate is one which could itself be questioned by *certiorari*. In short, there must be the exercise of some right or duty to decide in order to provide scope for a writ of *certiorari* at common law."

Vaughan Williams L. J. in the same case observed (p. 512) :

"In my opinion the grant or refusal of such a licence is a judicial act, and the judgment of Lord Halsbury in (1891) A. C. 173<sup>3</sup> at p. 179 seems to be an authority for this view ; for he says, as appears on p. 179 of the report, that 'an extensive power is confided to the justices in their capacity as justices to be exercised judicially, and discretion means, when it is said that something is to be done within the discretion of the authorities, that that something has to be done according to the rules of reason and justice, not according to private opinion, according to law, and not humour ; it is to be, not arbitrary, vague, and fanciful, but legal and regular'."

In connection with these writs of *certiorari* and prohibition the observations of Bankes L. J. in (1924) 1 K. B. 171<sup>4</sup> are very important to bear in mind (p. 192) :

"It has, however, always been the boast of our common law that it will, whenever possible, and where necessary, apply existing principles to new sets of circumstances. A study of the decisions of the Courts in relation to writs of prohibition illustrates how true this is. In (1921) 2 A. C. 570<sup>5</sup> at p. 882 the Lord Chancellor quotes with approval the description of a writ of prohibition given in Short and Mellor, 2nd Edn. (1908), p. 252, as 'a judicial writ, issuing out of a Court of superior jurisdiction and directed to an inferior Court for the purpose of preventing the inferior (Court) from usurping a jurisdiction with which it is not legally vested, or, in other words, to compel Courts entrusted with judicial duties to keep within the

3. (1891) 1891 A. C. 173 : 60 L. J. M. C. 73 : 64 L. T. 180 : 39 W. R. 551, *Sharp v. Wakefield*.

4. (1924) 1 K. B. 171 : 93 L. J. K. B. 390 : 130 L. T. 164, *Rex v. Electricity Commissioners : London Electricity Joint Committee Co., (1920) Ex parte*.

5. (1921) 2 A. C. 570 : 90 L. J. P. C. 244, *In re Clifford and O'Sullivan*.



limits of their jurisdiction.' Originally no doubt the writ was issued only to inferior Courts, using that expression in the ordinary meaning of the word 'Court.' As statutory bodies were brought into existence exercising legal jurisdiction, so the issue of the writ came to be extended to such bodies. There are numerous instances of that in the books, commencing in quite early times. In (1700) 1 Ld. Raym. 580,<sup>6</sup> the Court expressed the general opinion that it would examine the proceedings of all jurisdictions erected by Act of Parliament, and if under pretence of such an Act they proceeded to encroach jurisdiction to themselves greater than the Act warrants the Court could send a *certiorari* to them to have their proceedings returned to the Court, to the end that the Court might see that they keep themselves within their jurisdiction, and if they exceed it to restrain them. . . These authorities are, I think, conclusive to show that the Court will issue the writ to a body exercising judicial functions, though that body cannot be described as being any in ordinary sense a Court. There is the dictum of Brett L. J. as he then was in (1882) 10 Q.B.D. 309,<sup>7</sup> where he says (p. 321): 'my view of the power of prohibition at the present day is that the Court should not be chary of exercising it, and that wherever the Legislature entrusts to any body of persons other than to the superior Courts the power of imposing an obligation upon individuals, the Courts ought to exercise as widely as they can the power of controlling those bodies of persons if those persons admittedly attempt to exercise powers beyond the powers given to them by Act of Parliament.' There is the dictum of Lord Sumner in (1921) 2 A. C. 270,<sup>8</sup> where he says (p. 589): 'It is agreed also that, old as the procedure by writ of prohibition is, and few are older, there is not to be found in all the very numerous instances of the exercise of this jurisdiction any case in which prohibition has gone to a body which possessed no legal jurisdiction at all.' Lastly, there is the dictum of Fletcher Moulton L. J. in (1906) 2 K. B. 501<sup>2</sup> at p. 535 where he is discussing what, in his opinion, constitutes a judicial act."

And the remarks which I earlier quoted from (1906) 2 K. B. 501<sup>2</sup> are quoted *in extenso*. The observations of Atkin L. J. in the same case also deserve to be quoted in this connection (pp. 204, 205 and 206):

"Both writs (i. e., *certiorari* and prohibition) are of great antiquity, forming part of the process by which the King's Courts restrained Courts of inferior jurisdiction from exceeding their powers. Prohibition restrains the tribunal from proceeding further in excess of jurisdiction; *certiorari* requires the record or the order of the Court to be sent up to the King's Bench Division, to have its legality inquired into, and, if necessary, to have the order quashed. It is to be noted that both writs deal with questions of exclusive jurisdiction, and doubtless in their origin dealt almost exclusively with the jurisdiction of what is described in ordinary parlance as a Court of justice. But the operation of the writs has extended to control the proceedings of bodies which do not claim to be, and would not be recognized as, Courts of justice. Wherever any

body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs. . . I can see no difference in principle between *certiorari* and prohibition, except that the latter may be invoked at an earlier stage. If the proceedings establish that the body complained of is exceeding its jurisdiction by entertaining matters which would result in its final decision being subject to being brought up and quashed on *certiorari* I think that prohibition will lie to restrain it from so exceeding its jurisdiction. . . (There is) long line of authority which has extended the writs in question to bodies other than those who possess legal authority to try cases, and pass judgments in the strictest sense."

These authorities go to show that there is no difference in principle between the writ of *certiorari* and the writ of prohibition except that the latter may be invoked at an earlier stage. They also go to show that whenever any body of persons having legal authority to determine questions affecting the rights of subjects and having a duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs. This jurisdiction to issue writs of *certiorari* and prohibition was invested in the Supreme Court of Judicature at Bombay by Cl. (5) of the Charter which stated:

"And it is our further will and pleasure, that the said Chief Justice and the said Puisne Justices shall, severally and respectively, be, and they are, all and every of them, hereby appointed to be Justices and Conservators of the Peace, and Coroners, within and throughout the Settlement of Bombay, and the Town and Island of Bombay, and the limits thereof, and the Factories subordinate thereto and all the territories which now are or hereafter may be subject to, or dependent upon, the Government of Bombay, aforesaid, and to have such jurisdiction and authority as our Justices of our Court of King's Bench have and may lawfully exercise, within that part of Great Britain called England, as far as circumstances will admit."

The conditions precedent, therefore, for the High Court exercising its jurisdiction to issue the writs of *certiorari* and prohibition according to the authorities would appear to be that there should be a body of persons; (1) having legal authority; (2) to determine questions affecting rights of subjects, and (3) having a duty to act judicially, and (4) they should act in excess of their legal authority. If these conditions were fulfilled, that body of persons are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs.

Let us, however, consider whether the Court would have jurisdiction to issue these writs, only if the body of persons or to use

6. (1700) 1 Ld. Raym. 580, *Rex v. Inhabitants in Glamorganshire*.

7. (1882) 10 Q. B. D. 309; 52 L. J. M. C. 4: 48 L. T. 173; 31 W. R. 72, *Reg. v. Local Government Board*.



another expression, the tribunal or officer acted in excess of their legal authority. I have already referred to the observations of Lord Sumner in (1921) 2 A.C. 570<sup>5</sup> quoted by Bankes L. J. in (1944) 1 K. B. 171<sup>4</sup> (p. 194), viz, "It is agreed also that, old as the procedure by writ of prohibition is, and few are older, there is not to be found in all the very numerous instances of the exercise of this jurisdiction any case in which prohibition has gone to a body which possessed no legal jurisdiction at all," which would go to show that the Court might not have in the event of the tribunal or officer acting without authority or jurisdiction at all any jurisdiction to issue a writ of prohibition against him. As I have understood the observations of the learned Judges in (1924) 1 K. B. 171<sup>4</sup> there is no difference in principle between the writs of *certiorari* and prohibition. These observations of Lord Sumner would apply with equal force to the question of issuing a writ of *certiorari* also. Even though a literal interpretation of the remarks of Atkin L. J. (p. 204) in (1924) 1 K. B. 171<sup>4</sup> and the observations of Lord Sumner above referred to might lead one to the conclusion that the Court would have jurisdiction to issue a writ of *certiorari* and a writ of prohibition only in the event of the tribunal or officer acting in excess of his legal authority, there is really no warrant for limiting the Court's jurisdiction to issue writs of *certiorari* and prohibition in this manner. The absence of any authority whatever to act in a particular manner is certainly much worse than mere excess of legal authority, and it is inconceivable that even though the Courts would have the jurisdiction to issue a writ of *certiorari* or a writ of prohibition in cases where the tribunal or officer is acting in excess of the legal authority invested in him, the Courts would be helpless where the tribunal or officer concerned was seeking to exercise an authority or jurisdiction which was not at all vested in him. In these remarks of mine I am supported by a passage from Ryde's Law and Practice of Rating, Edn. 6, p. 702, which is quoted by Lokur J. in 41 Bom. L. R. 934<sup>8</sup> (p. 990):

"If the Court of quarter sessions refuses to exercise jurisdiction when it has it, the King's Bench will by *mandamus* compel that Court to hear and determine the appeal. And if the quarter sessions exercise powers in excess of their jurisdiction, or where they have none, the King's Bench will bring up the proceedings by a writ of *certiorari*

and quash them; for 'there is inherent in the Court of King's Bench authority to bring before it by writ of *certiorari*, save where the writ is taken away by statutory enactment or charter, the proceedings of any Court of inferior jurisdiction, with a view to quash such proceedings. But this applies only where there is some defect of jurisdiction, or informality or defect apparent on the face of the proceedings.' If the sessions have jurisdiction to hear an appeal and do so, but decide wrongly, the King's Bench will not interfere either by *mandamus* or *certiorari*."

and by the remarks of Lokur J. himself again at p. 990, where he observes:

"Thus, there are two conditions to be fulfilled before a writ can be issued, namely, that the tribunal or officer whose act is complained of must be acting judicially, and that the act complained of must be *without jurisdiction* or in excess of the legal authority of that tribunal or officer. An officer or tribunal having jurisdiction to decide a question cannot be said to have acted in excess of the legal authority if the decision happens to be wrong."

This passage from Ryde's Law and Practice of Rating and these remarks of Lokur J. go to show that the Court could exercise jurisdiction to issue the writs of *certiorari* and of prohibition or *mandamus* even though the tribunal or officer had no jurisdiction at all to act in the matter. Besides the passage from Halsbury's Laws of England, Hailsham Edition, Vol. 9, at p. 820, Para. 1397, quoted above, there is also a passage in the same volume at p. 878, Para. 1481:

"Although the writ is not of course it will nevertheless be granted *ex debito justitiæ*, to quash proceedings which the Court has power to quash, where it is shown that the Court below has acted *without jurisdiction* or in excess of jurisdiction, if the application is made by an aggrieved party and not merely by one of the public and if the conduct of the party applying has not been such as to disentitle him to relief; and this is the case even though *certiorari* is taken away by statute, and although there is an alternative remedy. The writ will never be granted to remove an erroneous order at the instance of the party in whose favour the error was made."

Moreover, in this very connection Mr. M. M. Jhaveri who argued the point in O. C. J. Misc. No. 63 of 1945<sup>9</sup> drew my attention to a case decided in (1887) 18 Q. B. D. 510.<sup>10</sup> In that case an order had been made by the Registrar of the Court that security for the costs of the defendants should be given by the plaintiff. It was contended that the rule under which that order had been made by the Registrar was invalid and the petitioners asked for a writ of prohibition to be issued against the respondents who were the defendants in the action in which such order

8. ('39) 26 A.I.R. 1939 Bom. 471 : 187 I. C. 8 : 41 Bom. L. R. 934, *Muljee Sicka & Co. v. Municipal Commissioner*.

9. O. C. J. Misc. No. 63 of 1945, decided on 9th August 1945, by Bhagwati J., *Vazir Bashir v. Collector of Bombay*.

10. (1887) 18 Q. B. D. 510 : 56 L. J. Q. B. 413 : 56 L. T. 314 : 35 W. R. 475, *The Queen v. Mayor, &c. of Liverpool*.



was made by the Registrar, to prohibit the enforcement of that order made by the Registrar. Wills J. observed, after a discussion of the validity of the rule under which the order was made by the Registrar (page 514) :

"... on that broad ground we are of opinion that the making of the rule in question is not an exercise of the power to make rules of practice given by the statute, that the rule is, therefore, invalid, and the application for a prohibition must be granted."

This was an instance where a writ of prohibition was issued by the Court to prohibit enforcement of an order which was made by the Registrar of the Court acting under the rule which was invalid and which, therefore, gave him absolutely no authority or jurisdiction to make the order in question. I am, therefore, of opinion that the Court would have jurisdiction to issue the writs of *certiorari* and of prohibition not only in those cases where the tribunal or officer acted in excess of their legal authority but also in those cases where the tribunal or officer acted without authority or jurisdiction at all.

I have, therefore, got to consider whether respondent 1 herein in the matter of the issue of the requisition order in question had (1) legal authority, (2) to determine questions affecting the rights of subjects, (3) had the duty to act judicially and (4) acted in excess of the legal authority vested in him or without authority or jurisdiction at all. It was contended by Sir Jamshedji Kanga that respondent 1 was not performing any judicial act but was performing what he called merely a ministerial act or at best an executive or an administrative act when he issued the requisition order in question. It was, on the other hand, contended by Mr. M. P. Amin that having regard to the provisions of S. 15, Defence of India Act, R. 75A, Defence of India Rules, and the inquiries made and the explanations asked for by respondent 1 from the petitioners or their representatives before he passed the requisition order in question as shown in the affidavit of respondent 1 himself dated 2nd April 1945, respondent 1 was doing a judicial act and not a merely ministerial or an executive or an administrative act and was, therefore, amenable to the jurisdiction of the Court in the matter of the issue of the writs of *certiorari* and of prohibition.

Before I proceed to consider whether the act of respondent 1 in the matter of the issue of the requisition order was a judicial act or not, I shall first of all dispose of the

minor points which arise in this connection. There is no doubt that respondent 1 was invested with legal authority in the matter of the exercise of the powers which he did by reason of the provisions of S. 2 (4), Defence of India Act, and the Notification of the Government of India, Defence Co-ordination Department, No. 1336/OR/1/42, dated 25th April 1942. He had, therefore, legal authority to act as he did. The next question is whether he had the legal authority to determine questions affecting the rights of subjects. As to that also there cannot be any doubt, because under the terms of the notification dated 25th April 1942, he had power to determine questions affecting the proprietary rights of the subjects whose properties he sought to requisition in exercise of such powers. I am answering this question without laying any stress on the word "determine" used in this connection. The word "determine" may involve a judicial determination of a question. That consideration, however, I will advert to when I consider whether respondent 1 was doing a judicial act when he was issuing the requisition order in question. The third question is whether respondent 1 had the duty to act judicially. That also will be examined by me when I consider the provisions of S. 15, Defence of India Act, and R. 75A, Defence of India Rules, in this connection, at the time of determining whether the act of respondent 1 in executing the requisition order in question was a judicial act. The last question is whether respondent 1 acted in excess of his legal authority, or without authority, or jurisdiction at all. If I came to the conclusion that he had authority to act in the matter of the requisition of immovable property, but in the matter of such requisition he acted in excess of that authority, the first part of this condition would be fulfilled. If, on the other hand, I came to the conclusion that, by reason of the enactment of S. 2 (2) (xxiv), Defence of India Act, and R. 75A, Defence of India Rules, with respect to the requisition of immovable property being *ultra vires* the Central Legislature, respondent 1 had no authority or jurisdiction at all to issue the order for requisition of immovable property, the second part of this condition would be fulfilled. In either event this condition would be fulfilled and the Court would have jurisdiction to issue a writ of *certiorari* or a writ of prohibition against him.

I shall now proceed to consider the question whether the act which respondent 1 was



doing in the matter of the issue of the requisition order in question was a judicial act. The word "judicial act" has been defined in Stroude's Judicial Dictionary, 2nd Edn., (Supplement) as under :

*Judicial Act* — It is established that the writ of *certiorari* does not lie to remove an order merely Ministerial, e. g., a warrant ; but it lies to remove and adjudicate upon the validity of acts Judicial.

In this connection the term 'Judicial' does not necessarily mean acts of a Judge, or Legal Tribunal, sitting for the determination of matters of law; but, for the purpose of this question, a 'Judicial' act seems to be, an act done by competent authority upon consideration of facts and circumstances, and imposing liability or affecting the rights of others (per May C. J., (1878) L.R. 2 Ir. R. 371<sup>11</sup> at pp. 376, 377, vindicated by Palles C. B., and Fitz-Gibbon L. J., in (1902) 2 Ir. R. 373<sup>12</sup> at pp. 383-4, the latter saying that there is no complete antithesis to 'Judicial' except 'Non-Judicial,' though of other words 'Ministerial' is as good as any).

The true view would seem to be that the term 'Judicial Act' is used in contrast with purely Ministerial Acts. To these latter the process of *certiorari* does not apply, e. g., to the issue of a warrant to enforce a rate, even though the rate is one which could itself be questioned by *certiorari*. In short, there must be the exercise of some right or duty to decide in order to provide scope for the writ of *certiorari* at Common Law. (per Moulton L. J., (1906) 2 K. B. 501<sup>2</sup> at page 535)."

This definition in Stroude's Judicial Dictionary has been taken from the remarks of May C. J. in (1878) L. R. 2 Ir. 371<sup>11</sup> at p. 376 :

"It is established that the writ of *certiorari* does not lie to remove an order merely ministerial, such as a warrant, but it lies to remove and adjudicate upon the validity of acts judicial. In this connection the term 'judicial' does not necessarily mean acts of a Judge or legal tribunal sitting for the determination of matters of law, but for the purpose of this question a judicial act seems to be an act done by competent authority, upon consideration of facts and circumstances, and imposing liability or affecting the rights of others. And if there be a body empowered by law to inquire into facts, make estimates to impose a rate on a district, it would seem to me that the acts of such a body involving such consequences would be judicial acts."

These remarks of May C. J. were quoted with approval in (1902) 2 Ir. R. 349<sup>13</sup> where after quoting the same Palles C. B. remarked at p. 373 :

" . . . . , I have always considered, and still consider, the principle of law to be as stated by the Chief Justice, assuming that there is nothing in the statute constituting the particular tribunal or investing it with the particular power which indicates a contrary intention. I have always thought that to erect a tribunal into a 'Court' or 'jurisdiction,' so as to make its determinations judicial,

the essential element is that it should have power by its *determination* within jurisdiction, to impose liability or affect rights. By this I mean that the liability is imposed, or the rights affected by the determination only, and not by the fact determined, and so that the liability will exist, or the right will be affected, although the determination be wrong in law or in fact. It is otherwise of a ministerial power. If the existence of such a power depends upon a contingency, although it may be necessary for the officer to determine whether the contingency has happened, in order to know whether he shall exercise the power, his determination does not bind. The happening of the contingency may be questioned in an action brought to try the legality of the act done under the alleged exercise of the power. But where the determination binds, although it is based on an erroneous view of facts or law, then the power authorising it is judicial. It may be proper to state that, of course, the correlative proposition is not universally true. A judicial act by an inferior Court does not always bind even the parties to it. To do so it must be within jurisdiction, and, therefore, if the determination be as to the limits of its jurisdiction and be erroneous, so that the act is in excess of jurisdiction, it will not bind."

The remarks of Fritz-Gibbon L. J. at p. 381 of the report are also to the same effect. Fritz-Gibbon L. J., however, added (p. 383) :

"In opposition to the word 'judicial' the word 'ministerial' has been adopted as the test-word to describe acts which are not the subject of *certiorari*. Mr. Ronan, for the Local Government Board, prefers 'administrative'. The truth is that neither of these words is adequate as a descriptive term. A number of words would be required to describe all the acts, whether of judicial or non-judicial bodies, which cannot be controlled by *certiorari*. 'Ministerial' 'Administrative', 'executive', 'discretionary', 'final', 'conclusive', are all terms applicable in different cases to describe such acts. I think that we must always ascertain affirmatively, before granting a *certiorari*, that the act to be reviewed is a judicial exercise, or assumed exercise, of a limited jurisdiction ; and I can find no one word that will adequately describe all the acts which are not judicial, in the sense required, except the contradictory 'non-judicial.' Of other words, 'ministerial' is as good as any ; its use is sanctioned, and its meaning has been elucidated by authority. As so elucidated, 'judicial' and 'ministerial' conveniently describe the acts which are, and the acts which are not, subject to control by *certiorari*."

These authorities go to show that the tribunal or competent authority should have power by its determination within jurisdiction to impose liability or affect the rights of others, that it must exercise some right or duty to decide and that the act should be done by it upon consideration of facts and circumstances and imposing liability or affecting the rights of others. It is on the strength of these authorities that it was held by Fletcher-Moulton L. J. in (1906) 2 K. B. 501<sup>2</sup> that the phrase "judicial act" must be taken in a very wide sense including many acts that would not ordinarily

11. (1878) L. R. 2 Ir. 371, The Queen v. Corporation of Dublin.

12. (1902) 2 Ir. R. 373, Reg. (Wexford Council) v. Local Government Board.

13. (1902) 2 Ir. R. 349, Reg. (Wexford Co. Council) v. Local Government Board.



be termed judicial and that the procedure of *certiorari* applies in many cases in which the bodies whose acts are criticised would not ordinarily be called Courts nor the acts ordinarily be termed judicial acts. The position was summarized in this sentence (p. 535):

"In short, there must be the exercise of some right or duty to decide in order to provide scope for the writ of *certiorari* at common law."

There are observations on this point to be found also in later cases. In the decision of the House of Lords in (1926) A. C. 586<sup>14</sup> Lord Atkinson observed (p. 602):

"One of the best distinctions of a judicial act as distinguished from an administrative act is that given by the late May C. J. in the Irish case in (1878) L. R. 2 Ir. R. 371<sup>11</sup> at p. 375."

His Lordship quoted the passage from the judgment of May C. J. hereinbefore referred to and observed (p. 602):

"This definition was apparently approved of by Palles C. B. in (1885) L. R. 16 Ir. 150<sup>15</sup> and also in 34 Ir. L. T. 196.<sup>16</sup>"

In (1931) 2 K. B. 215<sup>17</sup> Scrutton L. J. observed (p. 233):

"The writ of *certiorari* is a very old and high prerogative writ drawn up for the purpose of enabling the Court of King's Bench to control the action of inferior Courts and to make it certain that they shall not exceed their jurisdiction; and therefore the writ of *certiorari* is intended to bring into the High Court the decision of the inferior tribunal, in order that the High Court may be certified whether the decision is within the jurisdiction of the inferior Court. There has been a great deal of discussion and a large number of cases extending the meaning of 'Court.' It is not necessary that it should be a Court in the sense in which this Court is a Court; it is enough if it is exercising, after hearing evidence, judicial functions in the sense that it has to decide on evidence between a proposal and an opposition; and it is not necessary to be strictly a Court; if it is a tribunal which has to decide rights after hearing evidence and opposition, it is amenable to the writ of *certiorari*; and I do not discuss further the nature of the writ, because very elaborate discussions of it will be found in the recent cases, (1924) 1 K. B. 171<sup>14</sup> and (1929) 1 K. B. 619<sup>18</sup>. . . . When the question is, on what terms and conditions shall a licence be granted, and when the Committee proceeds to require that notice of the proposal shall be given, and to hear the applicant and his opponents, and to take evidence, the proceeding seems to me to be exactly that of a tribunal which the King's Bench Division,

by the writ of *certiorari*, restrains within its jurisdiction."

Slessor L. J. also observed in that case (p. 243):

"Atkin L. J. (as he then was) in (1942) 1 K. B. 171,<sup>4</sup> lays down four conditions under which a rule for a *certiorari* may issue. He says: 'Wherever any body of persons' (first) 'having legal authority' (secondly) 'to determine questions affecting rights of subjects, and' (thirdly) 'having the duty to act judicially,' (fourthly) 'act in excess of their legal authority,'—the sub-divisions are my own—'they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs'."

This decision lays down what are the main processes which go to form an act of a tribunal or competent authority a judicial act. The tribunal or competent authority should decide on the materials before it between a proposal and an opposition even though the mode in which the materials are collected and placed before it or the process adopted by it in connection with the decision on those materials as between a proposal and opposition may not strictly conform to what is ordinarily adopted in the regular Courts of law. In (1935) 1 K. B. 249,<sup>19</sup> Greer L. J. at p. 266 quoted with approval the views of Lord Loreburn L. C. in (1911) A. C. 179,<sup>20</sup> which in their turn had been approved by both Lord Haldane in (1915) A. C. 120<sup>21</sup> at p. 133 and by Lord Parmoor in *ibid.*, p. 141:

"Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of state the duty of deciding or determining questions of various kinds. In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view. . . . The Board is in the nature of the arbitral tribunal, and a Court of law has no jurisdiction to hear appeals from the determination either upon law or upon fact. But if the Court is satisfied either that the Board have not acted judicially in the way I have described, or have not

14. (1926) 1926 A. C. 586 : 95 L. J. K. B. 730 : 135 L. T. 482, *Frome United Breweries Co. v. Bath Justices*.

15. (1885) L. R. 16 Ir. 150, *In re Local Government Board, Ex parte Kingstown Commissioners*.

16. 34 Ir. L. T. 196, *Reg. (Monaghan County Council) v. Local Government Board*.

17. (1931) 2 K. B. 215 : 100 L. J. K. B. 760 : 144 L. T. 464, *Rex v. London County Council; Entertainments Protection Association Ex parte*.

18. (1929) 1 K. B. 619 : 141 L. T. 6, *Rex v. Minister of Health : Davie, Ex parte*.

19. (1935) 1 K. B. 249 : 104 L. J. K. B. 49 : 152 L. T. 154, *Errington v. Minister of Health*.

20. (1911) 1911 A. C. 179 : 80 L. J. K. B. 796 : 104 L. T. 689, *Board of Education v. Rice*.

21. (1915) 1915 A. C. 120 : 84 L. J. K. B. 72 : 111 L. T. 905, *Local Government Board v. Arlidge*.



determined the question which they are required by the Act to determine, then there is a remedy by *mandamus* and *certiorari*."

In the same case Roche L. J. observed (p. 280):

"It is sufficient to say that whereas it is sometimes contended that the principles of natural justice are vague and difficult to ascertain, fortunately the principles of British justice have been authoritatively laid down; and they at all events extend to the assertion of this principle, that where judicial functions, or quasi-judicial functions, have to be exercised by a Court or by a Board, or any body of persons, it is necessary and essential in the words of Lord Loreburn in (1911) A. C. 179<sup>20</sup> at p. 182 which have already been cited, that they must always give a fair opportunity to those who are parties in the controversy to correct or to contradict any relevant statement prejudicial to their view. In other words those principles of British justice proceed upon the basis that both sides have a right to be heard."

This case lays down that the function exercised by the tribunal or competent authority may be exercised by it in a quasi-judicial manner and not a strictly judicial way as a Court of law would do. It is, however, incumbent on the tribunal or competent authority to act in good faith and fairly listen to both the sides, i. e., adjudicate upon the materials before it as between a proposal and an opposition within the meaning of those words used in (1931) 2 K. B. 215,<sup>17</sup> though it is not bound to treat such a question as though it were a trial, though it has no power to administer an oath and need not examine witnesses and though it can obtain information in any way it thinks best giving a fair opportunity, however, always to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view. In this connection the remarks of Scott L. J. in (1937) 2 K. B. 309<sup>22</sup> are very important as laying down the distinction between judicial and quasi-judicial functions (p. 340):

"In the Report of the Ministers' Powers Committee (Command Paper 4060 of 1932), p. 75 (S. 3, para. 3) an attempt was made to define the words 'judicial' and 'quasi-judicial': 'A true judicial decision presupposes an existing dispute between two or more parties, and then involves four requisites: (1) The presentation (not necessarily orally) of their case by the parties to the dispute; (2) if the dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence; (3) if the dispute between them is a question of law, the submission of legal argument by the parties; and (4) a decision which disposes of the whole matter by a finding upon the facts in dispute and an application of the law of the land to the facts so

found, including where required a ruling upon any disputed question of law. A quasi-judicial decision equally presupposes an existing dispute between two or more parties and involves (1) and (2), but does not necessarily involve (3), and never involves (4). The place of (4) is in fact taken by administrative action, the character of which is determined by the Minister's free choice.' Broadly speaking, I think the above definitions there given are correct, but I would make an addition, and that is that on such issues as were tried before the Watch Committee on 29th August the quasi-judicial approaches in point of degree very near to the judicial. This does not of course mean that because the Watch Committee was then exercising nearly judicial functions, it was tied to ordinary judicial procedure. The principles both of its duties and of its freedom are explained in the oft-cited passage in Lord Loreburn's opinion in (1911) A. C. 179<sup>20</sup> at p. 182 which was quoted by Viscount Haldane L. C. in (1915) A. C. 120<sup>21</sup> at p. 132 and need not be repeated."

These are the general principles which afford a guide to the determination of the question whether an act which is done by a tribunal or competent authority is a judicial act or an executive, administrative, or a ministerial act. The result of these authorities is that the tribunal or competent authority should have power by its determination within jurisdiction to impose liability or affect rights of others, that it should act in exercise of some right or duty to decide, that the act should be done by it upon consideration of facts and circumstances and imposing liability or affecting the rights of others, that it decides on the materials before it as between a proposal and an opposition, even though it is not bound to treat as though it was a trial, though it has no power to administer oath and need not examine witnesses and though it can obtain information in any way it thinks best always giving a fair opportunity to those parties in controversy for correcting or contradicting statements prejudicial to their view. I may also in this connection refer to a judgment of Das J. in 48 C. W. N. 766.<sup>23</sup> Das J. discussed this question of what was a judicial act as distinguished from an executive act at p. 804 (col. 2) of that judgment. After having discussed the various authorities which I have referred to earlier, beginning with the case in (1878) L. R. 2 Ir. 371<sup>11</sup> at p. 376, where the oftquoted remarks of May C. J. are to be found, and ending with the case in (1931) 2 K. B. 215<sup>17</sup> he observed (p. 800, col. 2):

"The duty of 'acting' judicially or 'proceeding' judicially implies, to my mind, something more than mere application of the mind by the authority on the materials before him. If he does not apply his mind at all or does the act for a collateral purpose, it will be a bad act in all cases. If the

22. (1937) 2 K. B. 309 : 106 L. J. K. B. 728 : 157 L. T. 290 : (1937)-2 All E. R. 726, Cooper v. Wilson.

23. ('44) 48 C. W. N. 766, In re Banwarilal Roy.



doing of the act is left entirely to the discretion of the authority as a purely subjective matter as said in (1942) A. C. 206<sup>24</sup> or if the official act is 'discretionary and in some respects facultative' as their Lordships of the Judicial Committee put it in 46 I. A. 176,<sup>25</sup> it is purely an administrative or executive act. In such a case the authority alone has to form his own opinion, in good faith of course, on the materials before him. A judicial or quasi-judicial act, on the other hand, implies more than mere application of the mind or the formation of the opinion. It has reference to the mode or manner in which that opinion is formed. It implies 'a proposal and an opposition' and a decision on the issue. It vaguely connotes 'hearing evidence and opposition' as Scrutton L. J. expressed it. The degree of formality of the procedure as to receiving or hearing evidence may be more or less according to the requirements of the particular statute, but there is an indefinable yet an appreciable difference between the method of doing an administrative or executive act and a judicial or quasi-judicial act."

Das J. ultimately observed (p. 802, col. 2) :

"Whether an act is a judicial or quasi-judicial act or a purely executive act will depend on the terms of the particular rule, the nature, scope and effect of the particular power in exercise of which the act may be done read with the provisions of S. 15 of the Act."

This really seems to me to be the crux of the question. In order to decide whether an act is a judicial act so as to invoke the jurisdiction of issuing writs of *certiorari* or prohibition which is vested in the High Court, regard must also be had to the terms of the particular rule, the nature, scope and effect of the particular power in exercise of which an act may be done read with the provisions of S. 15, Defence of India Act.

Having regard to the principles enunciated above, can it be said that the act of the respondent in issuing the requisition order in question was a judicial act? There is no doubt that the respondent was constituted a tribunal or competent authority for determining whether the rights of the subject to his property should be effected by the issue of the requisition order. The question, however, to be determined is whether in the matter of the issue of the requisition order in question he was exercising some right or duty to decide or was exercising judicial function in the sense that he had to decide on materials before him as between a proposal and an opposition. He had certainly no power to administer an oath and therefore need not examine any witnesses. He could also obtain information in any way he thought best, giving, however, fair

opportunity to those who were the parties concerned and whose rights of property were sought to be affected by him by the terms of the requisition order in question to correct or contradict any relevant statements prejudicial to their view. Even though his functions in this behalf were not strictly judicial but what have been described as quasi-judicial by reason of what I have described above, was he really exercising that quasi-judicial function by way of deciding on the materials before him as between a proposal and an opposition, the last being an essential ingredient for converting the act which was being done by him into a judicial act within the extended meaning of the term. Under R. 75A (5), Defence of India Rules, he had the power with a view to requisitioning any property under sub-r. (1) or determining the compensation payable under sub-r. (4) to require any person to furnish to him such information in his possession relating to the property, and had also under sub-r. (5-a) powers to enter any premises and inspect such premises and property therein for the purpose of determining whether, and if so in what manner, an order under this rule should be made in relation to such premises or property. This was the power evidently given to the respondent for the purpose of gathering all requisite materials in order to enable him to determine from the point of view of the Government whether a requisition order should be made by him in respect of a particular property. This was also the power given to him to gather all requisite materials which would enable him to determine from the point of view of the subject, viz., the owner of the property, whether within the terms of S. 15, Defence of India Act, the proposed action of his in requisitioning the property would interfere with the ordinary avocations of life and the enjoyment of property as little as may be consonant with the purpose of ensuring the public safety and interest and the defence of British India. In the matter of the gathering of these materials, he was empowered not only to question any person or persons concerned with the property but also to enter upon the premises and inspect the same, and satisfy himself as to the pros and cons of the proposed order of requisition.

It was only after he satisfied himself on the materials gathered by him in the manner aforesaid that he was to act in the matter of the requisition of the property, having particular regard to the mandatory provi-

24. (1942) 1942 A. C. 206 : 110 L. J. K. B. 724 : 1941-3 All. E. R. 338 : 166 L. T. 1, *Liversidge v. Sir John Anderson*.

25. (19) 6 A. I. R. 1919 P. C. 31 : 43 Mad. 146 : 46 I. A. 176 : 52 I. C. 209 (P. C.), *Annie Besant v. Advocate-General of Madras*.



sions of S. 15, Defence of India Act, that his act was to interfere with the ordinary avocations of life and the enjoyment of property as little as may be consonant with the purposes therein mentioned. The determination of this question involved a proposal to requisition the property from the point of view of the Government. It also involved an opposition to the proposal to requisition the property from the point of view of the subject whose property was sought to be requisitioned. The respondent had before him the materials which he had gathered by reason of the inquiries which he instituted and by reason of the inquiries on the premises which he made, though such materials might have been gathered by him in any way he thought best; the duty was laid down upon him under the terms of R. 75A, Defence of India Rules, and S. 15, Defence of India Act, to act in the exercise of a right or duty to decide; and, in the matter of the issue of the requisition order on those materials and under those circumstances he was certainly exercising a judicial function in the sense that he was deciding on the materials before him as between a proposal and an opposition, with the result that the act which he was doing in the matter of the issue of the requisition order in question was a judicial act within the meaning of the extended sense of the term. I am supported in this conclusion of mine by the statements made by respondent 1 himself in his affidavit in reply dated 2th April 1945. In para. 3 of his affidavit respondent 1 stated :

"According to my information and to the investigations made by the Government Officers before the requisition order was made, and after receiving the representations made on behalf of the petitioners, I was informed that . . ."

In para. 7 of his affidavit respondent 1 stated :

"The action complained of was taken by me after fully considering the facts placed before me, and the order for requisition was served on the petitioners for the purpose mentioned in the said requisition order, viz., for the efficient prosecution of the war."

In para. 8 of his affidavit respondent 1 further stated :

"It is not true that explanations were not called for from the petitioners' representatives who were in the said flat in Bombay or that inquiries were not made from them and from other quarters. The inquiries prior to the making of these orders are departmental inquiries, and the facts placed before me are fully considered by me before any requisition order is made by me."

These statements contained in the affidavit of respondent 1 go to show that he exercised, as I have already described above, in the

matter of the issue of the requisition order in question, a judicial function in the sense that he decided upon the materials before him as between a proposal and an opposition, and that, therefore, he performed what was a judicial act within the extended definition of that term. If respondent 1 was, as I have already held above, doing a judicial act in the matter of the issue of the requisition order in question, all the conditions which would be requisite before the Court would exercise the controlling jurisdiction by issuing the writ of *certiorari* or the writ of prohibition would be satisfied. He was a tribunal or officer having legal authority to determine questions affecting the rights of subjects and having authority to act judicially, and would be acting in excess of his legal authority or without any authority or jurisdiction at all, with the result that it would be competent to the Court to issue a writ of *certiorari* or a writ of prohibition against him. An interesting argument was, however, advanced by Sir Jamshedji Kanga that by the enactment of S. 45, Specific Relief Act, the Indian Legislature had abolished the writ of prohibition. He relied in this connection on the observations of Sir Norman Macleod in 28 Bom. L. R. 264<sup>26</sup> where the learned Chief Justice observed at p. 269 that proceedings under this section (i.e. S. 45, Specific Relief Act), are in substitution for proceedings by writ of *mandamus* and writ of prohibition according to English practice. He also relied upon the observations of Coyajee J. in 47 Bom. L. R. 500<sup>27</sup> at pp. 504, 505, where the learned Judge after referring to the observations of Macleod C. J. in 28 Bom. L. R. 264,<sup>26</sup> hereinbefore referred to, referred also to S. 50, Specific Relief Act, and stated (p. 505) :

"One has to read S. 50 and S. 45 together. Section 45 itself talks of any specific act to be done or forbore and the Proviso (b) talks of such doing or forbearing. Therefore, in my opinion, the word *mandamus* used in S. 50 is to be construed with reference to the context in S. 45, and reading these together it appears that the word *mandamus* is used in a broad sense. I am not only fortified in that view by the decision of the Division Bench of this High Court cited above, but in the absence of any other authority cited on the subject, I am bound by the decision in that case and I do respectfully agree with the reasoning set out therein. In these circumstances in my opinion S. 45 must be read both in connection with a writ of *mandamus* as well as for a writ of prohibition."

26. ('26) 13 A. I. R. 1926 Bom. 247 : 50 Bom. 394 : 93 I. C. 918 : 28 Bom. L. R. 264, Mahomedalli v. Jafferbhoy.

27. ('45) 32 A.I.R. 1945 Bom. 419 : 47 Bom.L.R. 500, Dinbai Petit v. Noronha.



Relying upon these observations of Macleod C. J. and Coyajee J., in the respective cases which I have referred to above, Sir Jamshedji contended that the writ of prohibition was abolished by the enactment of S. 45, Specific Relief Act, by the Indian Legislature. Mr. M. P. Amin, on the other hand, contended that the observations of Sir Norman Macleod in 28 Bom. L. R. 264<sup>26</sup> were obiter, that the attention of Coyajee J., was not drawn in the arguments addressed to him in 47 Bom. L. R. 500<sup>27</sup> to the fact that these observations of Sir Norman Macleod were obiter and his attention was also not drawn to the relevant provisions of the Supreme Court Charter, that the reading of ss. 50 and 45, Specific Relief Act, which was adopted by Coyajee J., was wrong and was entirely contrary to the well-known principle that the writ of *certiorari* and so also the writ of prohibition could only be taken away by express negative words, that S. 50, Specific Relief Act, only referred to the writ of *mandamus* and not to the writ of prohibition, and that, therefore, even though some of the provisions contained in the writ of prohibition were incorporated by the Legislature in S. 45, Specific Relief Act, the writ of prohibition was not abolished by the enactment of S. 45, Specific Relief Act, by the Indian Legislature. It is necessary, therefore, for me to consider how far the writ of prohibition has been abolished by the Indian Legislature by enacting S. 45, Specific Relief Act. There is no doubt that all the provisions of the writ of *mandamus* have been incorporated by the Legislature in the provisions of S. 45, Specific Relief Act. The Legislature has moreover by the terms of S. 50, Specific Relief Act, laid down in clear terms that neither the High Court nor any Judge thereof shall thereafter issue any writ of *mandamus*. These are express negative words which do take away the jurisdiction and power of the High Court to issue a writ of *mandamus*. There is no doubt also that some of the provisions of the writ of prohibition have been enacted by the Indian Legislature in S. 45, Specific Relief Act. The forbearing to do a specific act which is clearly incumbent on the person holding a public office, or corporation or inferior Court of Judicature and which would be the subject-matter of an order under S. 45, Specific Relief Act, would no doubt be comprised within the writ of prohibition; but it cannot be contended and it has not been contended before me that there are certain aspects of the writ of prohibition which do not find

their place in S. 45, Specific Relief Act. Could it be, therefore, urged that in those cases where some of the aspects of the writ of prohibition are comprised within S. 45, Specific Relief Act, one has only got to look to the provisions of that section, that the writ of prohibition is abolished *pro tanto* by the enactment of those provisions in S. 45, Specific Relief Act, and that the jurisdiction to issue a writ of prohibition would survive only in respect of those provisions which have not been enacted in S. 45, Specific Relief Act? It was urged by Sir Jamshedji that in those cases where the Crown had consented to a statutory enactment of the provisions with regard to any prerogative and the imposition of limitations on the prerogative power in that manner the prerogative would to that extent be deemed to have been merged in the particular statutory provision. He relied upon the observations of Lord Dunedin in (1920) A. C. 508<sup>28</sup> (p. 526):

"Now the view which I think prevailed in (1915) 3 K. B. 649<sup>29</sup> was that the prerogative gives a right to take for use of the moment in a time of emergency, that when you come to the Defence Acts of 1803 and 1842 you find a code for the taking of land permanently in times of peace as well as of war, and that consequently the two systems could well stand side by side; and then, as there was no direct mention of the prerogative in the statutes, you were assisted by the general doctrine that the Crown is not bound by a statute unless specially mentioned. That in cases where the burden or tax is imposed the Crown must be specifically mentioned; no one doubts. Instances are given by the Master of the Rolls in (1893) 3 Ch. 48<sup>30</sup> at p. 64 and (1883) 9 A. C. 61<sup>31</sup> at p. 66 and there are many others. Nonetheless, it is equally certain that if the whole ground of something which could be done by the prerogative is covered by the statute, it is the statute that rules. On this point I think the observation of the learned Master of the Rolls is unanswerable. He says: 'What use would there be in imposing limitations, if the Crown could at its pleasure disregard them and fall back on prerogative?'

"The prerogative is defined by a learned constitutional writer as 'The residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown.' Inasmuch as the Crown is a party to every Act of Parliament it is logical enough to consider that when the Act deals with something which before the Act could be effected by the prerogative, and specially empowers the Crown to do the same thing, but subject to conditions the Crown assents to that, and by that Act, to the prerogative being curtailed."

28. (1920) 1920 A. C. 508 : 89 L. J. Ch. 417 : 122 L. T. 691, Attorney-General v. De Keyser's Royal Hotel.

29. (1915) 3 K. B. 649 : 84 L. J. K. B. 1961 : 113 L. T. 575, In re Petition of Right.

30. (1893) 3 Ch. 48 : 62 L. J. Ch. 963 : 69 L. T. 203 : 41 W. R. 677, Wheaton v. Maple & Co.

31. (1883) 9 A. C. 61 : 53 L. J. Q. B. 239 : 50 L. T. 405 : 32 W. R. 525, Coomber v. Justices of Berks.



It may be, however, noted in this connection that the remarks of Lord Dunedin have reference to those cases where the whole ground of something which could be done by the prerogative is covered by the statute. It is in those cases only that the statute rules and the prerogative is curtailed. Where, however, as in the case before us, it is only certain provisions of the writ of prohibition that are enacted in S. 45, Specific Relief Act, the ratio of this decision of Lord Dunedin does not apply and there is no warrant for holding that even though the Crown assented to the enactment of S. 45, Specific Relief Act, it assented to the prerogative being curtailed merely by reason of the fact that certain only of those provisions were being enacted in S. 45, Specific Relief Act. Mr. G. N. Joshi, who appeared with Sir Jamshedji for the respondent, pointed out to me in this connection a decision of the Court of the Judicial Commissioner, W. I. S. A., in (1944) F. L. J. 20.<sup>32</sup> That was a case where the Court was concerned with the provisions of S. 2, Government of India Act, 1935. Davies J. C. there observed (p. 24) :

"When legislation receives the Royal Assent, it is now the accepted convention that the Royal prerogative merges in the provisions of the statute, and where those provisions are succinct, no further exercise of the prerogative will be attempted. The statute has become the touchstone for the future acts of the Sovereign and those acts will invariably conform with the statute's provisions. Having regard, therefore, to the wording of the proviso to S. 2 (1), Government of India Act, and the very clear directions and statements of policy therein contained, it is I think useless to argue that these attaching orders ought to be accepted as instances of the exercise of the prerogative as regards the functions of the Crown in its relations with the Indian States. In so far as the persons, who are to exercise those functions are concerned, the prerogative has been merged in the statute, and if orders are promulgated outside the statute's provisions, those orders are illegal and *ultra vires*."

Kaveeshwar A. J. C. also observed there (page 26) :

"It has been held in several decided cases that if the field of the prerogative is covered by statute, the prerogative ceases to exist : See (1920) A. C. 508<sup>28</sup> and (1931) 1 Ch. 169<sup>33</sup> at p. 185. But only that which has been specifically laid down will be excluded from the exercise of the prerogative. By the Government of India Act of 1935, the prerogative of the Crown was circumscribed. Sub-section (1) of S. 2 includes all the rights formerly enjoyed. Section 2 (2) states this position. These rights were then redistributed. The proviso to S. 2 (1) makes full provision for the channel through which the powers are to be exercised. Firstly the powers are

to be exercised by His Majesty and if not exercised by His Majesty only by the Crown Representative or by persons acting under his authority."

These observations also, in my opinion, do not lead respondent 1 any further. In so far as those observations go to show that the prerogative is merged in the statute where the whole ground of something which could be done by the prerogative is covered by the statute as laid down by (1920) A. C. 508,<sup>28</sup> I have no quarrel with the same. If, however, they go beyond what has been observed by Lord Dunedin and if they mean to lay down that even in those cases where a part of these provisions are enacted within a statute the prerogative is *pro tanto* merged in the statute, I respectfully differ from the same. In those cases where only a part of the provisions of a particular prerogative writ are embodied in the enactment of a statute, the prerogative is not merged *pro tanto* in the statute but continues to exist in its full glory, the only thing which is done by the statute being that in the cases covered by the statute the subject or the applicant would have a concurrent or alternative remedy also under the statute apart from his right to invoke the jurisdiction of the Court to issue a prerogative writ in his favour. In this connection I may also refer to the enactment of S. 115, Civil P. C., and the effect if any that has on the jurisdiction of the Court to issue the writ of *certiorari*. As has been already observed, the writ of *certiorari* is a very old and high prerogative writ drawn up for the purpose of enabling the Court of King's Bench to control the action of inferior Courts and to make it certain that they shall not exceed their jurisdiction, and, therefore, the writ of *certiorari* is intended to bring into the High Court the decision of the inferior tribunal, in order that the High Court may be certified whether the decision is within the jurisdiction of the inferior Court. Section 115, Civil P. C., deals with the powers of revision of the High Court, and enacts that

"The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears—

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit."

Could it be urged that the power of the High Court to issue a writ of *certiorari* to

32. ('44) 31 A. I. R. 1944 Journal 5 : 7 F. L. J. 20 (W. I. S. A.), Bhadwa Taluka v. Crown.

33. (1931) 1 Ch. 169: 99 L. J. Ch. 483: 143 L.T. 623, North Charterland Exploration Co. (1910) Ltd. v. The King.



the inferior Courts is circumscribed by the enactment of the provisions of S. 115, Civil P. C., or that the writ of *certiorari* in so far as it can issue in exercise of the powers similar to the revisional powers of the High Court therein enacted is *pro tanto* merged in S. 115, Civil P. C. ? I shall only refer in this connection to the decision of our Appeal Court in 41 Bom. L. R. 984,<sup>34</sup> where, after tracing the history of the High Court since the establishment of the Supreme Court of Judicature in 1883 and after dealing with the relevant provisions of the Government of India Act and also S. 115, Civil P. C., Lokur J. at p. 989, quoted with approval the passage from Halsbury's Laws of England, 2nd Edn., Vol. IX, p. 861, Para. 1455 :

"*Certiorari* can only be taken away by express negative words. It is not taken away by words which direct that certain matters shall be 'finally determined' in the inferior Court, nor by a proviso that 'no other Court shall intermeddle' with regard to certain matters as to which jurisdiction is conferred on the inferior Court."

and came to the conclusion that if the power to issue a writ of *certiorari* is vested in the High Court, then it is not, and could not be, taken away by S. 219, City of Bombay Municipal Act, 1888, which provided that the decision of the Chief Judge upon any appeal under S. 217 against any such value or tax shall be final. He quoted a passage from the judgment of their Lordships of the Privy Council in (1922) 2 A. C. 128<sup>35</sup> (pp. 159-160) :

"Long before Jervis's Acts statutes had been passed which created an inferior Court, and declared its decisions to be 'final' and 'without appeal,' and again and again the Court of King's Bench had held that language of this kind did not restrict or take away the right of the Court to bring the proceedings before itself by *certiorari*."

This decision lays down that the jurisdiction to issue a writ of *certiorari* can only be taken away by express negative words and that it cannot be taken away by the enactment of certain of the provisions therein in a statute by the Legislature. In that case the enactment of certain provisions of the writ of *certiorari* in S. 115, Civil P. C., was not considered by the Court as in any manner whatsoever affecting the jurisdiction of the High Court to issue the writ of *certiorari*. Both the jurisdictions, viz., the power of the High Court to issue the writ of *certiorari* as also the power of the High Court to exercise revisional jurisdiction conferred on

it by S. 115, Civil P. C., could be exercised side by side and one without any encroachment on the scope of the other. In those cases the subject or the applicant has two remedies open to him, the one to invoke the jurisdiction of the High Court to issue the prerogative writ of *certiorari* and the other to invoke the revisional powers of the High Court in exercise of the powers vested in it under S. 115, Civil P. C. The passage in Halsbury's Law of England, 2nd Edn., Vol. 9, p. 878, Para. 1481, also lends support to this conclusion of mine :

"Although the writ is not of course it will nevertheless be granted *ex debito justitiæ*, to quash proceedings which the Court has power to quash, where it is shown that the Court below has acted without jurisdiction or in excess of jurisdiction, if the application is made by an aggrieved party and not merely by one of the public and if the conduct of the party applying has not been such as to disentitle him to relief; and this is the case even though *certiorari* is taken away by statute, and although there is an alternative remedy. The writ will never be granted to remove an erroneous order at the instance of the party in whose favour the error was made."

The fact that in those cases which are covered by S. 115, Civil P. C., the subject or the applicant has an alternative remedy of invoking the revisional powers of the High Court cannot take away the jurisdiction of the Court to issue the prerogative writ of *certiorari* in proper cases even though the same might be covered within the four corners of S. 115, Civil P. C. Both these are treated as alternative remedies and the subject is entitled to have resort to either the one or the other. Similarly, the enactment of some of the provisions of the writ of prohibition under S. 45, Specific Relief Act, also would not take away the right of the subject or applicant to invoke the jurisdiction of the Court to issue the writ of prohibition even in those cases which are covered within the four corners of the provisions of S. 45, Specific Relief Act. The subject or the applicant would be entitled to both the remedies as alternative remedies and would be entitled to invoke the jurisdiction of the High Court to grant him the one or the other of these two remedies. An argument was advanced at one time by Sir Jamshedji that even though by cl. (5) of the Supreme Court Charter the Supreme Court was invested with the jurisdiction similar to the jurisdiction of the King's Bench in England including therein the jurisdiction to issue the prerogative writs which were then being issued by the King's Bench in England, this jurisdiction was curtailed by the enactment

34. ('39) 26 A. I. R. 1939 Bom. 471 : 187 I. C. 8 : 41 Bom. L. R. 984, Muljee Sicks & Co. v. Municipal Commissioner.

35. (1922) 2 A. C. 128 : 91 L. J. P. C. 146 : 127 L.T. 437, Rex v. Nat Bell Liquors, Ltd.



of cl. (55) of the Charter which runs as under:

"And to the end that the Court of Request and the Court of Quarter Sessions, erected and established at Bombay aforesaid, and the Justices and other Magistrates appointed for the Town and Island of Bombay, and the Factories subordinate thereto, may better answer the ends of their respective institutions, and act conformably to law and justice, it is our further will and pleasure, and we do hereby further grant, ordain, and establish, That all and every the said Courts and Magistrates shall be subject to the order and control of the said Supreme Court of Judicature at Bombay, in such sort, manner, and form, as the inferior Courts and Magistrates of and in that part of Great Britain called England, are by law subject to the order and control of our Court of King's Bench; to which end, the said Supreme Court of Judicature at Bombay is hereby empowered and authorized to award and issue a writ or writs of *Mandamus*, *Certiorari*, *Procedendo*, or Error, to be prepared in manner abovementioned, and directed to such Courts or Magistrates as the case may require, and to punish any contempt thereof, or wilful disobedience thereunto, by fine and imprisonment." He urged that the writ of prohibition was not at all mentioned in cl. (55) of the Charter and that, therefore, the Court should construe cls. (5) and (55) as meaning that the jurisdiction to issue a writ of prohibition was not vested in the Supreme Court under the terms of the Charter. This argument was, however, fallacious. Clause (55) did not purport to, nor could it limit or control the generality of the powers which were invested in the Supreme Court under cl. (5) of the Charter. Clause (55) of the Charter dealt only with the powers which were vested in the Supreme Court to control the Courts of Request and Courts of Quarter Sessions, etc., and it was in that connection only that the writ or writs of *Mandamus*, *Certiorari*, *Procedendo*, or Error were mentioned therein. The mention of these writs did not curtail the general jurisdiction which was invested in the Supreme Court and was a jurisdiction similar to the jurisdiction of the King's Bench in England including the jurisdiction to issue all the writs including the writ of prohibition which was exercised by the Court of King's Bench in England. If authority be needed in this behalf, it is to be found in the decision of our Appeal Court in 46 Bom. L. R. 675<sup>36</sup> (page 677):

"The powers conferred by Cl. (55) related only to Courts subordinate to the High Court, whereas the wider powers conferred by Cl. (5) apply not merely to Courts subordinate to the High Court, but also to any tribunals which perform any kind of judicial function."

This argument of Sir Jamshedji, therefore,

36. ('45) 32 A. I. R. 1945 Bom. 7 : I.L.R. (1944) Bom. 683 : 46 Bom. L. R. 675, *Raghunath Keshav v. Poona Municipality*.

has no substance in it. It, therefore, remains for me to consider, having regard to the considerations above referred to how far I am bound by the observations of Sir Norman Macleod in 28 Bom. L. R. 264<sup>26</sup> and by the observations of Coyajee J. in 47 Bom. L. R. 500<sup>27</sup> that the proceedings under S. 45, Specific Relief Act, are in substitution of proceedings by writ of *mandamus* and writ of prohibition according to English practice. As regards the decision of Sir Norman Macleod in 28 Bom. L. R. 264<sup>26</sup> the Court was concerned therein with an application under S. 45, Specific Relief Act. In that case, the Government of Bombay had passed a resolution appointing the Taxing Officer of the High Court, Bombay, to tax the petitioner's bill of costs in Bombay Election Petition No. 11 of 1924 and to sanction the payment to him of a remuneration of Rs. 15 per hour or part of an hour while employed in taxing the bill, such remuneration being payable by the petitioner. The Taxing Officer had under the terms of that resolution proceeded with the taxation notwithstanding the respondent's protest. Before the *allocatur* was issued the respondent filed the application under S. 45, Specific Relief Act, for an order directing the Taxing Officer, Mr. E. W. Gillett, not to proceed with the taxing of the bill and not to issue the *allocatur*. Shah J., before whom the application came to be heard, was of opinion that the conditions of S. 45, Specific Relief Act, were fulfilled and ordered the Taxing Officer not to proceed further with the bill or to issue the *allocatur*. The petitioner appealed, and, on the hearing of the appeal, Sir Norman Macleod held that even though Mr. Gillett in his capacity of Taxing Officer of the High Court may be said to be a person holding a public office and as such his duty was to tax the bills of costs in proceedings in the High Court under the orders issued by Judges of the High Court, he was certainly not acting as a person holding a public office when he was taxing the bill whether under the directions of a special resolution of the Government or at the request of the Governor. He was acting in his capacity as a private individual with a special knowledge with regard to the taxation of bills of costs according to the High Court Rules. The learned Chief Justice, therefore, held that Proviso (b) to S. 45, Specific Relief Act, did not apply and that the application under S. 45, Specific Relief Act, failed because the conditions under headings (a) to (e) of the provisos were



cumulative and no order under the section could be passed unless they were satisfied. This was enough to dispose of the case. The learned Chief Justice, however, proceeded to make general observations on the writs of *mandamus* and writs of prohibition according to English practice and proceeded to observe that the proceedings under S. 45, Specific Relief Act, were in substitution for those proceedings. With great respect to the learned Chief Justice these remarks of his were *obiter*. The point as to whether the writ of prohibition was abolished by the enactment of S. 45, Specific Relief Act, or was merged therein did not arise for consideration before him, nor were all the points of view which were urged before me by learned counsel appearing on both the sides here urged before the Appeal Court in 28 Bom. L. R. 264.<sup>26</sup> I, therefore, feel that I am not bound to follow the observations of Sir Norman Macleod.

I shall now deal with the observations of Coyajee J. in 47 Bom. L. R. 500.<sup>27</sup> In connection with that case before Coyajee J., I may observe that the attention of the Court was not drawn either to the provisions of cls. (5) and (55) of the Supreme Court Charter nor the decision of the Appeal Court in 41 Bom. L. R. 984<sup>34</sup> where the provisions of S. 115, Civil P. C., in relation to the jurisdiction of the Court to issue the writ of *certiorari* were discussed by the Appeal Court, and it was laid down that the writ of *certiorari* could only be taken away by express negative words. The attention of Coyajee J. seems to have been drawn only to the provisions of the Specific Relief Act and the decision of Sir Norman Macleod in 28 Bom. L. R. 264.<sup>26</sup> It was not also pointed out to him that the observations of Sir Norman Macleod in that case were *obiter*, with the result that in the passage from his judgment which I have quoted above the learned Judge felt himself bound by what he considered to be the decision of Sir Norman Macleod in that case. In the absence of any of these provisions having been brought to the notice of the learned Judge, he only went on what he thought was the proper construction of Ss. 45 and 50, Specific Relief Act, and proceeded to observe that reading those sections together it appeared to him that the word *mandamus* was used in a broad sense and that in his opinion S. 45 must be read both in connection with the writ of *mandamus* as well as a writ of prohibition. Having regard, however, to the fact that the various pro-

visions which I have referred to and the various authorities which I have discussed in this connection were not brought to the notice of the Court and having regard also to the fact that the learned Judge felt himself bound by the *obiter* of Sir Norman Macleod in 28 Bom. L. R. 264,<sup>26</sup> I feel that the decision arrived at by Coyajee J. in this behalf, even though it be that of a Court of co-ordinate jurisdiction, is covered by my observations in 46 Bom. L. R. 916<sup>37</sup> and I do not feel bound to follow the same. I may also quote in this connection the remarks of Beaumont C. J. in 45 Bom. L.R. 240<sup>38</sup> (p. 241):

"Generally speaking, a Judge ought to follow a decision of a Court of co-ordinate jurisdiction as to the construction of an Act of the Legislature, but Judges are not entitled to legislate, or to bind their successors to a construction of an Act, which the language plainly does not justify."

I feel that the language of S. 50, Specific Relief Act, plainly does not justify the conclusion which Coyajee J. has arrived at in 47 Bom. L. R. 500<sup>27</sup> and with great respect to the learned Judge I do not agree with the same. That the writ of prohibition has not been abolished by S. 45, Specific Relief Act, has also been adjudicated upon by the Calcutta High Court. In 61 Cal. 450<sup>39</sup> Panckridge J. was concerned with an application for the issue of a writ of prohibition. It was argued before him that the Court had no power to issue a writ of prohibition and at p. 459 he stated that in his opinion this power of issuing a writ of prohibition existed. He quoted cl. (4) of the Charter of the Supreme Court of Calcutta (of 1774) which is identical in terms with cl. (5) of the Charter of the Supreme Court of Bombay, and proceeded to observe (p. 459):

"Undoubtedly, among the powers of the Court of King's Bench at the date of the Charter was that of issuing writs of prohibition. It is admitted that all the powers of the Supreme Court have been inherited by the High Court, except such as have been specifically taken away by statute."

He then dealt with the argument that to issue a writ of prohibition was never among the powers of the Supreme Court and that cl. (21) of the Charter had the effect of cutting down and curtailing the powers apparently conferred by cl. (4). It may be noted

37. ('45) 32 A. I. R. 1945 Bom. 173: 46 Bom. L. R. 916, In re Rodrigues.

38. ('43) 80 A. I. R. 1943 Bom. 141: I.L.R. (1943) Bom. 480 : 207 I. C. 300 : 45 Bom. L. R. 240, Punamchand Vetraraj v. Bombay Cloth Market Company Limited.

39. ('34) 21 A. I. R. 1934 Cal. 725 : 61 Cal. 450 : 152 I. C. 914, In re National Carbon Co. Incorporated.



that cl. (21) of the Charter there corresponds with cl. (55) of the Charter of the Supreme Court of Bombay. He dealt with the argument that there was no mention there of any authority to issue a writ of prohibition and also that there was no record of such a writ ever having in fact issued from the Supreme Court or the High Court. Nonetheless, he came to the conclusion that he could not accept that argument (p. 460) :

"As has been pointed out by learned commentators, including Sir Fitzjames Stephen, the draftsmanship of the Charter is open to criticism, and it may be that there is here an instance of omission through oversight. In any case, I do not think that the language of Cl. (21) can be used to control the language of Cl. (4) in the manner suggested. It would need far more direct language to convince me that it was intended by Cl. (21) to exclude, from the powers of the Court of King's Bench conferred on the new Court by Cl. (4), the power to issue a writ of prohibition."

Further on (p. 461) :

"The principle has been many times affirmed that when a person, or body of persons, is clothed with power to determine questions, and decide issues affecting the rights of the private citizen or the public, the King's Bench Division will interfere by prohibition or *certiorari* to prevent the illegal exercise of such power."

This power of issuing a writ of prohibition was recognised by the Appeal Court in 62 Cal. 596,<sup>40</sup> where it was held that (headnote) :

"In extraordinary situations in which justice cannot otherwise be done, the High Court has discretionary power to issue writs of *certiorari* or prohibition or orders under S. 45, Specific Relief Act, wherever any person or body of persons, having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially, act in excess of their legal authority or refuse to act or act illegally. Before issuing such writs or orders the Court must be sure that they will be effective."

An application for issue of a writ of prohibition again came before McNair J. in 62 Cal. 1011<sup>41</sup> where he observed (p. 1027) :

"The relief sought is by a writ of *certiorari* or prohibition which is issued by the Court under the power and authority conferred on it by the Charter."

I have already referred to those powers and it was recently decided in 61 Cal. 450<sup>39</sup> that those powers include the power in a proper case to issue a writ of prohibition."

There is a later decision of the Calcutta High Court in 48 C. W. N. 766.<sup>23</sup> In that case Das J. traced in great detail the history of the exercise by the High Courts in India of the powers to issue the various prerogative writs, and in para. 39 of his judgment he dealt with the instance in which a writ of prohibition had been issued by the Calcutta

High Court and he referred to the cases in 61 Cal. 450<sup>39</sup> and 62 Cal. 596,<sup>40</sup> which I have referred to. He also noted an instance where in I.L.R. (1938) 1 Cal. 476,<sup>42</sup> Panckridge J. actually issued the writ of prohibition on the Court of Wards prohibiting them from acting upon their order whereby they declared the petitioner as a disqualified proprietor and taking possession of her properties situate outside Calcutta. These decisions of the Calcutta High Court confirm me in the conclusion which I have already arrived at that the provisions of S. 45, Specific Relief Act, do not abolish the writ of prohibition either wholly or in part.

Under the circumstances I have come to the conclusion that having regard to my finding that the enactment of S. 2 (2) (xxiv), Defence of India Act, and R. 75A, Defence of India Rules, with respect to the requisition of immovable property without a public notification by the Governor-General under S. 104, Government of India Act, was *ultra vires* the Central Legislature and the consequent finding that the requisition order in question issued by the respondent was illegal, void and inoperative in law, the petitioners would be entitled to the issue of a writ of *certiorari* or prohibition against the respondent. As regards the question whether the petitioners would be entitled to an order against the respondent under S. 45, Specific Relief Act, under the circumstances aforesaid I have already dealt with the same in my judgment in 47 Bom. L. R. 1010.<sup>1</sup> I accordingly hold that the petitioners would be entitled to maintain this petition against the respondent to obtain an order against him under S. 45, Specific Relief Act, as prayed for in prayer (c) of the petition.

In the result, I do make an order against respondent 1 in terms of prayer (a) of the petition. In view of my granting the petitioners the prayer (a) of their petition, I do not consider it necessary to make any order under prayer (b) and prayer (c) of their petition. I may, however, observe that if any other Court came to the conclusion that the petitioners are not entitled to the relief prayed for in prayer (a) of the petition, I would certainly grant the petitioners the prayer (c) of their petition, which as I have held above, they are entitled to under the circumstances set out above.

As regards the costs of the petition, I may state that the petitioners came to the

40. ('35) 62 Cal. 596, Dorman Long & Co., Ltd. v. Jagadishchandra Mahindra.

41. ('35) 62 Cal. 1011, In re Ramjidas Mahaliram.

42. ('38) 25 A. I. R. 1938 Cal. 385 : I.L.R. (1938) 1 Cal. 476 : 181 I. C. 973, Indumati Debi Chaudhuri v. Bengal Court of Wards.



Court with two main grounds in support of their petition, the one being that the requisition order in question was illegal, void and inoperative in law by reason of the enactment of S. 2 (2) (xxiv), Defence of India Act, and R. 75A, Defence of India Rules, being *ultra vires* the Central Legislature and the other being that the requisition order in question was illegal, void and inoperative in law by reason of its being in contravention of the provisions of S. 15, Defence of India Act. Both these counts were equally important in their minds. As a matter of fact, I feel constrained to observe that the second ground was trotted out with greater prominence all throughout by the petitioners than the first one. I have already held against the petitioners on the second ground. I may also observe in this connection that the petitioners filed this petition against respondent 2 against whom they had no cause of action whatever and in respect of whom Mr. M. P. Amin for the petitioners conceded that he could not sustain the petition at all. Under the circumstances, I feel that the ends of justice will be met if I order that each party should bear and pay his own respective costs of this petition. Accordingly, there will be an order in favour of the petitioners in terms of prayer (a) of the petition and that the requisition order in question will be quashed. There will be no order as to the costs of the petition.

**Per Curiam.**—Mr. G. N. Joshi asks for a certificate under S. 205 (1), Government of India Act, that the case involves a substantial question of law as to the interpretation of the Government of India Act. I accordingly grant that certificate.

D.S./D.H.

*Order accordingly.*

[Case No. 64.]

**A. I. R. (33) 1946 Bombay 304**

**LOKUR AND GAJENDRAGADKAR JJ.**

*Komalsing Kuwarsing — Appellant*  
v.

*Krishnabai — Respondent.*

First Appeal No. 64 of 1944, Decided on 3rd July 1945, from decision of Civil Judge, Senior Division, Jalgaon, in Special Suit No. 51 of 1943.

(a) Evidence Act (1872), S. 68 — S. 68 does not apply when execution of document is not to be proved.

All that S. 68 says is that the execution of a document cannot be regarded as proved unless one attesting witness at least has been called for that purpose. But where the execution is not to be proved, it is not necessary to call any attesting witness, unless it is expressly contended that the

attesting witness has not witnessed the execution of the document. [P 305 C 2]

(b) Provident Funds Act (1925), Ss. 3, 4 and 5 — G. I. P. Railway Provident Fund Rules—Nomination by contributor of any person other than dependant is valid—Nominee though not dependant takes absolute interest in fund.

Under the Provident Funds Act read with the Provident Fund Rules of the G. I. P. Railway there can be a valid nomination by a contributor of any person other than a dependant although there was a dependant of the contributor in existence. And as the rules do not prohibit nomination in favour of one who is not a dependant, the nominee though not a dependant takes an absolute interest in the fund and need not hand it over to the dependant : ('45) 32 A. I. R. 1945 Bom. 43, *Rel. on.* [P 306 C 1; P 308 C 1]

(c) Provident Funds Act (1925), S. 3 — Scope.

Section 3 does not say that the amount of the provident fund necessarily vests in a dependant or dependants in all cases. That section deals only with 'the protection of compulsory deposits in a Provident Fund' and not with the title to them.

[P 307 C 1]

(d) Provident Funds Act (1925), S. 2 (c) — S. 2 (c) does not confer any right upon dependant.

Section 2 (c) merely defines who is a dependant and does not purport to confer any right upon the dependant or make him or her a lawful representative. That is to be determined according to the ordinary law governing the parties, in the absence of a nomination by the subscriber. [P 307 C 2]

(e) Interpretation of Statutes—Provisions of statute must be construed according to their plain meaning.

In interpreting the provisions of a statute Court need not speculate upon the reasons which influenced the Legislature, but must take the provisions as they are and construe them according to their plain meaning. [P 309 C 1]

*Y. V. Dixit and B. N. Gokhale —*

for Appellant,

*J. C. Shah and G. S. Gupte —*

for Respondent.

**Lokur J.**—This appeal raises a question of considerable importance with regard to the construction of the Provident Funds Act (19 [XIX] of 1925) and the rules thereunder framed by the G. I. P. Railway Company. The facts are not in dispute. The defendant's brother Kunjalsingh who was in the service of the G. I. P. Railway was a subscriber to the Railway Provident Fund. The plaintiff Krishnabai is his widow. On 9th July 1924, he made a declaration in the prescribed form stating that in the event of his death the defendant would be entitled to receive payment of his provident fund holding, including additional benefits, if any, and appointing the defendant himself to be the executor of his will as regards the provident fund only. Kunjalsingh died on 1st June 1941, when the amount to his credit was nearly Rs. 10,000. The defendant applied for a succession certificate in respect of that



amount in the Court of the Second Class Subordinate Judge at Bhusawal and it was granted to him despite the opposition of the plaintiff. The plaintiff's appeal against it was dismissed, and before the defendant withdrew the amount from the railway on the strength of the succession certificate, this suit was filed by the plaintiff for a declaration that she was entitled to that amount and for an injunction restraining the defendant from withdrawing it. She alleged that the declaration had not been properly attested and was, therefore, illegal, that the defendant's nomination in preference to her was void and inoperative and that the defendant had released his right in her favour. This last contention was given up at the hearing. The trial Court found that the declaration in favour of the defendant was duly attested, but holding that it was illegal, void and inoperative, it decreed the plaintiff's claim.

As regards the execution of the nomination paper, a printed form of declaration was duly filled in and signed by deceased Kunjalsing and was attested by two witnesses. Dattatraya and Sadashiv. It is true that in the plaint the plaintiff alleged that the declaration had not been properly executed and attested. But no specific issue was raised on this point. Issue 6 is worded in general terms. But it appears that on the date of hearing, before any evidence was led, the plaintiff put in a *purshis* (Ex. 28) admitting that the declaration form had been signed by her deceased husband Kunjalsing and that Dattatraya and Sadashiv had made their signature on it as *attestors*. The *purshis* was signed by the plaintiff herself. In view of this admission, it was taken that the plaintiff had given up her contention regarding the execution and attestation of her declaration and no further evidence was led. But, in the course of the arguments, it was urged that the *purshis* did not amount to an admission that Kunjalsing had made his signature *in the presence* of the two attesting witnesses as required by the form of the declaration. On that form, there are marginal notes which give definite instructions to the declarant that he must sign it in the presence of two witnesses and similar instructions to the attestors that they must sign it in the presence of each other and in the presence of the declarant. The presumption, in view of the *purshis*, is that the instructions were followed. Exhibit 34 shows that the instructions are printed in the margin just where

the signatures of the declarant and the attestors are to be made, so that they may not escape their attention. A good deal of stress was laid on the fact that the ink in which the three signatures were made appeared to be different, and therefore, it was urged that they must have been made at different times. But the defendant says that he was present at the time when the declaration was made, and that Kunjalsing made his signature in the presence of the attestors and the attestors made their signatures in the presence of Kunjalsing. The learned Judge of the lower Court has believed this statement and we see no reason to take a different view. It is, however, urged that as the prescribed form requires the declaration to be attested by two witnesses, under S. 68, Evidence Act, 1872, the defendant was bound to call at least one of the attesting witnesses for the purpose of proving its execution and that unless at least one witness was thus called and examined, the document could not be used as evidence. But S. 68, would be applicable only if the execution has to be proved. All that it says is that the execution of a document cannot be regarded as proved unless one attesting witness at least has been called *for that purpose*. But where the execution is not to be proved, it is not necessary to call any attesting witness, unless it is expressly contended that the attesting witness has not witnessed the execution of the document. There is no such express allegation either in the plaint or in the *purshis* admitting the execution and attestation, which was evidently put in by the plaintiff, in order that the defendant might not be required to call the attesting witnesses to prove the declaration. It is on account of this *purshis* that the defendant refrained from calling either of the attesting witnesses. We do not, therefore, think that the declaration is liable to be excluded from evidence on the ground that neither of the attesting witnesses was called by the defendant. We hold that the declaration is duly proved and that deceased Kunjalsing nominated his brother, the defendant, to receive the amount of his Provident Fund after his death.

The lower Court dismissed (*sic.*, decreed) the plaintiff's suit on the ground that when the deceased subscriber died leaving a dependant behind him, the nomination made by him in favour of one who was not a dependant was altogether void and ineffective. After this case was decided by the lower Court, the validity of such a nomination came up for con-



sideration before this Court in the recent case in 46 Bom. L. R. 720<sup>1</sup> and it was held that under the Provident Funds Act, 1925, and the rules framed under it, there could be a valid nomination, by a contributor, of any person other than a dependant, although there was a dependant of the contributor in existence. It is, however, urged that although such nomination may be valid, the nominee cannot get its benefit, and even if he were to receive the amount, he must hand it over to the dependant. This contention has apparently found favour with the lower Court. As the question really turns on the construction of ss. 3, sub-s. (2), 4, sub-s. (1) and 5, sub-s. (1), Provident Funds Act, I will quote the pertinent portions of these sections. Section 3, sub-s. (2), says:

"Any sum standing to the credit of any subscriber to, or depositor in any such Fund at the time of his decease and payable under the rules of the Fund to any dependant of the subscriber or depositor, or to such person as may be authorized by law to receive payment on his behalf, subject to any deduction authorized by this Act, . . . shall vest in the dependant, and shall, subject as aforesaid, be free from any debt or other liability incurred by the deceased or incurred by the dependant before the death of the subscriber or depositor."

Section 4, sub-s. (1), says:

"When under the rules of any Government or Railway Provident Fund the sum standing to the credit of any subscriber or depositor, or the balance thereof after the making of any deduction authorized by this Act, has become payable, the officer whose duty is to make the payment shall pay the sum or balance, as the case may be, to the subscriber or depositor, or, if he is dead, shall—

(a) if the sum or balance, or any part thereof, vests in a dependant under the provisions of S. 3, pay the same to the dependant or to such person as may be authorized by law to receive payment on his behalf; or

(b) if the whole sum or balance, as the case may be, does not exceed five thousand rupees, pay the same, or any part thereof, which is not payable under cl. (a) to any person nominated to receive it under the rules of the Fund, or, if no person is so

nominated to any person appearing to him to be otherwise entitled to receive it; or

(c) in the case of any sum or balance, or any part thereof, which is not payable to any person under cl. (a) or cl. (b) pay the same—

(i) to any person nominated to receive it under the rules of the Fund, on production by such person of probate or letters of administration evidencing the grant to him of administration to the estate of the deceased or a certificate granted under the Succession Certificate Act, 1889, or under the Bombay Regn. 8 [VIII] of 1827, entitling the holder thereof to receive payment of such sum, balance or part, or

(ii) where no person is so nominated, to any person who produces such probate, letters, or certificate."

Section 5, sub-s. (1), says:

"Subject to the provisions of this Act, but otherwise notwithstanding anything contained in any law for the time being in force or any disposition, whether testamentary or otherwise, by a subscriber to, or depositor in, a Government or Railway Provident Fund of the sum standing to his credit in the Fund, or of any part thereof, any nomination, duly made in accordance with the rules of the Fund, which purports to confer upon any person the right to receive the whole or any part of such sum on the death of the subscriber or depositor, shall be deemed to confer such right absolutely."

Section 2 (c) defines a dependant, and according to that definition the plaintiff is a dependant of her deceased husband, but the defendant is not. A subscriber to provident fund may leave one or more dependants behind him or may not leave any; he may make a nomination in favour of one or more of the dependants, or in favour of a stranger or strangers, or partly in favour of a dependant and partly in favour of a stranger. These three sections provide for all these contingencies, and as Mr. Shah for the plaintiff has tried to deduce from those sections, that a nominee who is not a dependant, is not entitled to receive the amount of the fund if the subscriber has left a dependant behind him, it is necessary to analyse them carefully.

When analysed, the result is as follows:

- |   |                                     |   |   |
|---|-------------------------------------|---|---|
| 1 | When the nominee is a dependant     | The fund vests in the nominee: S. 3 (2)                     | Is payable absolutely to the nominee to the exclusion of others: S. (4) (1) (a) and S. (5) (1).   |
| 2 | When the nominee is not a dependant | The fund does not vest in the nominee: S. (3) (2).          | If payable absolutely to the nominee: Section (5) (1):<br>(a) if the sum exceeds Rupees 5000 on production of probate, etc.: 4 (1) (c).<br>(b) if the sum does not exceed Rs. 5000 without such production: S. 4 (1) (b). |
| 3 | When there is no nomination         | Vests in the payee if he be a dependant, but not otherwise. | Is payable to such person or persons as may be entitled to it under the ordinary law, but if the sum exceeds Rs. 5000 production of probate, etc., is required.   |

1. ('45) 32 A. I. R. 1945 Bom. 43; I.L.R. (1944) Bom. 716; 46 Bom.L.R. 720; 218 I.C. 133, Head v. Guest.



It is important to bear this analysis in mind for appreciating the flaw in the reasoning of the lower Court, which is based on the ruling in I.L.R. (1940) Cal. 476.<sup>2</sup> In that case one Dr. Mukherji, who had a large amount in the provident fund, died leaving behind him six dependants, namely, three sons and three married daughters. He had nominated his wife to receive the amount of the fund after his death, but she predeceased him and he made no other nomination. His three sons, as the heirs of their mother, who was the nominee, claimed the amount for themselves in preference to his daughters. Panckridge J., (sitting alone) held that the daughters also were entitled to share it equally with the sons. He observed (p. 484):

"... the Act itself provides that the rights of nominees, which include the rights of the nominee's representatives, are expressly postponed to the rights of dependants. This is clear from S. 4 of the Act which provides that the amount standing to a subscriber's credit should be paid to his dependant in the first instance, or to his nominees and only permits his nominee to receive any sum or balance which is not payable under cl. (a), that is, to a dependant."

With all respect, we think that this reasoning does not take into account the most material clause in S. 4 (1) (a), viz., "if the sum or balance, or any part thereof, vests in a dependant under the provisions of S. 3." Section 3 does not say that the amount of the provident fund necessarily vests in a dependant or dependants in all cases. That section deals only with "the protection of compulsory deposits in a Provident Fund," and not with the title to them. Sub-section (2) provides that if under the rules of the fund the amount is payable to any dependant, then it vests in him and shall be free from any debt or other liability incurred by the deceased subscriber or depositor or incurred by the dependant before the death of the subscriber or depositor. Hence before applying this sub-section and holding that the amount has vested in the dependant, we must determine whether it is payable to the dependant. If it is not, then the section has no application. Section 4, sub-s. (1), contains instructions for repayments, so that if the amount is paid in accordance with those instructions, then sub-s. (2) protects the Government or the Railway Administration from all liability.

Rules 23, 24 and 25 of the Provident Fund Rules framed by the G. I. P. Railway provide for payment of the amount of the

provident fund after the death of the subscriber. Rule 23 says that on the death of any member of the fund, the Chief Accounts Officer shall, subject to the provisions in the rules and more particularly the provisions in Rr. 24 and 25, pay to his executors or administrators or other lawful representative, upon their giving a receipt in full satisfaction of their claim on the fund, the sum standing to the deceased member's credit. Rule 24 is applicable only when the amount of the fund standing to the credit of the deceased subscriber does not exceed Rs. 5000. In that case the Chief Accounts Officer may pay the amount to any person nominated by the deceased member, to his widow, to any person appearing to him to be entitled to receive it, or may invest the same in the purchase of an annuity for his widow or for any child or children then surviving. Rule 25 (a), which applies to the present case, provides that if the sum exceeds Rs. 5000, the Chief Accounts Officer shall pay or distribute the amount according to the provisions of the Provident Funds Act, 1925. Thus, where the amount exceeds Rs. 5000 the rule does not specify the person to whom the amount is to be paid. While R. 23 says that it may be paid to the deceased member's executors or administrators or other lawful representative, Rule 25 says that it should be paid according to the provisions of the Provident Funds Act, 1925. In other words, subject to the provisions of the Act, these rules leave untouched the personal law of succession by which the member may be governed.

The learned Judge of the lower Court seems to think that the expression "lawful representative" is no other person than the dependant mentioned in S. 2 (c) of the Act. But S. 2 (c) merely defines who is a dependant and does not purport to confer any right upon the dependant or make him or her a lawful representative. That is to be determined according to the ordinary law governing the parties, in the absence of a nomination by the subscriber. The right of the nominee is laid down in S. 5, sub-s. (1), which expressly confers on the nominee an absolute right to the amount of the fund. The dependants will have no claim on the fund if such absolute right is conferred upon some one else by a nomination duly made in accordance with the rules of the fund. Thus in 6 Rang. 682,<sup>3</sup> where the contest was between a sister of the subscriber, who was

2. ('40) 27 A.I.R. 1940 Cal. 395 : I.L.R. (1940) 1 Cal. 476 : 190 I.C. 310, Nidhu Sudan Mukerji v. Bibha Batee Debi.

3. ('29) 16 A. I. R. 1929 Rang. 54 : 6 Rang. 682 : 115 I. C. 909, Ma Kyway v. Ma Mi Lay.



his nominee, and his own widow, it was held that the sister as the nominee defeated the title of the widow, even though she was a dependant, the learned Judges remarking that the provisions of S. 5, were perfectly clear and definite. This case was cited with approval in 59 Bom. 475<sup>4</sup> and was recently followed in 46 Bom. L. R. 720.<sup>1</sup> On the view taken by the trial Court the word "absolutely" in S. 5 would be meaningless. If the nominee is only to recover the amount and hand it over to the dependant, then there is no propriety in nominating a non-dependant. That would only necessitate the taking of a probate or letters of administration or the like, without which the nominee would not be paid the amount, if it exceeds rupees 5000. There is nothing in Ss. 3, 4 and 5 to suggest that he is to withdraw the amount only for the benefit of the dependant. The lower Court seems to think that the widow being the first of the dependants named in Sec. 2 (c), the fund *ipso facto* vests in her under S. 3 (2) and no other nominee is entitled to it. Such an interpretation cannot be placed on S. 3 (2). The reference in that section to the rules of the fund shows that its provisions can apply to sums which under the rules are payable to a dependant. As pointed out in A.I.R. 1939 Mad. 489,<sup>5</sup> it is quite clear that the section recognizes the possibility of sums being payable to persons other than dependants. Where, therefore, the rules do not prohibit nominations in favour of those who are not dependants, a nominee, though not a dependant, takes an absolute interest in the fund, though he may not be entitled to the benefit of S. 3 (2). Rule 7 in the Bombay General Provident Fund Rules quoted in 46 Bom. L. R. 720<sup>1</sup> (p. 722) does contain such a prohibition. But the rules of the G. I. P. Railway Provident Fund contain no such prohibition. On the other hand, R. 23 leaves untouched the personal law of intestate succession and the power of a subscriber to nominate any one he likes to receive the amount of his fund absolutely. The learned Judge of the Court says:

"The claim of the dependant has been treated on a preferential basis under S. 3, sub-s. (2) and S. 4 (a) because the purpose of the subscriber in subscribing to the Provident Fund is to make a provision for his dependants in the event of his death during the course of his service. While drafting the Provident Funds Act the Legislature has thought rightly to give prominence and sanc-

tity to that holy object of the subscriber in order that the subscriber should have peace of mind which is quite essential to the smooth performance of the duties. In short, the Legislature has rightly drafted the sections for accomplishing the desired object of the subscriber."

This aspect of the case was considered in the Full Bench case in 11 Luck. 611.<sup>6</sup> In holding that a nomination conferred an absolute right on the nominees to appropriate to themselves the amount of the provident fund, King C. J. observed that in S. 5 (1) the Legislature expressly inserted the words "notwithstanding anything contained in any personal law" so as to validate the nomination, which was equivalent to a testamentary disposition, notwithstanding anything contained in any personal law (p. 636):

"It is said that the Legislature could have no object in overriding the personal law of the Muslim community by validating a will which would be invalid according to Mahomedan law. It is perhaps unnecessary for us to speculate upon the objects and reasons of the Legislature in enacting S. 5, sub-s. (1). It is quite possible, however, that the Legislature deliberately intended to give the depositor a free hand in the disposal of his Provident Fund money after his death."

In A. I. R. 1935 Rang. 449<sup>7</sup> a nomination which purported to confer upon the nominee the right to receive the sums standing to the credit of a subscriber in the fund on the death of the subscriber was held not to be invalid as contravening the prohibition against assignment or charge under S. 3 (1), although the nomination had been made in consideration of a loan and not on account of mere love and affection. Thus whatever be the object of subscribing to the provident fund, the power of the subscriber to nominate any one he likes to receive it after his death is not curtailed by anything contained in the Act or the rules. We are aware that there is a conflict of judicial opinion on this point, but the weight of authority appears to be in favour of the view which has been consistently taken by this Court and which we have preferred to take. I have already referred to the decision of Panckridge J. in I. L. R. (1940) 1 Cal. 476.<sup>3</sup> In A. I. R. 1937 ALL. 562,<sup>8</sup> Sulaiman C. J. and Bennet J. observed [564 (1)] :

"... the mere fact that a certain person has been declared to be the nominee under S. 5 for the purpose of receiving the provident fund is not necessarily the sole person entitled to appropriate the amount as the owner, legatee or heir. The ques-

4. ('35) 22 A. I. R. 1935 Bom. 234 : 59 Bom. 475 : 156 I. C. 630, Ahmad Abdul v. Jamala.

5. ('39) 26 A.I.R. 1939 Mad. 489 : 184 I. C. 812, Lakshamma v. Subramanyam.

6. ('36) 23 A.I.R. 1936 Oudh 82 : 11 Luck. 611 : 159 I. C. 596 (F.B.), Mohammad Naim v. Mt. Munim-un-nissa.

7. ('35) 22 A.I.R. 1935 Rang. 449 : 160 I. C. 327, Vishwanatham v. Murugesu.

8. ('37) 24 A. I. R. 1937 All. 562 : 168 I. C. 530, Mt. Amna Khatoon v. Abdul Karim.



tion of the distribution of the amount after it has been drawn by the nominee as among those who may be entitled to it either under the personal law or by testamentary disposition is not covered by this section."

We may respectfully point out that the effect of the very important words, "notwithstanding anything contained in any law for the time being in force" in S. 5 (1) were not considered or given effect to. The same view was taken in A.I.R. 1935 Sind 73,<sup>9</sup> but the contrary view taken in A. I. R. 1932 Sind 115<sup>10</sup> was not considered. In A. I. R. 1928 Lah. 773<sup>11</sup> Addison J. (sitting alone), in a brief judgment, relied upon in A. I. R. 1924 Sind 57<sup>12</sup> and held that the object of the nomination system was merely to designate some person to whom the fund money might be paid after the subscriber's death; but we think, with respect, the learned Judge, in following the Sind case, did not notice that it was decided in 1923 and overlooked the change in the law effected by S. 5 of the Act of 1925. In interpreting the provisions of a statute, we need not speculate upon the reasons which influenced the Legislature, but must take the provisions as they are and construe them according to their plain meaning. The view which we have preferred to take follows from the plain words of sections 3, 4 and 5 of the Act and the rules framed by the G. I. P. Railway, and in consonance with the decisions of this Court in 59 Bom. 475<sup>4</sup> and 46 Bom. L. R. 720.<sup>1</sup> In the latter case, a subscriber to the G. I. P. Railway Fund died leaving a wife who had deserted him, a mistress and a son born of the mistress. He had made a declaration that out of the amount standing to his credit in the provident fund, Rs. 50 should be paid to his wife, Rs. 5000 to his mistress's son, and the balance to his mistress. After his death, his wife sued for a declaration that she alone was entitled to the entire amount. But her claim was rejected and her suit was dismissed. This was a clear case in which non-dependants who had been nominated by the contributor were held entitled to the amounts given to them in preference to his wife who was a dependant within the meaning of S. 2 (c) of the Act. The decision is binding on us, and as we respectfully agree

with it, we see no reason to refer the case to a Full Bench, as requested by Mr. Shah. We, therefore, hold that in view of the nomination made in favour of the defendant, the plaintiff, though a dependant, is not entitled to the amount of the fund. We allow the appeal, set aside the decree of the lower Court and dismiss the suit. In view of the conflict of judicial opinion on the points arising in this case which existed when this suit was filed, we order that the costs of the suit should be borne by the parties. But as regards the costs in this Court we order that the respondent should pay the costs of the appellant and bear her own.

D.S./D.H.

*Appeal allowed.*

[Case No. 65.]

**A. I. R. (33) 1946 Bombay 309**

BHAGWATI J.

*Ahmedabad Cotton Manufacturing Co. Ltd., and others — Petitioners*

v.

*Textile Labour Association —*

*Opponents.*

O. C. J. Misc. No. 98 of 1945, Decided on 17th July 1945.

**Certiorari — Writ of —** Both parties to dispute residing outside jurisdiction of Bombay High Court — High Court cannot issue writ merely because tribunal has office in Bombay.

The jurisdiction which the High Courts exercise in the matter of the issue of the writs of *certiorari* prohibition, *mandamus* and the like, which was invested in the Supreme Court and which was invested in the High Courts by reason of the appropriate provisions in the respective clauses of the Charters which constituted those High Courts was a jurisdiction over the inhabitants of the Presidency towns and also persons who were amenable to that jurisdiction, howsoever that jurisdiction might be exercised, either by the issue of the writs of *certiorari*, prohibition, *mandamus* or any other, by adopting appropriate proceedings and by issuing those writs though affecting the rights of the individuals concerned by directing those writs to particular officers, tribunals or other parties to whom they were addressed. In substance, therefore, it was a jurisdiction exercised against the individuals.

[P 314 C 2]

Where an industrial dispute between two parties residing in Ahmedabad was referred to the Industrial Court having its office in Bombay and one of the parties prayed the High Court of Bombay to issue a writ of *certiorari* against the Industrial Court :

**Held**, that even though the tribunal against whom the writ was sought to be issued had its office within the jurisdiction of the High Court, it had no jurisdiction to issue the writ of *certiorari* because both the parties to the proceedings, and particularly the party who was affected thereby, was outside the jurisdiction of the Court : ('43) 30 A. I. R. 1943 P. C. 164, *Expl. and foll.*; ('45) 32 A. I. R. 1945 Bom. 419, *Ref.* [P 314 C 2]

9. ('35) 22 A. I. R. 1935 Sind 73 : 159 I. C. 427, Hayatuddin v. Mt. Rahiman.

10. ('32) 19 A.I.R. 1932 Sind 115 : 139 I. C. 775, Mt. Hurmat Bibi v. Mt. Kaz Banu.

11. ('28) 15 A.I.R. 1928 Lah. 773 : 108 I. C. 894, Hardial Devi v. Janki Das.

12. ('24) 11 A.I.R. 1924 Sind 57 : 18 S.L.R. 311 : 76 I. C. 739, Aimai v. Awabai.



**C. P. C. —**

('44) Chitaley, Government of India Act, 1915, S. 107, N. 2; N. 17, Pt. 8.

('41) Mulla, P. 408, Note "*certiorari*".

*C. K. Daphtary, Advocate-General and M. P. Amin — for Petitioners.*

*D. B. Desai and G. N. Joshi — for Opponents.*

*Sir Jamshedji Kanga — for the Province of Bombay and the Industrial Court.*

**Order.** — This is a petition filed by the Ahmedabad Cotton Manufacturing Co., Ltd., for itself and on behalf of the other local member Mills of the Ahmedabad Mill-owners Association, with leave under O. 1, R. 8, Civil P. C., 1908, against the respondents who are the Textile Labour Association having their office at Mirzapur Road, Ahmedabad, being an association registered as a Trade Union under the Trade Unions Act. Both the petitioners and the opponents have their registered offices outside the jurisdiction of this Court. The Ahmedabad Mill-owners Association has its registered office at Ahmedabad and all the members of that association, who are represented by the petitioners, have their registered offices also at Ahmedabad. It appears that there was a dispute between the opponents and the Ahmedabad Millowners Association as regards the bonus equivalent to four months' wages of the employees which was claimed by the opponents as payable by the various members of the Ahmedabad Millowners Association. No agreement could be reached and a notice in form M provided in the Bombay Industrial Disputes Act (Bom. 25 [XXV] of 1938) was forwarded by the opponents to the Conciliator on 1st February 1945, and there was a notice of change given under the Act. The Chief Conciliator failed to bring about a settlement, concluded the proceedings on 24th February 1945, and made his report to the Government of Bombay, whereupon the Government of Bombay on 9th April 1945, issued a notification under cl. (2) of S. 49A, Bombay Industrial Disputes Act, referring the industrial dispute which had thus arisen between the Ahmedabad Millowners Association on the one hand and the opponents on the other to the arbitration of the Industrial Court constituted under S. 24, Bombay Industrial Disputes Act.

The petitioners contended that the bonus as demanded by the opponents was not and could not legitimately be the subject-matter of demand under the said Act or of any conciliation, reference, recommendation or award, that the granting of the bonus whether calculated on the salary of the

workers or on the profits of the employers or in any manner or form whatever was always a matter of the pure volition and free will of the employer and either in law or in principle it was not competent to the employee to claim a bonus as a matter of right, except only when the payment of any bonus was by way of extra remuneration payable under an express contract that the claim to a bonus was not an industrial matter within the meaning of the said Act nor did the employer's refusal to pay it constitute or give rise to an industrial dispute, and, therefore, it was not competent to the opponents to give a notice under the said Act nor for the conciliator to act thereupon nor for the Government of Bombay to make any order under clause (2) of S. 49A of the Act. They, therefore, contended that the Industrial Court had no jurisdiction to entertain the said demand or any matter relating thereto or to act under the said order of reference. They, therefore, prayed for an issue of a writ of *certiorari* calling upon the Industrial Court to send to this Court the record and papers in the above matter and to quash the said proceedings and for further and other reliefs.

On this petition filed by the petitioners, they applied for an interim stay of proceedings before the Industrial Court and make an application to me in the vacation on 2nd June 1945. On that application I made an order that the question whether interim stay of proceedings before the Industrial Court should be granted or not should be argued before me on 20th June 1945, and I directed that notices in that behalf should issue to the opponents. I, however, in the meanwhile stayed all proceedings before the Industrial Court pending the hearing and final disposal of that application before me on 20th June 1945. The matter accordingly came on for hearing before me on 20th June 1945, when Sir Jamshedji Kanga appeared for the Province of Bombay and applied that his clients should be added as party-respondents to the petition. The Advocate-General for the petitioners opposed the application contending that the Province of Bombay had no *locus standi* on this petition. On that day I made an order that the rule and portion should be served on the Province of Bombay by the petitioners, but without prejudice to the contention of the petitioners which they would be at liberty to advance at the hearing of the rule that the Province of Bombay had no *locus standi* to be heard on this rule. I reserved the costs of that



application which had been made by Sir Jamshedji Kanga. I also directed that the rule should be placed on my board for hearing and final disposal on 16th July 1945, and extended the interim stay which I had granted till the hearing and final disposal of the rule. The petitioners undertook on that occasion that in the event of the decision of the Court going against them they would file their written statement in the Industrial Court within forty-eight hours of the judgment delivered in the matter.

The rule accordingly came on for hearing before me on 16th July 1945, when Sir Jamshedji Kanga appeared not only for the Province of Bombay but also for the Industrial Court. My attention was drawn to the fact that on the earlier occasion I had only ordered this rule to be served on the Province of Bombay and at no time up to that day had any mention been made of the Industrial Court being in any manner whatever concerned with this rule except that the prayer (a) of the petition mentioned that a writ of *certiorari* should issue against the Industrial Court calling upon it to send to this Court the record and papers in the matter. Sir Jamshedji Kanga, however, contended that the Industrial Court was entitled to be heard though, if the Court thought that the attitude taken by it was not proper, the Court had jurisdiction to mulct it in costs. He referred to O. 59, R. 5, sub-rr. (1) and (2) and O. 59, R. 7, of the Rules of the Supreme Court and also to certain passages from Halsbury's Laws of England, Hailsham Edition, Vol. 9, particularly to a passage at page 786 in para. 1330, that notice must be given by the order *nisi* to every person who, by the affidavits on which the order is moved, appears to be interested in or likely to be affected by the proceedings, and to any person who, in the opinion of the Court or Judge, ought to have such notice. Though this passage has reference to a writ of *mandamus*, he submitted that the same principle was applicable to the case of writs of *certiorari* and prohibition also and submitted that his clients, the Industrial Court, were thus entitled to be heard. I understood that there was no serious opposition to the Industrial Court being heard so far as the petitioners were concerned and I, therefore, allowed Sir Jamshedji Kanga to appear for the Industrial Court as well as the Province of Bombay.

Apart from the contentions which had been raised by the opponents on the affidavits as filed they had also addressed on 14th

July 1945, a letter through their attorneys Messrs. Dhru & Co. to the attorneys of the petitioners in which they stated that in addition to the points taken in their affidavit they would further contend that this Court had no jurisdiction to grant the relief prayed for in the petition inasmuch as the parties to the petition belonged to Ahmedabad and were outside the jurisdiction of this Court. They also stated that they would further contend that the petition was not maintainable and that this Court had no jurisdiction to grant the relief prayed for. This letter dated 14th July 1945, addressed by the attorneys of the opponents to the attorneys of the petitioners has been marked as Ex. 1 in these proceedings. Mr. D. B. Desai who appeared for the respondents, therefore, argued the preliminary point whether this Court had jurisdiction to issue the writ as the parties were residents outside the town and island of Bombay. He also raised other preliminary points which, however, I did not consider it necessary to be argued in view of my opinion that if Mr. D. B. Desai made good this preliminary point of his, it was sufficient to dispose of the petition.

It is common ground that the petitioners as well as the opponents are parties from Ahmedabad and, therefore, outside the jurisdiction of this Court. The jurisdiction of this Court to issue the writ of *certiorari* has been invoked by the petitioners, therefore, relying upon the fact that the Industrial Court against whom the writ of *certiorari* is sought to be issued in these proceedings is situate within the jurisdiction of this Court, having its office in Bombay and having also entered upon the reference in question in Bombay by reason of the letter dated 12th April 1945, which they addressed to the Secretary, Millowners' Association, Ahmedabad, as also to the opponents in that behalf. By his letter dated 12th April 1945, addressed to the Secretary, Millowners' Association, Ahmedabad, the Secretary, Industrial Court, Bombay, after referring to the Government Notification, Political and Services Department, No. 6481/34, dated 9th April 1945, referring the industrial dispute between the Textile Labour Association and the Millowners' Association, Ahmedabad, in respect of bonus for the year 1944, to the arbitration of the Court, informed the Millowners' Association, Ahmedabad, that the opponents had been directed to file their written statement in connection with the said dispute on or before 28th April 1945, a copy of which would be handed over to them simultaneously



by that Association. The Secretary, Industrial Court, therefore, required the Secretary, Millowners' Association, Ahmedabad, to file in the office of the Industrial Court, Bombay, on or before 15th May 1945, six copies of their written statement in reply to the statement of the opponents and required that one copy of the reply should be handed over simultaneously to the opponents and the office should be informed that it had been so done. It also called upon the Secretary, Millowners' Association, to comply with certain other requisitions which were consequential upon the directions given by the Industrial Court to the Millowners' Association by that letter. This letter is Ex. A in these proceedings.

In support of his preliminary point, Mr. D. B. Desai relied on a decision of their Lordships of the Privy Council in 70 I. A. 129.<sup>1</sup> The facts of that case were that the appellants were ryots of three villages included in the Parlakimedi estate in the district of Ganjam in the Northern Circars. The respondents were, the zemindar of Parlakimedi and the Board of Revenue at Madras. The zemindar had in October 1925, applied under Ch. XI, Madras Estates Land Act, for the settlement of rent in respect of those villages and had by a supplemental application in March 1926 applied for settlement of a "fair and equitable rent" under S. 168 (1) of the Act. In November 1927, the Government of Madras directed the special revenue officer of the district to settle a fair and equitable rent in respect of lands in the said villages. The special revenue officer investigated the whole position and made an order in the year 1935 doubling the previous rents. The ryots appealed to the Board of Revenue and a member of that board, sitting alone, reversed the decision of the revenue officer and allowed an increase of rent of only 12½ per cent. The zemindar appealed by way of revision to the Collective Board of Revenue from the decision of the single member of the board. On 9th October 1936, the Collective Board decided, by a majority of two members to one that the proviso (b) of S. 30 (1) by which the single member of the board felt himself bound, did not apply to the case, but fixed as the appropriate increase an enhancement of six annas in the rupee, or 87½ per cent. as the fair and equitable rent in respect of the lands in the said villages.

The ryots then appealed to the Madras High Court for a writ of *certiorari* to quash the order of the Collective Board of Revenue on 9th February 1937, complaining that the rents had been raised above the limit of two annas in the rupee, or 12½ per cent., which was the maximum increase permitted under S. 30 (1) of the Act. The Madras High Court held that if the section of the statute applied so that no increase beyond 12½ per cent. could lawfully be made, the appellants would be entitled to a writ of *certiorari* addressed to the Board of Revenue to correct the illegality, but that in the circumstances the Board of Revenue had power to enhance by 37½ per cent. The petition for the writ was, therefore, dismissed by the Madras High Court. Against this decision of the Madras High Court the ryots appealed to the Privy Council.

Their Lordships of the Privy Council had before them counsel who had been instructed by the Secretary of State for India on behalf of the Governor-General in Council, to argue the question on behalf of the Governor-General in Council as *amicus curiae*, and the question whether the High Court had jurisdiction to issue a writ of *certiorari* under the circumstances of that case was canvassed at considerable length. It was contended on behalf of the zamindars that both the parties to the proceedings being outside jurisdiction, there was no jurisdiction in the Madras High Court to issue a writ of *certiorari* at all. It was common ground in that decision also that the Board of Revenue had always had its offices in the presidency-town and that the collective board which had made the order complained of had issued the order in the presidency-town itself. On the other hand, the parties were not subject to the original jurisdiction of the High Court and the estate of Parlakimedi lay in the north of the Province. It was on these facts which were not at all in dispute between the parties, viz., the parties being outside the jurisdiction of the Court and the Board of Revenue which made the order being within the jurisdiction of the Court that the question of the jurisdiction of the Madras High Court to issue the writ of *certiorari* was argued before their Lordships of the Privy Council. Their Lordships approached the question of the jurisdiction of the Madras High Court to issue the writ of *certiorari* in the following manner. They observed (p. 142):

"While the sole purpose of the present appeal is to obtain a direction that a writ of *certiorari*

1. ('43) 30 A.I.R. 1943 P. C. 164 : I.L.R. (1944) Mad. 457 : I.L.R. (1944) Kar, P. C. 119; 70 I.A. 129 : 210 I. C. 239 (P. C.), Ryots of Garabandho v. Zemindar of Parlakimedi.



should issue out of the Madras High Court to the Board of Revenue in respect of proceedings to settle the rents payable for certain lands in Ganjam, it is necessary to consider the question of jurisdiction from two separate standpoints. This necessity arises out of the circumstance that the Board of Revenue, which were first instituted in Madras in 1786, is located, like most of the organs of Provincial Government, within the town of Madras. The jurisdiction may, therefore, be claimed (a) independently of the local civil jurisdiction which the High Court exercises over the presidency town, or (b) solely by reason thereof, as an incident of the location of the Board of Revenue within the town."

In regard to the first question their Lordships went into a detailed examination of the various statutes and notifications which invested the Madras High Court with jurisdiction in respect of the various matters including the power to issue a writ of *certiorari* and which were ultimately crystallized in the Charter of 1800 which was the Charter by which the Madras High Court was constituted. Clause 8 of that Charter (which corresponds exactly with cl. 5 of the Charter of our High Court) invested the Madras High Court with jurisdiction similar to the jurisdiction of the King's Bench in England, and it was contended that by reason of the terms of that clause the Madras High Court got the power to issue a writ of *certiorari* to quash judicial proceedings even in cases where those proceedings were entertained by persons in the mofussil. It was contended, on the other hand, that the Supreme Court itself did not possess the power to issue the writ on any one beyond the limits of Madras unless he was a British subject, that there had been apparently no case in which the Madras High Court had issued the writ of *certiorari* on an officer outside its own jurisdiction, that the Madras High Court was not invested by cl. 8 of the Charter with any powers which the Supreme Court itself did not possess and therefore had no jurisdiction to issue a writ of *certiorari* over Courts which were situate outside the limits of the presidency-town, nor to issue prerogative writs to persons outside the limits of the presidency-town which were not subject to its civil or criminal jurisdiction. Their Lordships traced the history of the powers granted to the Supreme Court and thereafter to the Madras High Court by cl. 8 of the Charter in great detail and ultimately upheld the view that the Madras High Court had no power to issue any writ of *certiorari* against persons who were outside the jurisdiction and against Courts which were situate outside the jurisdiction.

After dealing with this aspect of the case

their Lordships proceeded to consider whether solely by reason of the fact that the Board of Revenue had their offices within the jurisdiction of the Court and that the order had been issued by the Board of Revenue also within the jurisdiction of the Court, the Madras High Court had jurisdiction to issue the writ of *certiorari* against the Board of Revenue. Their Lordships proceeded to observe that even though the Madras High Court had jurisdiction to issue a writ of *certiorari* in those cases where the parties would be within its jurisdiction and the Court also was within its jurisdiction they were not prepared where the parties were admittedly outside the jurisdiction merely by reason of the incident of the Board of Revenue having their offices within the jurisdiction to hold that the Madras High Court had jurisdiction to issue the writ of *certiorari* against the Board of Revenue. They treated the point of jurisdiction as a point of substance. I understand their remarks in this behalf to mean that whether the High Court has jurisdiction to issue a writ of *certiorari* or not should be determined not merely by the fact of the location of the particular tribunal within the jurisdiction of the Court. It was mere incident or what one may be permitted to describe an accident that the particular tribunal was located within the jurisdiction of the High Court. What was really the point of substance, however, was, where are the parties who are affected actually by the writ of *certiorari* being issued by the High Court residing or carrying on their business. Their Lordships meant that the High Court would have jurisdiction to issue a writ of *certiorari* even though the tribunal be situate within the jurisdiction only in those cases where the parties who were sought to be affected by the issue of the writ of *certiorari*, viz., the persons in the position of the opponents herein, were also residing in or were amenable to the jurisdiction of the High Court. The Advocate-General strenuously contended that the real ratio of the decision of their Lordships was what was contained in their observations at pp. 164 to 165 of this decision. He laid particular stress on the last two sentences of the paragraph at p. 165 where their Lordships observed :

"Their Lordships think that the question of jurisdiction must be regarded as one of substance and that it would not have been within the competence of the Supreme Court to claim jurisdiction over such a matter as the present by issuing *certiorari* to the Board of Revenue on the strength of its location in the town. Such a view would give



jurisdiction to the Supreme Court, in the matter of the settlement of rents for ryoti holdings in Ganjam between parties not otherwise subject to its jurisdiction, which it would not have had over the Revenue Officer who dealt with the matter at first instance."

He contended that the real determinative factor which weighed with their Lordships was the fact the initial decision which happened to give the power to the Board of Revenue by way of revision was the decision of a revenue officer who dealt with the matter at first instance at Ganjam and the High Court would in no event have jurisdiction over that officer to issue a writ of *certiorari* calling for the records of the proceedings before him and quashing the same in any possible contingency. This contention of the Advocate-General, however, ignores the whole of the consideration, which their Lordships devoted to the first point, viz., whether independently of such location of the tribunal within the jurisdiction of the High Court, the High Court had by virtue of cl. (8) of the Charter jurisdiction to issue a writ of *certiorari* of the nature claimed. If it were open to come to a conclusion that if the tribunal which primarily took upon itself the burden of deciding the disputes between the parties was situate within the jurisdiction of the Court, the High Court would have jurisdiction to issue a writ of *certiorari* even though the result of that would be to affect the rights of persons residing outside the jurisdiction of the Court, the facts in the case before their Lordships admittedly were that the order which was complained against was in fact issued within the jurisdiction of the Court in Madras and the Board of Revenue which issued that order had also its offices within the jurisdiction of the High Court of Madras. In that event it would have been absolutely irrelevant to entertain a discussion on the first point which was elaborately gone into by their Lordships whether the High Court had jurisdiction to issue a writ of *certiorari* when the parties before it were residing outside the jurisdiction of the Court. In this view of mine, I am also supported by the observations of their Lordships at p. 156 of this decision. After discussing the scope of the powers which were invested in the Madras High Court by virtue of cl. 8 of the Charter their Lordships proceed to observe as under:

"The concluding part of cl. 8 makes no reference to prerogative writs, but is a broad and summary reference to the whole of a King's Bench Judge's jurisdiction and authority. It cannot be construed as restricted to such powers only as were peculiar to the King's Bench and were not shared by the

other superior Courts of common law. Is it really the effect of these words to subject the Indian inhabitants throughout the Province, and all matters of dispute between themselves, to the same jurisdiction as the King's Bench would apply to the inhabitants of an English county? Do the words put the Indian living at Ganjam equally under this jurisdiction with the Indian inhabitant of the Presidency town, because they say that the Judges within and without the town are to have the jurisdiction and authority which a Justice of the King's Bench has in England?"

These observations show that the jurisdiction which the High Courts exercise in the matter of the issue of the writs of *certiorari*, prohibition, *mandamus* and the like, which was invested in the Supreme Court and which was invested in the High Courts by reason of the appropriate provisions in the respective clauses of the Charters which constituted those High Courts was a jurisdiction over the inhabitants of the Presidency-towns and also persons who were amenable to that jurisdiction, howsoever, that jurisdiction might be exercised either by the issue of the writs of *certiorari*, prohibition, *mandamus* or any other, by adopting appropriate proceedings and by issuing those writs though affecting the rights of the individuals concerned by directing those writs to particular officers, tribunals or other parties to whom they were addressed. In substance, therefore, it was a jurisdiction exercised against the individuals and the observations of their Lordships appearing at p. 165 of the report where they say that the question of jurisdiction must be regarded as one of substance have, therefore, got to be understood in that light. This ratio of their Lordships' decision is equally applicable to our High Court which has also by virtue of cl. 5 of its Charter invested in it jurisdiction similar to the jurisdiction of the King's Bench in England, as was done in the case of the Madras High Court by virtue of cl. 8 of its Charter. I have, therefore, come to the conclusion that the observations of their Lordships which are binding on me lay down that even though the tribunal against whom the writ of *certiorari* is sought to be issued has its office within the jurisdiction of this Court, this Court has no jurisdiction to issue the writ of *certiorari* because both the parties to these proceedings are outside the jurisdiction of this Court, and particularly because the parties who are affected thereby, viz., the opponents, the Textile Labour Association of Ahmedabad, are outside the jurisdiction of this Court. In the result the preliminary point which has been urged by Mr. D. B. Desai succeeds and I dismiss the



petition. I have heard the parties on the question of costs. As regards the opponents, i. e., the Textile Labour Association, Ahmedabad, I do not see any reason to deprive them of their costs of this petition. This case in 70 I. A. 129<sup>1</sup> which I have discussed was also considered by Coyajee J. in 47 Bom. L. R. 500<sup>2</sup> where the learned Judge observed as follows (p. 513):

"The reason for referring to this case is that their Lordships distinctly indicated that the respondent being outside the original jurisdiction no such writ could be issued. This case has a bearing on the present case for this reason, that the writ could not be issued as the appellant and respondent 2 were out of jurisdiction although the Board itself was within jurisdiction. These remarks show how the writ would affect the other respondents who were out of jurisdiction and therefore the Court will not issue a writ of this nature."

In view of this pronouncement of my brother Coyajee, I do not see why the petitioners should have persisted in their contention which was urged before me and I, therefore, award the opponents their costs of this petition. Those costs would be taxed on a long cause scale with one counsel. As regards the costs of the Government of Bombay and the Industrial Court, I allowed them to appear before me, both of them on the distinct understanding that they would be responsible for the costs in the event of their failing. The Government of Bombay were further allowed to appear without prejudice to the rights and contentions of the petitioners that they had no *locus standi* in these proceedings. I heard Sir Jamshedji Kanga on behalf of both these parties because I did not want any arguments which they would have thought fit to urge on their behalf in addition to those arguments which were advanced on behalf of the opponents to be left out of consideration by the Court. Their appearance, however, was not, in my opinion, absolutely necessary, and having regard to all the circumstances of the case I do order that they shall bear and pay their own costs of this petition.

D.R./D.H.

*Petition dismissed.*

2. ('45) 32 A. I. R. 1945 Bom. 419: 47 Bom. L. R. 500, *Dinbai Petit v. Noronha*.

[Case No. 66.]

**A. I. R. (33) 1946 Bombay 315**

DIVATIA AND BAVDEKAR JJ.

*Mahomed Bashir & anr.— Applicants*

v.

*Emperor.*

Criminal Revn. Appln. No. 335 of 1945, Decided on 14th August 1945, from conviction and sentence by Presidency Magistrate, Second Addl. Court, Mazagaon.

Defence of India Rules, (1939), Rr. 81 (2) (a) and 81 (4) — Master and servant — Master when criminally liable for acts of his servant — Notification under R. 81 (2) (a) prohibiting sale of articles of food after certain hour at night — Manager of hotel selling articles of food after prescribed hour in absence of proprietor — Held, offence under R. 81 (4) was committed both by proprietor and manager.

As a general rule a master is not criminally liable for the acts of his servants, but there are certain well recognized exceptions to this rule. One of the exceptions is that where a statute prohibits an act or enforces a duty in such words as to make the prohibition or the duty absolute, the master will be liable if the act is in fact done by his servant. To ascertain whether a particular statute has that effect or not regard must be had to the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty is imposed: (1930) 1 K.B. 211, *Rel. on; Case law referred.* [P 317 C 2]

A proprietor of a hotel and a manager employed by the former to conduct the hotel were charged with an offence under R. 81 (4), Defence of India Rules, committed by them in contravention of notification issued under R. 81 (2) (a) by the Police Commissioner, Bombay, which provided that no article of food or drink shall be sold or supplied for consumption between certain hours in the night at any place of entertainment except under, and in conformity with the conditions of a special permit granted by the police. The manager of the hotel sold articles of food to his customers after the hour prescribed in the special permit granted to the proprietor of the hotel who was not present in the hotel at the time of commission of the offence. Both the proprietor and the manager were convicted under R. 81 (4):

*Held* that as the object of the notification was preservation and proper distribution of articles of food by prohibiting their sale or supply after a certain hour at night and as the prohibition was absolute the case fell within the exception to the general rule. The conviction of the proprietor under R. 81 (4) was therefore proper. [P 318 C 1; P 319 C 1]

I. N. Mehta and J. G. Rele — for Applicants.

S. G. Patwardhan, Government Pleader —  
for the Crown.

**Divatia J.** — This is an application by accused 1 and 2 who were convicted by the Presidency Magistrate, Second Additional Court, Mazagaon, Bombay, for the offence under R. 81 (4), Defence of India Rules, read with the Commissioner of Police's Notification No. 14824/123.C dated 12th September 1944. Accused 1 is the proprietor of a hotel called Islami Hotel at the corner of Grant Road in Bombay, and accused 2 is a manager of the hotel employed by accused 1. The hotel served refreshments consisting of food and non-alcoholic drinks to customers by virtue of a licence issued to accused 1 in 1941 and renewed from year to year. The charge against the two accused was that they on 16th December 1944, kept their hotel



open between the hours of 1 A. M. and 5 A. M. and did sell or supply for consumption on their premises food or drinks to customers and aided and abetted each other in doing so and thereby committed an offence punishable under R. 81 (4) read with R. 121, Defence of India Rules, and the above-mentioned notification. That notification was issued under R. 81, sub-r. (2), cl. (a), and it directed that from 20th September 1944, no article of food or drink shall be sold or supplied for consumption between the hours of 11 P. M. and 5 A. M. at any place of entertainment in the City of Bombay except under and in conformity with the conditions of a special permit granted by the Police. The notification was issued on 12th September, and it appears that such special permit was issued to accused 1 on 18th September, authorising him to keep open the said hotel for selling or supplying for consumption articles of food or drink after 11 P. M. up to 1 A. M. As result of this special permit the accused were entitled to keep their hotel open from 5 A.M. to 1 A.M. on the next morning. The prosecution case was that a bogus customer was sent to the accused's hotel at about 12-50 A. M. and he and other customers were supplied with food after 1 A. M. Thereafter the police raided the hotel and found 31 customers eating and drinking in the hotel. Accused 2, i. e., the manager, was standing near the till. A panchnama was made of the things found in possession of the accused which included marked notes which were given to the bogus punter. The panchnama was begun at 1-45 A. M. and concluded at 2 A. M. Thereafter the accused were charged with the infringement of the terms of the notification under R. 81 (4), Defence of India Rules. The bogus customer died after hearing of the case commenced, but the prosecution examined the panch witness, Deputy Inspector Soloman, and Sub-Inspector Khadke who had taken part in the raid.

The learned Magistrate was satisfied on the evidence that about 30 customers were taking food in the hotel after 1 A. M. On behalf of accused 1, the proprietor, it was urged that he was admittedly not present in the hotel at the time of the raid and he had left the entire management of the hotel in the hands of accused 2 and another manager, that he came to the hotel after the raid was over and that the licence was given to the hotel and not to accused 1 personally. The learned Magistrate was of the opinion that for the offence under R. 81 (4),

Defence of India Rules, it was not necessary that there must be a guilty intention in the mind of the person charged, that it was sufficient if accused 1 was the proprietor of the hotel and that his servants committed the offence. The liability of the master for the crime of the servant was to be implied from the very nature of the offence created by that rule. He, therefore, held both the accused liable for the offence and convicted them and sentenced accused 1 to pay a fine of Rs. 25 and accused 2 to pay a fine of Rs. 75. Both the accused have come to this Court in revision.

Mr. Mehta on behalf of the petitioners has urged two points before us. The first point is that the offence with which the accused are charged is really the infringement of the terms of the licence and not the infringement of the Defence of India Rules. His first contention is that the licence was given to accused 1 in 1941 at which time the old standard time was in existence, and at the time when the accused was charged the new standard time had come into force which was one hour in advance of the old standard time. The hours of business originally mentioned in the licence were 5 in the morning to 11 P. M. standard time. The licence was renewed from time to time up to 31st March 1945. As the original licence was given under the old standard time, the renewal of the hours of business from time to time must also be considered to be under the old standard time even though the licence was renewed after the introduction of the new standard time. It is further urged that even under the special permit, which was issued in 1944, the time of 11 P. M. which was extended to 1 A. M. must also be read in reference to the old standard time because the time which was mentioned in the licence was extended by the special permit, and, therefore, the standard of time must be regarded as the same as it was when the original licence was issued. It was contended on that ground that 1 A. M. mentioned in the special permit would be 2 A. M. according to the present standard time, and that being so, no offence was committed because it has not been found that any food or drink was supplied to any customer after 2 A. M. on that night. It is no doubt true that the licence was issued at the time when the old standard time was in force. It is, however, quite clear that the special permit was given in 1944 at a time when the new standard time was in force and after the issue of the notification on 12th



September. That notification read with the special permit prescribes, so far as the present accused are concerned, the hours of business between 5 A. M. and 1 A. M., and in the absence of any specific mention, it must be taken that the hours of business which are referred to in the notification must be the hours under the new standard time which was in force at that time and not under the old standard time. In our opinion, therefore, the time mentioned in the notification as well as the time mentioned in the special permit must be the new time which was then in force. The mere fact that the licence was continued from 1944 to 1945 without changing the nature of the standard time does not necessarily mean that even when the special permit was granted the time was intended to be the old standard time and not the new one. In our opinion, therefore, that argument is without any substance, and it must be taken that the customers were found in the hotel between 1 A. M. and 2 A. M. according to the new standard time.

The second argument about the liability of accused 1 has some importance in law because there does not seem to be any authority on this point under the Defence of India Rules. It is common ground that accused 1, though the proprietor of the hotel, was not taking any active part in its management, and had left the management in the hands of two managers whose names were endorsed on the licence. He was also not present at the time when the raid took place, and his case is that he had not authorised the managers to keep the hotel open after the hours mentioned in the licence and the special permit. The question is whether accused 1, the master, is liable for the criminal act of his servant, accused 2. No doubt under the ordinary rule of law a master is not criminally liable for the acts of his servant, but there are certain well recognized exceptions to that rule, and in our opinion the present case falls under the exception and not under the general rule. A number of cases has been referred to by Mr. Mehta on this point. It is not necessary to refer to all of them. It is sufficient to say that the effect of the authorities has been summarized in Halsbury's Laws of England, Hailsham Edition, Vol. XXII, p. 232, Art. 412, where the cases of the liability of the masters for the crimes of their servants are divided into four classes. The first class consists of cases where the statute might make the master liable for his servant's act in any

event. In that case it was only necessary to show that the act was done by the servant in the course of his employment and within the scope of his general authority, and the liability of the master arose solely from his relation to the servant, and the absence of personal guilt was immaterial. The second class consists of cases where the statute might make the master liable for his servant's act unless he could prove that he himself was not in default. The third class consists of cases where the statute might make the master liable for his servant's act only if the prosecution proved affirmatively that he knew, either actually or constructively, of the servant's act or that he connived at its commission. The fourth class consists of cases where the statute might make the master liable, not for his servant's act, but only for his own. Under the first class the leading cases are (1874) 9 Q.B. 292,<sup>1</sup> (1898) 2 Q. B. 306,<sup>2</sup> (1899) 1 Q. B. 20,<sup>3</sup> and the latest case in (1930) 1 K. B. 211.<sup>4</sup> In the last of these cases the law has been summarized and it is observed, quoting from the case in (1917) 2 K. B. 836<sup>5</sup> at p. 845 as follows (p. 220) :

"I think that the authorities cited by my Lord make it plain that while *prima facie* a principal is not to be made criminally responsible for the acts of his servants, yet the Legislature may prohibit an act or enforce a duty in such words as to make the prohibition or the duty absolute; in which case the principal is liable if the act is in fact done by his servants. To ascertain whether a particular Act of Parliament has that effect or not regard must be had to the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty is imposed."

On the facts of that case it was held that looking to the object of the statute, viz., the Metropolitan Police Act, the master was liable for the crime of his servant even though he was not aware of the offence committed by him. Mr. Mehta contends that the liability of the accused, if any, was under the licence, and not under the Defence of India Rules. But, in our opinion, although the basis of the liability is the conditions mentioned in the licence itself, the penalty for the infringement of the terms of the

1. (1874) 9 Q. B. 292 : 43 L.J.M.C. 67 : 29 L. T. 838 : 22 W. R. 297, *Mullins v. Collins*.
2. (1898) 2 Q. B. 306 : 67 L.J.Q.B. 689 : 73 L.T. 520 : 46 W. R. 620, *Coppen v. Moore* (No. 2).
3. (1899) 1 Q. B. 20 : 68 L. J. Q. B. 7 : 79 L. T. 381 : 47 W. R. 142, *Parker v. Alder*.
4. (1930) 1 K. B. 211 : 99 L. J. K. B. 146 : 142 L. T. 141, *Allen v. Whitehead*.
5. (1917) 2 K. B. 836 : 87 L. J. K. B. 82 : 113 L. T. 25, *Mausell Brothers v. L. & N. W. Rly.*



licence is provided in the Defence of India Rules. Reading Rr. 81 (2) and 81 (4) together, it follows that the notification, which is issued under R. 81 (2), enjoins the accused not to keep the hotel open after 1 A. M., and for a breach of the terms of the notification the penalty is provided in R. 81 (4). It cannot be said, therefore, that the liability of the accused is only under the licence and not under the Defence of India Rules. If, therefore, the infringement is not merely of the terms of the licence but that of the terms of the notification issued under the Defence of India Rules, we have to see as to what the object of the Legislature was. In a very recent case, *Mangat Ram v. Emperor*,<sup>6</sup> which is still not reported, of a Full Bench of the Lahore High Court the whole law, English as well as Indian, on this point has been exhaustively discussed by their Lordships. That was no doubt a case under the Hoarding and Profiteering Prevention Ordinance, and the question was "Whether a servant, be he a salesman or a manager, is covered by the term 'dealer' as used in the Ordinance."

The point which they had to decide was whether the proprietor of the shop was liable for the crime of his servant, which is exactly the question to be decided in the present case. No doubt that case was under the Hoarding and Profiteering Prevention Ordinance, while the present case is under R. 81, Defence of India Rules. In our opinion, however, that does not make any difference so far as the object of the Legislature is concerned. Just as the object of that Ordinance is to conserve the stocks of various articles for their proper distribution among the consumers, so also the object of the present notification issued under R. 81 (2) is the preservation and proper distribution of articles of food by prohibiting their sale or supply after a certain hour at night. The object, therefore, of both these pieces of legislation seems to us to be the same, and therefore, the decision in the Full Bench case would, in our opinion, apply to the facts of the present case also. Their Lordships of the Lahore High Court, after an exhaustive discussion of the point before them, came to the conclusion that the case fell under the first class of cases mentioned in Halsbury's Laws of England, because looking to the object for which the statute was enacted, it ought to be construed not merely with reference to its language, but also its subject-matter and object. We agree with

the decision which the Full Bench arrived at in that case, particularly because we find that our High Court has also taken the same view in several reported decisions. The first of these decisions is in 24 Bom. 423.<sup>7</sup> That was a case under the Arms Act, and it was also a case of infringement of the terms of the licence issued under that Act. It was held that where the manager of a licensed vendor of arms, ammunition and military stores sold certain military stores without previously ascertaining that the buyer was legally authorised to possess the same, the licensee was liable to punishment under S. 22, Arms Act, though the goods were not sold with his knowledge and consent. The leading cases in (1874) 9 Q. B. 292<sup>1</sup> and (1898) 2 Q. B. 306<sup>2</sup> referred to above, were followed. The next case is 31 Bom. 611.<sup>8</sup> That was a case under the Indian Emigration Act, and it was held, following the English case-law, as follows (p. 627) :

"Where a penal statute has been infringed by servants and criminal proceedings are taken against the master, although it lies upon the prosecutor to establish the master's liability, yet the question whether he is liable turns necessarily upon what is the true construction to be placed upon the statute . . . . The statute should be construed, not merely with reference to its language, but also its subject-matter and object."

The third case is 51 Bom. 352.<sup>9</sup> That was also a case of infringement of the terms of a licence granted under the Indian Explosives Act. There it was held by majority of the Judges that the principle of English law enunciated in 31 Bom. 611<sup>8</sup> was applicable to the case of a crime committed by a servant in breach of the licence granted under the Indian Explosives Act, and that the master was also liable even though he had no knowledge of the crime committed. It is true that none of these cases was under the Defence of India Rules. In our opinion, however, that principle is much more applicable in a case coming under an emergency legislation, whether it is an ordinance or it is a notification issued under the Defence of India Rules.

Mr. Mehta has further contended that the language of the notification is different from the language of the statutes which have been the subject-matter of judicial decisions in the English as well as Indian cases. Whereas all these statutes run to the effect that "No person shall do . . .", in the present case the notification is worded in the

6. Reported in ('45)32A.I.R.1945 Lah. 281 (F.B.).

7. (1900) 24 Bom. 423, *Queen Empress v. Tyab Ali*.

8. ('07) 31 Bom. 611, *Emperor v. Jeevanji*.

9. ('27) 14 A.I.R. 1927 Bom. 209 : 51 Bom. 352 : 100 I. C. 972, *Emperor v. Mahadewappa*.



[Case No. 67.]

**A. I. R. (33) 1946 Bombay 319**  
FULL BENCHKANIA AG. C. J., DIVATIA AND  
GAJENDRAGADKAR JJ.*Sanabhai Nathabhai — Applicant*  
v.*Gordhandas — Respondent.*

Civil Revn. Appln. No. 121 of 1945, Decided on 3rd September 1945, against order of Second Class Sub-Judge, Nadiad, in Civil Suit No. 83 of 1943.

(a) Dekkhan Agriculturists' Relief Act (1879), S. 15D—Suit alleging that sale deed was really mortgage with prayer that deed should be declared mortgage and to take account—Consideration above Rs. 5000 — Suit is only one for accounts and is triable by Civil Judge (Junior Division) when valued at Rs. 5 under S. 7 (iv)(f), Court-fees Act, 1870 — Suits Valuation Act, S. 8.

A suit on the allegation that an ostensible sale deed executed by plaintiff for Rs. 9000 was really a mortgage with the prayers—(1) to declare that the deed in question was really a mortgage and (2) to take an account of the mortgage under the Dekkhan Agriculturists' Relief Act, 1879, and to ascertain the amount payable is only a suit for accounts under S. 15D of that Act governed by S. 7 (iv) (f), Court-fees Act, 1870. The existence of the first prayer does not prevent it from being a suit for accounts, nor does the fact that on application of the parties under S. 15D (3) it might be converted into a suit for redemption or foreclosure change its nature till that contingency arises. Where such suit is valued at Rs. 5 only, a Civil Judge (Junior Division) having jurisdiction to try suits below Rs. 5000 in value has jurisdiction to try the suit : ('42) 29 A. I. R. 1942 Bom. 178 and ('33) 20 A. I. R. 1933 Bom. 306, *Rel. on*; 16 Bom. 351, *Expl.* [P 321 C 1, 2]

(b) Dekkhan Agriculturists' Relief Act (1879), S. 15D — 'For decree declaring that amount', meaning of — Expression does not make suit one for declaration within Sch. 2, Art. 17 (3), or one under Art. 17 (6), Court-fees Act.

Section 15D (1), Dekkhan Agriculturists' Relief Act, clearly indicates that a suit under that section is one for an account of the amount of principal and interest remaining unpaid on the mortgage. The last words "and for a decree declaring that amount" only show what must follow from a suit for accounts. The authority taking accounts cannot end its work except by striking a balance and holding that a certain amount is due by one party to the other. The word "declare" is therefore not used in the section in a technical sense and the last words do not make a suit of the nature contemplated by S. 15D (1) a suit for declaration within the meaning of Sch. 2, Article 17 (3), Court-fees Act. In the same way as it is clearly a suit for accounts, the general residuary Art. 17(6) is inapplicable. [P 321 C 1, 2; P 322 C 2]

Court-fees Act —

('44) Chitale, S. 7 (iv) (f) N. 1; Suits Valuation Act, S. 8, Notes 8 and 31.

('36) Ayyar, S. 7 (iv) (f), page 111, "Valuation"; Suits Valuation Act, S. 8, page 753, "Accounts."

*J. C. Shah and N. C. Shah — for Applicant.*  
*D. V. Patel — for Respondent.*

passive voice and it says that "No article of food or drink shall be sold or supplied for consumption..." His contention is that what is prohibited is the sale of any article of food or drink, and that the liability is sought to be attached to the person who actually sells it and not necessarily to the owner or proprietor of the establishment. In our opinion, in spite of this difference between the language of the statutes and the notification in the present case, the prohibition of sale is absolute in both cases. It is true that in the statutes stress is laid on the person whereas in the notification stress is laid on the article of food or drink. But both of them are absolute in their nature inasmuch as no article of food or drink can be sold by any person. The object, as I said before, was that there should be preservation and proper distribution of the articles of food and drink to the members of the public. If the object is the same in the Hoarding and Profiteering Prevention Ordinance where the language is in the active form and not in the passive form and where also the master is liable for the criminal act of his servant, we do not see any reason why the master should not be held liable for the criminal act of his servant in a case where the notification is worded in the passive form and not in the active form. We are, therefore, clearly of the opinion that the present case comes within the exception to the general rule that a master is not liable for the criminal act of his servant. That being so, the conviction of accused 1 for the offence under R. 81 (4) is, in our opinion, correct.

It was lastly contended by Mr. Mehta that accused 1 was charged under R. 121, Defence of India Rules, which applies to cases of attempt or abetment, and that abetment necessarily implies an intention on the part of the doer of the act. In our opinion, the charge is not limited to the offence under R. 121. Accused 1 is charged with the principal offence under R. 81 (4), and in the alternative of the offence under R. 121. If he is guilty of the principal offence, the question of his liability for the alternative offence would not arise. For these reasons we confirm the convictions as well as the sentences of both the accused and discharge the rule.

K.S./D.H.

*Rule discharged.*



**FACTS.**—The plaintiff Gordhandas filed a suit against Sanabhai (defendant) for a declaration that a deed passed by him on 6th April 1942, for Rs. 9000 though in form a sale deed was in reality a deed of mortgage, and prayed for accounts of the mortgage transaction under the provisions of S. 15D, Dekkhan Agriculturists' Relief Act, 1879. The claim in the suit for prayer of declaration was valued at Rs. 5 and that for account was valued at Rs. 5, and court-fee for the first claim was paid at Rs. 5, and for the second claim at Re. 0-6-0. The suit was heard by a Subordinate Judge of the second class, who had jurisdiction to hear suits claims in which were valued under Rs. 5000. The defendant contended *inter alia* that the Judge had no pecuniary jurisdiction to hear the suit. The trial Judge held that he had jurisdiction to try the suit as the suit was one for declaration and consequential relief (i. e., prayer for accounts) and as such fell within S. 7 (iv) (c), Court-fees Act, 1870. The Judge relied on 39 Bom. L. R. 138<sup>1</sup> and 35 Bom. L. R. 604.<sup>2</sup>

**Kania Ag. C. J.** — This is a civil revision application of the original defendant in Civil Suit No. 83 of 1943 filed in the Court of the Joint Civil Judge (Junior Division) at Nadiad. The plaintiff filed the suit on the allegation that an ostensible sale deed for Rs. 9000 executed by him on 6th April 1942, was really a mortgage. He alleged that he was paid only Rs. 3000 in cash and Rs. 5000 had been credited towards past dues. He disputed his liability for the amount mentioned in the deed. The prayers were: (1) to declare that for the reasons stated above, the fields mentioned in para. 1 of the plaint had been mortgaged by the plaintiff to the defendant and for which the defendant had obtained a document on 6th April in the form of a sale, but that the same was in reality a mortgage; and (2) to take an account of the mortgage and the produce of the fields, since the said fields were mortgaged on 6th April 1942, under the Dekkhan Agriculturists' Relief Act, 1879, and ascertain the amount payable by the plaintiff to the defendant. There were prayers for further and other reliefs, and for costs. An objection was raised to the jurisdiction of the Court. It was decided against the defendant. The defendant filed this civil revision appli-

cation which first came before Weston J. 44 Bom. L. R. 278,<sup>3</sup> I. L. R. (1940) ALL. 762,<sup>4</sup> and 16 Bom. 351<sup>5</sup> were pointed out to the learned Judge and it was thought that there was some conflict of views in these decisions. The learned Judge, therefore, instead of disposing of the matter, referred it to a Bench. When the matter came before us on Thursday last, the question whether 16 Bom. 351<sup>5</sup> was rightly decided or not was directly put for our consideration. In view of that contention, it was thought that the application should be heard by a Bench of three Judges and the matter has thus come before us today.

The argument urged on behalf of the applicant is that under S. 15D, Dekkhan Agriculturists' Relief Act, the duty of the Court is to take an account and pass a decree declaring that amount. Thereafter, if the plaintiff applied and the Court granted the application, the suit might be converted into a suit for redemption. Similarly, if the time for payment had passed and the mortgagee applied for foreclosure or sale and the Court acceded to that request, the suit might be converted into a suit for foreclosure or sale. It was, therefore, argued that this is not a suit for accounts within the meaning of S. 7 (iv) (f), Court-fees Act. It was, therefore, contended that the suit not being one for accounts, the Civil Judge (Junior Division) had no jurisdiction to try the suit as the amount claimed under the written document was Rs. 9000. It was contended in the alternative that if this was a suit for a declaration, it would fall under Sch. 2, Art. 17 (6) or (3), Court-fees Act, as a suit either of a peculiar nature which was not covered by any specific article, or a suit in which a declaration was asked. In this connection strong reliance was placed on the concluding words of S. 15D, Dekkhan Agriculturists' Relief Act. It was argued that in 16 Bom. 351<sup>5</sup> it was held that when the amount due under the deed was over Rs. 5000 the only Court to try the suit was the Court of the First Class Subordinate Judge. It was pointed out that if on taking accounts a party was dissatisfied, he had the right to go to the Court of the Civil Judge (Senior Division) and file a substantive suit for redemption or sale as the case may be, and, in that

1. ('37) 24 A.I.R. 1937 Bom. 167 : I. L. R. (1937) Bom. 623 : 168 I. C. 449 : 39 Bom. L. R. 138, Jamna Das Vrij Lal v. Chandu Lal Jamna Das.  
2. ('33) 20 A.I.R. 1933 Bom. 306 : 146 I. C. 165 : 35 Bom. L. R. 604, Savant v. Bharmappa.

3. ('42) 29 A. I. R. 1942 Bom. 178 : I.L.R. (1942) Bom. 337 : 200 I. C. 849 : 44 Bom. L. R. 278, Chunilal Kevalram v. Ramchandra Yesaji.  
4. ('40) 27 A. I. R. 1940 All. 504 : I. L. R. (1940) All. 762 : 191 I. C. 337 (F.B.), Harendra Shankar v. Khiali Ram.  
5. ('92) 16 Bom. 351, Babaji v. Hari.



event, all the time and money spent in proceeding with the suit filed in the Court of the Civil Judge (Junior Division) would be wasted.

We are not concerned in this litigation, at this stage, with considering the position which the Court may be faced with at the time of passing the final decree. The short point for consideration now is this. When the document in question mentions that a sum of Rs. 9000 was paid and it is claimed that the transaction was not a sale but a mortgage, and the debtor, undisputedly an agriculturist, files a suit for accounts under S. 15D, is it competent to be dealt with by the Civil Judge (Junior Division) or not? As regards the prayer for a declaration that the document is a mortgage and not a sale, it has been held by our Court in 44 Bom. L. R. 278<sup>3</sup> that such a prayer is unnecessary and the suit is in effect a suit for accounts under S. 3 (a), Dekkhan Agriculturists' Relief Act. It should be noted that the only suits for account which are permitted to be filed on behalf of an agriculturist under the Dekkhan Agriculturists' Relief Act are under ss. 15D and 16. Originally, a suit could have been filed under S. 16 only. It was thought that a suit asking for accounts in respect of mortgage transactions, without a prayer for redemption or sale, was not covered by S. 16. Thereupon S. 15D was incorporated in the Dekkhan Agriculturists' Relief Act by Act 22 [XXII] of 1882. Therefore, it is clear that the existence of the first prayer in the plaint before us does not prevent the suit being one for accounts. The same view was taken by Beaumont C. J. in 35 Bom. L. R. 604.<sup>2</sup> In that case it was stated as follows: "For the purposes of court-fees the claim was valued at Rs. 5, which would be sufficient if the claim is merely one for an account." It was contended before us that that observation, while entitled to due consideration, cannot be held to have decided that a suit under S. 15D was a suit for accounts, because the rival contentions now urged before us were never argued. We are prepared to accept 44 Bom. L. R. 278<sup>3</sup> as correctly decided and this argument therefore need not be discussed further.

The next question is about the words used at the end of para. 1 of S. 15D. In our opinion those words also do not help the applicant. The words of that paragraph clearly indicate that the suit under consideration is one "for an account of the amount of principal and interest remaining unpaid on the mortgage." The last words "and

for a decree declaring that amount" only show what must follow from a suit for accounts. The authority taking accounts cannot end its work except by striking a balance and holding that a certain amount is due by one party to the other. The word "declare" is therefore not used in the section in a technical sense. The words of the section only indicate that in such a suit the decree shall ascertain the amount which is due. In our opinion, those words do not make a suit of the nature contemplated by S. 15D (1) a suit for a declaration within the meaning of Sch. 2, Art. 17 (3), Court-fees Act. In the same way, as this is clearly a suit for accounts, the general residuary Article 17 (6) is inapplicable.

The further argument that such a suit may be converted by operation of para. 3 of S. 15D into a suit for redemption or foreclosure or sale, does not help the applicant. Two contingencies must arise before the suit acquires that character: (1) an application on the part of the plaintiff or the defendant, and (2) leave of the Court to make such amendment. Failing either of these two, the suit remains a suit for accounts and nothing else. When such an application is made and granted, the Court may have to decide the limits of its jurisdiction and what reliefs it can give to the parties. We are not concerned at this stage with that larger issue.

On behalf of the applicant strong reliance was placed on 16 Bom. 351.<sup>5</sup> In that case the suit was brought by the mortgagors of certain lands under S. 15D, Dekkhan Agriculturists' Relief Act. There were numerous mortgages in favour of the same creditor. The total of those mortgages was Rs. 5750 as shown by the original record which we sent for. The mortgagor tried to drop one of the intermediate mortgages to make the aggregate amount Rs. 4850. Thereupon, the Subordinate Judge submitted three questions for the opinion of the High Court. Neither party appeared before the High Court and the questions were answered by the Court in one paragraph consisting of nine lines. The three questions were these:

"(I) Whether, having regard to the meaning of the word 'mortgage' used in S. 15D, cl. (1), Dekkhan Agriculturists' Relief Act, the plaintiffs are bound, in a suit like the present, to include in the plaint all the mortgage-bonds by which charges have been created on the property in question or can keep back one of them and claim an account of the rest, as they have now done?"

"(II) Whether, under S. 3 (a) of the said Act it is necessary to inquire into the total of the principal amount secured by the mortgage-bonds in determining the jurisdiction of the Court, or whe-



ther that jurisdiction extends to all account suits under S. 15D irrespective of the limitation of Rs. 5000?

(III) Whether a Subordinate Judge of the second class could pass a decree as contemplated by cl. (3) of S. 15D even though the total of the principal amount secured in bonds creating the mortgage, or the amount found due after accounts have been taken in the manner referred to in cl. (2) might exceed Rs. 5000?"

A perusal of the judgment clearly shows that the Court dealt with the first question in the first part of the first sentence. It held that it was not open to the mortgagor to drop some mortgage claims and ask for an account of some of the mortgages only when all mortgage debts were due to one party only. The reason for this appears to be clear. If the idea is to free the property on payment of the amount due or to know the liability of the mortgagor to the individual creditor under the mortgages, it is incumbent on the debtor to get from the Court an account of all amounts due to that individual creditor. It is sheer waste of time to ask the Court to ascertain the amount due to the individual creditor only on certain mortgages, when other transactions leave the land still covered by some mortgages in favour of the same creditor. The second question was disposed of by the second part of the first sentence of the judgment. The learned Judges there stated "the account must be taken of all of them (the mortgage deeds) in the same suit, and if the total amount, as in the present case, exceeds Rs. 5000 the case does not fall under Chap. 2 of the Act." It is clear that this refers in terms to S. 3 (a) which was specifically referred to in the second question submitted for the Court's opinion. The first sentence ended there. The last sentence "If it exceeds Rs. 5000 the First Class Subordinate Judge alone has jurisdiction" has to be read in the light of the words used in question No. 3. The Court's opinion was asked if a Second Class Subordinate Judge could pass a decree as contemplated by S. 15D (3) even though the total of the principal amount secured by the bonds creating the mortgage, or the amount found due after accounts have been taken in the manner referred to in cl. (2) exceeded Rs. 5000. The question was clearly under cl. (3) of the section. The Court held that the First Class Subordinate Judge alone had jurisdiction. In this connection it is very material to bear in mind that before this decision the view of our High Court was that in a suit even for ordinary accounts filed before a Second Class Subordinate Judge, if a sum exceeding Rs. 5000 was found due, that Judge had no jurisdiction to pass a decree. Our Court has there-

after taken a different view and the present trend of decisions is that in a suit for an account if a sum more than Rs. 5000 is found due, the Second Class Subordinate Judge has jurisdiction to pass a decree. In the light of that change of view, the last sentence of the judgment in 16 Bom. 351<sup>5</sup> may have at the proper time to be considered. As I have pointed out, at the present stage of the suit, as no relief under para. (3) of S. 15D is asked for, this decision need not be considered.

Bearing in mind the stage at which this litigation stands today, we have no hesitation in holding that the Civil Judge (Junior Division), Nadiad, before whom the suit is pending, has jurisdiction to proceed with the same. The result is that the civil revision application fails and is dismissed with costs. Interim stay now comes to an end.

D.R./D.H. *Application dismissed.*

[Case No. 68.]

**A. I. R. (33) 1946 Bombay 322**

**SPECIAL BENCH**

**DIVATIA, CHAGLA AND**

**RAJADHYAKSHA JJ.**

**R. K. Karanjia — Applicant**

**v.**

**Emperor.**

Criminal Appln. No. 345 of 1945, Decided on 6th September 1945.

(a) Press (Emergency Powers) Act (1931), S. 4 (1) (f)—Article in newspaper inviting public to send in official secrets to editor comes within S. 4 (1) (f).

The expression 'official secret' is ordinarily understood in the sense in which it is used in the Official Secrets Act and has reference to secrets of one or the other department of the Government or the State and not to any secret of a private office or institution. Hence an article in a newspaper inviting the public to send in official secrets to the editor comes under S. 5 (1), Official Secrets Act, and therefore falls under S. 4 (1) (f), Press (Emergency Powers) Act, as it is an invitation encouraging or inciting any person to commit an offence. Where the publisher of a news magazine is ordered by the Government to deposit a sum as security under S. 7 (3), Press (Emergency Powers) Act, in respect of such article and the publisher applies to the High Court for setting aside such order the burden is on the applicant to prove that the tendency is otherwise than what is alleged to be and the Court is not concerned with the intention or the motive underlying the article but only with the direct or indirect tendency of the words used in the article itself: (32) 19 A.I.R. 1932 Cal. 745 (S.B.), *Rel. on.* [P 324 C 1, 2]

(b) Press (Emergency Powers) Act (1931), S. 26—Applicability—First article complete by itself—Writer writing second one to clear wrong impression likely to be created by first article—S. 26 does not apply.

Section 26 would apply where the article in question is to be read in its context with a previous or



a subsequent article just as different parts of one article or different passages in one book are to be read along with the impugned article in order to ascertain its meaning. S. 26 is an enabling section permitting the words to be considered in their general context. Where there is no context between the two articles in the sense that they cannot be properly understood except in reference to each other and the first article purports to be complete by itself and the second article is written only because the writer thought that a wrong impression was likely to be created by the first article, S. 26 does not apply. [P 325 C 1]

*M. C. Setalvad and S. D. Vimadalal* —  
for Applicant.

*C.K. Daphtary, Advocate-General, S.B. Jathar, Asst. Govt. Pleader and N. K. Petigara, Public Prosecutor*—for the Crown.

**Divatia J.**— This is an application by the publisher of a news magazine called "*Blitz*" for setting aside the order of the Government of Bombay dated 24th February 1945, requiring the petitioner to deposit a sum of Rs. 3000 as security under S. 7, sub-s. (3), Press (Emergency Powers) Act, 1931. The reason for passing the order was stated to be that in its issue of 20th January 1945, the said news magazine had published an article which contained words falling under cls. (bb) and (f) of sub-s. (1) of S. 4 of the said Act. The article, which purported to be from the editor of the paper, was a short one as follows:

#### "INFORMATION PLEASE

*Blitz's* overall policy is to give its readers the fullest information on all topics—secret or otherwise—affecting them. As such, this paper is not bound by an antiquated convention which debars the press from releasing to the common people official secrets, confidential documents, leakages of such news as is sought to be suppressed from public knowledge. Such information is always most welcome when brought to the editor, and will be paid for at lavish rates. *Blitz* has in the past paid as much as Rs 1000 and over for one such story . . . . *Editor.*"

It is the case for the Crown that the words "official secrets, confidential documents, leakages of such news as is sought to be suppressed from public knowledge" in the said article come within cl. (bb) inasmuch as they directly or indirectly tend to convey confidential information as defined in the rules made under the Defence of India Act, or are calculated to instigate the contravention of any of the rules. It is also contended that they come under cl. (f) of the said sub-section which includes all the expressions directly or indirectly tending to encourage or incite any person to interfere with the administration of the law or with the maintenance of law and order, or to commit any offence. As regards cl. (f) it is contended that the offence mentioned in

that clause, so far as it applies to the facts of the present case, would be under S. 5, sub-s. (1), Official Secrets Act, the material portion of which is to the effect that if any person having in his possession or control any document or information obtained in contravention of this Act or which he has obtained or to which he has had access owing to his position as a person who holds or has held office under His Majesty wilfully communicates such document or information to any person other than a person to whom he is authorised to communicate it, he is guilty of an offence, and the punishment is provided for in sub-s. (4) of the said section. The petitioner's case is that these words in the article have not the meaning attributed to them by the respondent, that the expression "official secrets" does not mean secrets of Government Offices only but also of all offices or private institutions, and that the expression "confidential documents" also does not necessarily mean Government documents of the nature stated in the Defence of India Rules but includes any document of a confidential nature whether Government or private. It is further urged on behalf of the petitioner that this article was considered at a meeting of the Press Advisory Committee on 19th February of the same year and it was presided over by Mr. Drewe, the Secretary to the Government of Bombay, Home Department. The article was stated to have been objected to by the Chairman and an alleged agreement was arrived at that the objection of the Government would be satisfactorily met by the publication of a correction in the next issue of the paper. Thereupon a second article was published in the issue of 24th February, in which it is stated that the readers should clearly understand that the information desired in the first article concerned such topics of public interest as the Gandhi-Jinnah talks and not secret or confidential information of any Government Department or the Defence Services or any matter, the disclosure of which may amount to a breach of faith on the part of the informant, and that any wrong impression which may have been created by the request was regretted. The petitioner says that he was given an assurance that no action would be taken against him if the correction was published with an expression of regret, but that the Government in breach of that agreement issued the notice against him under the Press Act on the same day on which the correction was published. Mr. Drewe has filed an affi-



davit in this Court definitely stating that no such assurance was given to the petitioner who was told that it was open to Government to take action according to law, but that in doing so Government would take the apology into consideration, and that it was because of the apology that the petitioner was not prosecuted but action was taken only under the Press Act.

We are not really concerned in this application with the alleged assurance of agreement. In fact it is frankly and rightly conceded by Mr. Setalvad on behalf of the petitioner that the alleged agreement is not relevant to this application where we have to consider whether the order was justified by the provisions of the Press Act and not whether Government was estopped from passing the order after the alleged assurance.

On the merits Mr. Setalvad has urged that the article does not fall either under cl. (bb) or cl. (f) because it is merely an advertisement offered to the public the effect of which is not any incitement to break the law. It is further urged that what was really asked for was such information as could be published without violating the law, and that the paper was going to disregard not the law but "an antiquated convention." As regards the expressions themselves Mr. Setalvad has strongly urged that the word "official" in the expression "official secrets" according to its dictionary meaning in the Oxford Dictionary means "of or pertaining to an office," and that it did not necessarily mean a Government office. The expression "official secret" is not defined in the Official Secrets Act, and Mr. Setalvad contends that it must, therefore, be taken in its dictionary meaning. On the other hand it is urged that the expression "official secret" is a well understood expression meaning any secret pertaining to any department of the Government. It is no doubt true that nowhere is the expression "official secret" defined, but looking to the purpose and scheme of the Official Secrets Act, especially ss. 3 to 10, which create offences against the Government for publication of official secrets, they have all reference to secrets of one or the other department of the Government or the State and not to any secret of a private office. In our opinion the expression "official secret" is ordinarily understood in the sense in which it is used in the Official Secrets Act. If the secret pertains to any private office such as, for instance, the office of the University or the Corporation, it would not be called an official secret but as a Univer-

sity secret or a Corporation secret. But the term "official" by itself has obtained the meaning attached to it in the Official Secrets Act, and in our opinion that is the sense in which it would be understood by readers of this news magazine. We are, therefore, unable to hold that "official secret" is a wider term including secrets of any private institution.

That being so, the question of an invitation to the public to send in official secrets to the editor of "*Blitz*" must, in our opinion, be considered with reference to the provisions of the Official Secrets Act. The relevant provision on this point in that Act is S. 5, sub-s. (1), which is very comprehensive in its nature. It applies not merely to Government servants but also to all persons who have obtained that secret in contravention of this Act. Reading cl. (f) of sub-s. (1) of S. (4), Press Act, and S. 5, sub-s. (4), together, it is in our opinion clear that the invitation to the public to send official secrets comes within cl. (f) as well as S. 5, sub-s. (1), and that therefore it is really an invitation encouraging or inciting any person to commit an offence. As held in 60 Cal. 408,<sup>1</sup> the burden in such an application is on the applicant to prove that the tendency is otherwise than what it is alleged to be without going into the question of the intention of the writer. We are not, therefore, concerned with the intention or the motive underlying this article but only with the direct or indirect tendency of the words used in the article itself, and in our opinion that tendency is, as alleged on behalf of the respondent, to encourage or incite any person to commit an offence. This view of the article is, in our opinion, sufficient to dispose of this application, because if the words fall under cl. (f), the order requiring the deposit of security would be justified. It is not necessary, therefore, to go into the other question as to whether the other words, *viz.*, "confidential documents, leakages of such news as is sought to be suppressed from public knowledge," come within either cl. (bb) or cl. (f), nor is it necessary to consider as to whether the term "official secret" also comes under clause (bb).

It was next contended by Mr. Setalvad that the subsequent article of 24th February must be read in conjunction with the first article of 20th January and the effect of their being read together was that the writer had in the second article told his readers

1. ('32) 19 A.I.R. 1932 Cal. 745 : 60 Cal. 408 : 140 I.C. 5 (S.B.), In re Anandabazar Patrika.



that the information desired in the first article did not concern any secret or confidential information of any Government department or the Defence Services or any matter the disclosure of which might amount to a breach of faith on the part of the informant. He relies on the provisions of S. 26, Press Act, according to which any copy of the same newspaper published after the commencement of the Act may be given in evidence in aid of the proof of the nature or tendency of the words in respect of which the order may be made. In our opinion this section would apply where the article in question is to be read in its context with a previous or a subsequent article just as different parts of one article or different passages in one book are to be read along with the impugned article in order to ascertain its meaning. As observed in *I. L. R. 1942 Kar. 127*<sup>2</sup> S. 26 is an enabling section permitting the words to be considered in their general context. In the present case we think there is no context between the two articles in the sense that they cannot be properly understood except in reference to each other. The first article purports to be complete by itself and the second article was written only because the writer thought that a wrong impression was likely to be created by the first article. That shows that the writer himself thought that such an impression may be created by the words used in that article. But we are not concerned with what the writer thought was a wrong impression but with the direct or indirect tendency of those words. The writer in fact tries to explain away the possible effect of those words in the mind of the readers by saying that he did not intend to produce that impression. But the writer's state of mind is irrelevant. Even assuming that the writer's intention was what it was alleged to be in the second article, we have to look to the first article alone to find out whether it has the direct or indirect tendency to produce the result stated in S. 4 (1), cl. (bb) or (f), Press Act. In our opinion, therefore, that argument fails. In the result, therefore, the applicant has not proved that the article does not come within cl. (f) of S. 4 (1), Press Act. The application is dismissed. No order as to costs.

D.S./D.H. *Application dismissed.*

2. ('42) 29 A.I.R. 1942 Sind 65 : *I. L. R. (1942) Kar. 127 : 202 I.C. 405 (S.B.)*, In re 'New Sind'.

[*Case No. 69.*]

**A. I. R. (33) 1946 Bombay 325**

**SPECIAL BENCH**

**DIVATIA, CHAGLA AND**

**RAJADHYAKSHA JJ.**

*Morarji Padamsey — Applicant*

*v.*

*Emperor.*

Criminal Appln. No. 345 of 1945, Decided on 12th September 1945, for setting aside order of Government of Bombay, D/- 22nd March 1945.

Press (Emergency Powers) Act (1931), S. 4 (1) (bb)—'Prejudicial report'—Publication must be such as affecting one of objects referred to in S. 2 (1), Defence of India Act—Book entitled 'Denationalisation of Goans' held did not constitute prejudicial report.

If one of the Defence of India Rules prohibits a certain act specifically, then the Court must give effect to that prohibition; but where the word used is ambiguous and is not defined and is not clear as to its interpretation, it is open to the Court to look to the object with which the rules were framed under the Defence of India Act. Therefore, in order that a publication or a book should prejudice His Majesty's relations with a foreign power and fall within the mischief aimed at under cl. (bb) of S. 4 (1), Press (Emergency Powers) Act as read with R. 36 (6) (a), Defence of India Rules, the publication must be such as in some way to affect one of the objects referred to in S. 2 (1), Defence of India Act. The Court must look at the book as a whole in order to determine whether it is likely to prejudice the relations between His Majesty and the foreign power. [P 326 C 1, 2; P 327 C 1]

A book entitled 'Denationalisation of Goans' historically traced the gradual decadence of the Goans and called upon the Goans to free themselves from the historical back-ground and their present outlook so that they should be more fitted to aspire for freedom and to join hands with their fellow-countrymen in the rest of India. There were passages in the book which commented on the Fascist policy of the present Portuguese Government :

*Held* that the book could not be said to prejudice His Majesty's relations with the Government of Portugal. To criticise the political system of a Government, even though that Government may be on friendly terms with His Majesty was not sufficient to bring a publication within the mischief aimed at under cl. (bb) of S. 4 (1), Press (Emergency Powers) Act, read with R. 34 (6) (a), Defence of India Rules. [P 328 C 2]

*K. M. Desai* — for Applicant.

*C. K. Daphtary, Advocate-General and S. B. Jathar Asst. Govt. Pleader and N. K. Petigara, Public Prosecutor* — for the Crown.

**Chagla J.**—This is an application under S. 23, Press (Emergency Powers) Act, 1931, for setting aside an order of the Government of Bombay dated 22nd March 1945. The order forfeited the security of Rs. 1500 deposited by Vishwanath Ramchandra Savant, the keeper of the press known as the Associated Advertisers and Printers, Limited. The reason why the Government made this



order is stated in the body of the order itself, and it points out that whereas the Associated Advertisers and Printers, Limited, Press, has been used for the purpose of printing a book in English entitled "Denationalisation of Goans" which contains certain words which are set out at the foot of that order and whereas it appeared to the Government of Bombay that those words were likely to prejudice His Majesty's relations with the Portuguese Government and, as such, constitute a prejudicial report and come within the scope of cl. (bb) of S. 4 (1), Press (Emergency Powers) Act, 1931, the Government of Bombay were moved to forfeit the security deposited by Vishwanath Ramchandra Savant. Section 4 (1), cl. (bb), Press (Emergency Powers) Act, refers to words, signs or visible representations which directly or indirectly convey any 'confidential information,' any 'information likely to assist the enemy' or any 'prejudicial report,' as defined in the rules made under the Defence of India Act, 1939, or are calculated to instigate the contravention of any of those rules.

The case of Government is that this particular book "Denationalisation of Goans" contains a prejudicial report as defined in the Defence of India Rules. "Prejudicial report" is defined in R. 34, cl. (7), as any report, statement or visible representation, whether true or false, which, or the publishing of which, is, or is an incitement to the commission of, a prejudicial act as defined in this rule; and "prejudicial act" is defined in R. 34, cl. (6), and the only definition with which we are concerned is the one contained in sub-cl. (a) which is to prejudice His Majesty's relations with any Indian State or with any foreign power. Now, it is the contention of Government that by publishing this book the relations between His Majesty and the Government of Portugal have been prejudiced. It is to be noted that the word "prejudice" is not defined anywhere in the Defence of India Act or the Rules framed thereunder. "Prejudice" is not a term with any definite connotation, and in order to construe it one is entitled to look at the purpose for which the rules under the Defence of India Act are to be framed. We agree with the learned Advocate-General that if one of the Defence of India Rules prohibits a certain act specifically, then we must give effect to that prohibition; but where the word used is ambiguous and is not defined and is not clear, as to its interpretation, it is open to

us to look to the object with which the rules were framed under the Defence of India Act; and when we turn to S. 2, Defence of India Act, provides that the Central Government may, by notification in the Official Gazette, make such rules as appear to it to be necessary or expedient for securing the defence of British India, the public safety, the maintenance of public order or the efficient prosecution of war, or for maintaining supplies and services essential to the life of the community. Therefore it is clear that in order that a publication or a book should prejudice His Majesty's relations with a foreign power, the publication must be such as in some way to affect one of the objects referred to in S. 2 (1), Defence of India Act, to which we have just referred.

Mr. Drewe, Secretary to the Government of Bombay in the Home Department, has made an affidavit in which he points out that complaints were made to the Government of Bombay by the Portuguese Government drawing the attention of the former Government to this particular publication and pointing out that that publication was resented. Now, we have nothing to do with the view taken by the Portuguese Government as to the nature of this book, and in that sense the affidavit of Mr. Drewe is not very helpful. As a matter of fact, in the affidavit Mr. Drewe says that various other books published by the Goa Congress Committee, which has also published the book in question entitled "Denationalisation of Goans," have brought about unpleasant relations between His Majesty and the Portuguese Government, and it is not specifically stated that the cause of the strained relations is this book itself. But as we are pointing out the affidavit of Mr. Drewe is not very helpful because it is for us to decide on a perusal of the book itself and after carefully considering the objected passages whether the publication comes within the mischief of S. 4 (1), cl. (bb), Press (Emergency Powers) Act. As a matter of fact if one were permitted to look at the affidavit of Mr. Drewe, for the purpose of deciding whether the book falls under cl. (bb) of S. 4 (1), it would be equally relevant to consider what Morarji Padamsey says in para. 1 of his affidavit dated 2nd August 1945, that although the Government of Bombay have taken action under the Press Act against this book, this book has not been proscribed in Goa by the Portuguese Government and that the book is being



freely and openly sold in Goa. This statement has not been denied or disputed by Mr. Drewe in his affidavit to which I have just referred.

But we must look at the book as a whole in order to determine whether it is likely to prejudice the relations between His Majesty and the Portuguese Government. The aim of this book, which as we have stated is issued by the Goa Congress Committee, is precisely to disinter the causes and bring to the conscience of Goans the slow mental change they are going through during 430 years of foreign rule, growing increasingly unfit for an independent and free life; and it is further pointed out by the author that it is only by acquiring this consciousness that they would be able to react against their own denationalisation and cease to be the willing slaves they are today. The whole object of the book, as pointed out in the preface, is to open the eyes of the Goans who have been blinded by a most ruthless process of mental bondage. And towards the end of the book the author strikes the same note that the salvation of the Goans depends on their will to cultivate a national and human dignity in themselves, to free their mind from the spirit of servility and imitation, of their ape-like and characterless moods, reacting vigorously against their rulers in the political, ideological, social and economic fields, and even in the most everyday habits of their life. The book really contains a historical analysis beginning from the days of Albuquerque in the year 1510 right up to the modern times pointing out the various causes and processes which have led to the denationalisation of Goans. It first points out that there is a historical myth about the doings and activities of Albuquerque and that a great deal of falsified history and propaganda is carried on in Goa in order to make the people feel that Albuquerque was a man free from all racial bias and a great benefactor of the Goans. In exploding this myth the author refers to the letters of Albuquerque himself and also to the writings of one Corsali. He points out that he put to the sword all the Moslems, set fire to cities, burnt mosques full of worshippers, killed women and children and ordered the roasting alive of prisoners; and the author expresses therein an amazement that such a barbarous and ferocious man should have succeeded in leaving behind him a name for tolerance even among those who are today the victims of his cruel policy. Then the author points out again historically

how the people of Goa were converted to Christianity; he says—and he cites authorities for his purpose—that the people of Goa were converted to Christianity by what he calls “mass baptism” and terrorisms. He then deals with the part played by the Inquisition in Goa which continued to rule from the middle of the 16th century to the end of the 18th century; and here again he quotes from the instructions issued by the Inquisition to the people of Goa. These instructions in brief amount to asking the Goans completely to denationalise themselves; they were not to wear the clothes which the Hindus were wearing; they were not to eat what the Hindus were eating; and the attempt was made by the Inquisitors to interfere with the smallest details of the personal and intimate life of a Goan. It is significant to note that in support of this tirade against the Inquisition the author quotes no less a person than the Archbishop of Evora in a sermon he is supposed to have delivered at Lisbon; and the Archbishop says:

“If everywhere the Inquisition was an infamous Court, the infamy, however base, however vile, however corrupt and determined by worldly interests, it was never more so than the Inquisition of Goa, by irony of fate called the Holy Office. The Inquisitors even attained the infamy of sending to their prisons women who resisted them, there satisfying their beastly instincts and then burning them as heretics.”

Then the author points out that although Portuguese writers have held up their hands in horror at the caste system prevailing in India, they themselves have perpetrated the worst form of caste system in Goa by creating an Imperial caste consisting of the Portuguese; and he also points out how this particular caste receives invidious treatment as against the other people residing in Goa. But the main theme of the book is to point out historically how with the passage of time the Goans have become culturally denationalised and how they have copied and parodied western manners and customs and given up their own culture. In the opinion of the author the Portuguese showed themselves ferocious in their zeal for the destruction of Goanese culture but were unable to give any new culture in substitution of the culture they have destroyed. The author further points out that such culture as the Goans now possess is of a reactionary and anti-democratic quality; it is anti-liberal and directed against all social progress. The author further points out that denationalisation has resulted in the Goans acquiescing



in political subjection and they are incapable of reacting against the suppression of all their civil liberties. He points out that the Goans had certain political rights under the Portuguese Republican regime and even under the constitutional monarchy of the nineteenth century; but under the present Portuguese rule even those political rights have been taken away. He also emphasizes the important fact that the mother-tongue of the Goans, either Konkani or Marathi, has been sternly repressed by the Government. He also draws the attention of his readers to the fact that the people of Goa have been pauperised by the Government issuing inconvertible paper-notes issued by the "Banco Ultramarino" which have depreciated the value of rupee in Goa and it has also resulted in a general rise in the level of prices. He then lays a great deal of emphasis on the fact that by the policy of Government alcoholism has been encouraged in Goa and the people have taken to drink with the result that their moral and mental fibre has been affected; and the author cites what was stated in the World Economic Conference in London that Goa is a country where there is a great deal of drunkenness; and the author sums up this part of his argument by saying that this drunkenness is responsible for the physical degeneracy and mental apathy of the race. In his final conclusion the author points out that the Portuguese rule has made the Goans servile, emasculated, obsequious and timid and that their present denationalisation makes them only submissive servants fit only for subordinate occupations. He further makes a plea to the people of Goa to ally themselves with the freedom movement growing in British India. He says that the Goans at present lack the necessary preparation for aspiring to freedom and he calls upon them to get out of their mental slavery and to prepare themselves so that they should be fit to aspire for freedom.

The Advocate-General has contended that this book is an attack on a friendly power and as such it is bound to prejudice the relations of His Majesty with that Government. It is true that the book has attacked Portugal's colonising policy. It is true that the book has emphatically pointed out that Portugal has used religion as a weapon of imperialism. But in our opinion that by itself is not sufficient to bring this publication within the mischief of R. 34 (6) (a), Defence of India Rules. The whole aim of the author, it seems to us, is to trace his-

torically the gradual denationalisation of Goans from the days of Albuquerque and pointing out what the consequences of this denationalisation are and finally emphasising the point that unless the Goans went back to their own culture and their own language they would always remain servile and subservient, unfit for any progress and incapable of obtaining freedom. It is true that there are passages in the book which comment on the Fascist policy of the present Portuguese Government; but to criticise the political system of a Government, even though that Government may be on friendly terms with His Majesty, does not seem to us sufficient to bring a publication within the mischief aimed at under cl. (bb) of S. 4 (1), Press (Emergency Powers) Act, as read with R. 34 (6) (a), Defence of India Rules. As we have stated earlier, it has got to be established that this particular publication is intended or is likely to prejudice His Majesty's relations with Portugal and the relations must be so prejudiced as to in some way or other affect the public safety, the defence of British India, the maintenance of public order or the efficient prosecution of the war or maintaining supplies and services essential to the life of the community. A book which historically traces the gradual decadence of the Goans, a book which calls upon the Goans to free themselves from the historical background and their present outlook so that they should be more fitted to aspire for freedom and to join hands with their fellow countrymen in the rest of India cannot possibly be said to prejudice His Majesty's relations with the Government of Portugal in the manner in which we have indicated. Under the circumstances we are of the opinion that the petitioner must succeed and the order complained of must be set aside. Application allowed with costs.

D.S./D.H.

*Application allowed.*

[Case No. 70.]

**A. I. R. (33) 1946 Bombay 328**

KANIA AG. C. J. AND CHAGLA J.

*Waman Satwappa Kalghatgi—Assessee*  
v.*Commissioner of Income-tax.*

Income-tax Reference No. 2 of 1945, Decided on 18th September 1945, made by Income-tax Appellate Tribunal.

(a) Income-tax Act (1922), S. 25A — Joint Hindu family — Partial partition — Business carried by joint family divided and given to separate members who carried it afterwards individually and for their own benefit—Income from business after partition should not be included in total income of family.



It is open to the members of a joint Hindu family to separate one of its assets, so as to make it not to belong to the joint family and in respect of which they can enter into an agreement of partnership. If that asset is a business, the income derived from carrying on such a business thereafter would not form part of the joint family income and S. 25A would not come in the way of such an arrangement. This is in accordance with the ordinary rule that there is nothing in Hindu law to prevent individual members from holding separate property. In such a case the member will be liable to be taxed on his separate income. In respect of the joint family income, however, the manager will be liable to pay the tax as karta. There is no reason why in the course of partition which may take five or ten years if the immovable properties are not capable of being easily sold, the members should not be given movables which become their absolute property from the moment they are so given to them individually, so that they can deal with them according to their absolute discretion and right and which is under their absolute domain. The income of such assets so irrevocably transferred to each member is his individual income with which the joint family has nothing to do. If such an arrangement can be arrived at when the joint family is in existence, there is nothing in law to prevent the same being done in the course of partition of a joint Hindu family. The question whether it has been so done is a question of fact but in law there is nothing to prevent such a thing being done: ('44) 31 A.I.R. 1944 Pat. 137 and ('42) 29 A.I.R. 1942 P. C. 57, *Rel. on*; ('44) 31 A.I.R. 1944 Mad. 368, *Dissent*. [P 331 C 1]

A joint Hindu family divided cash, jewellery and business on 30th July 1941 and submitted the dispute of the members with regard to shares in immovable property to arbitration which gave an award on 16th October 1941. The karta of the family being sought to be assessed as such for income during the previous year (Hindu year commencing from 31st October 1940 and ending on 20th October 1941) applied on 12th March 1942 to Income-tax Officer to record an order of partition under S. 25A (1). The order was made on 30th July 1942. The assessee claimed that income of the businesses between 30th July 1941 to 20th October 1941 should be treated as separate income and not the income of the joint family :

*Held* that there was nothing in Hindu law to prevent members of the joint family owning individual assets at certain stages when the joint family existed or when it was in the course of partition, and that as the businesses were individually allotted and worked by the members separately for their own benefit, the income in question could not be considered the income of the joint family and could not be included in the total income of the Hindu undivided family represented by the assessee for the assessment year 1942-43. [P 332 C 2]

(b) Income-tax Act (1922), S. 25A (2)—Object of—Income to be assessed must be received by joint Hindu family as such — Fact that family is not joint on the date of assessment makes no difference.

Section 25A (2) does not mean that where there is a rupture of a joint Hindu family but the shares are not definitely allotted in individual property to individual members, the assessment is to continue as before. Such a construction overlooks the words

of the clause "an assessment of the total income received by or on behalf of the joint family as such." The essence of the section is that the income must in the first instance be received by the joint family as such. Once it is so received it makes no difference whether the joint family exists or not on the date of assessment. The scheme of the section is to tax joint family income as a unit if it was received as such by the joint family, even though at the date of the assessment there may have been a partition. [P 332 C 1, 2]

(c) Income-tax Act (1922), S. 25A—Scope of —Section does not create any new rights or obligations or affect provisions of Hindu law.

Section 25A, Income-tax Act, does not create any new rights or obligations nor does it in any way affect the provisions of the Hindu law. The section merely sets up a machinery by which the income of a joint Hindu family, which was in existence in the accounting year but has become defunct in the year of assessment, can be computed and calculated. [P 332 C 2]

*Y. P. Pandit* — for Assessee.

*M. C. Setalvad* — for Commissioner.

**Kania Ag. C. J.** — This is a reference made under S. 66 (1), Income-tax Act, 1922, by the Income-tax Appellate Tribunal. The relevant facts as found in the statement of case are these : The year of assessment is 1942-43 and the income of the previous year, which is sought to be taxed, is the Hindu year commencing from 31st October 1940, and ending on 20th October 1941. The assessee was sought to be assessed as the karta of a joint Hindu family. He had been so assessed in the previous years. In July 1941, the members decided to separate and make a partition of the family properties and assets. For that purpose they divided themselves into four groups. The first group consisted of the assessee, his wife and three minor sons together. The remaining three groups consisted of the three major sons and their own families. They started making a division of the family cash, jewellery and the businesses and completed it on 30th July 1941. That division was embodied in a memorandum which the parties executed that day. The document expressly stated, and the fact was also admitted before the tribunal, that the shares of the different groups in the movables and businesses did not correspond exactly with the interest which they possessed in the family estate according to Hindu law. It appears that there was some disagreement amongst the members as regards the division of the immovable properties and consequently there was a reference to arbitration so that the final adjustment of the shares should be made by the arbitrators at the time of the division. On 31st July 1941, the parties submitted a reference to arbitration and the award was made on 16th October



1941. Thereafter a decree on the award was passed on 3rd February 1942. In para. 7 of the statement of case it is stated as follows:

"After the division of the business on 30th July 1941, the applicant and his three major sons separately carried on those that were assigned to their respective shares till the end of the year of account, i. e., 20th October 1941."

On 12th March 1942, the applicant applied to the Income-tax Officer to record an order of partition under S. 25A (1) of the Act. The order was made on 30th July 1942. The assessee at first claimed that the income of the joint family for the whole year under the circumstances should not be assessed as such but the individual members only should be assessed. In the alternative he claimed that the income of the businesses between 30th July and 20th October should be treated as separate income. The tribunal rejected the larger contention but has referred for the Court's opinion the narrower question in respect of the profits of the several businesses between 30th July and 20th October 1941 in the following terms :

"Whether in the circumstances of the case and having regard to the provisions of S. 25A of the Indian Income-tax Act, 1922, the profits and gains of the several businesses for the period from 30th July 1941 to 20th October 1941, have been rightly included in the total income of the Hindu undivided family represented by the applicant, for the assessment year 1942-43 ?"

The material facts therefore are that according to the findings of the tribunal the businesses were at one time joint family businesses. They were allotted to the individual members on 30th July 1941, and the assessee and his three major sons thereafter separately carried on those businesses which were assigned to the respective shares till the end of the year. It also appears that the immovable properties belonging to the family were not allotted to individual members and the shares therein were not specifically defined. The value of the movables and the businesses divided on 30th July 1941, were unequal and they had to be equalised at the time of the division of the immovable properties. The tribunal was of the opinion that there can be only one partition under Hindu law and therefore in the present case as there was no completed partition till 16th October 1941, the assessee was liable to be assessed for the whole year on the footing that he was the karta of the joint family.

On behalf of the assessee it is contended that the tribunal has taken a wrong view. It is urged that there is nothing in law to prevent a Hindu family from parting with one or more of its assets in favour of a

stranger or a member. If that is done, that particular asset ceases to be a joint family property and the income, profits and gains of such asset in no event can be considered to be that of the joint family. It is contended that the assessment of the karta is and can only be in respect of the income of the joint family properties. In 69 I. A. 119<sup>1</sup> it is pointed out that Sec. 25A deals with the position of a joint family which was in existence when the income of the joint family property was received but was not in existence at the date of the assessment. The law, therefore, provides that in such a case if the joint family has been divided and the properties have been partitioned amongst the various members in definite proportions, the Income-tax Officer can pass an order under S. 25A (3) and thereafter the assessment will be on the individual members only and not on the manager as representing the family. In S. 14 (1) it is, therefore, provided that tax shall not be payable by the assessee in respect of any sum which he receives as a member of an undivided Hindu family. This is obviously with a view to avoid double taxation. On behalf of the assessee our attention was drawn to 23 Pat. 68,<sup>2</sup> where the Court held that if businesses were allotted to individual members when the immovable properties had not been partitioned, the income of the businesses did not form part of the income of the joint family for which the karta could be assessed as before. The assessee further relied on the abovementioned judgment of the Privy Council in 69 I. A. 119.<sup>1</sup>

On behalf of the Commissioner it is urged that 69 I. A. 119<sup>1</sup> is not applicable because in that case the family had continued to be joint and it was only one asset which had been taken out of the family properties and treated by agreement between the parties as a partnership asset. It was contended that the observations in that case were inapplicable when the family unit had been disrupted although there had been no partition of the family assets. Mr. Setalvad further relied on (1944) 12 I. T. R. 176,<sup>3</sup> in support of the contention that the partition contem-

1. ('42) 29 A. I. R. 1942 P. C. 57 : I. L. R. (1942) Kar. P. C. 132 : 69 I. A. 119 : I. L. R. (1943) All. 69 : 202 I. C. 483 (P. C.), *Sunder Singh Majithia v. Commissioner of Income-tax*.

2. ('44) 31 A. I. R. 1944 Pat. 137 : 23 Pat. 68 : 215 I. C. 18, *Bansidhar Dhandhanias v. Commissioner of Income-tax*.

3. ('44) 31 A. I. R. 1944 Mad. 368 : I. L. R. (1945) Mad. 21 : (1944) 12 I. T. R. 176 : 221 I. C. 7, *Gurumurthi Setty v. Commissioner of Income-tax, Madras*.



plated by S. 25A means a complete partition and not a partial partition. It was contended that if in the course of division of the joint family assets some assets are handed over to individual members till an order under S. 25A (3) is made, the manager continues to be liable to be assessed with the 'status' of the 'joint undivided Hindu family.' He urged that the scheme of S. 25A negated the contention of the assessee.

In my view, the contention of the assessee is correct. In 69 I. A. 119<sup>1</sup> the Board held that it was open to the members of a joint Hindu family to separate one of its assets, so as to make it not to belong to the joint family and in respect of which they can enter into an agreement of partnership. If that asset was a business, the income derived from carrying on such a business thereafter would not form part of the joint family income and S. 25A would not come in the way of such an arrangement. This is in accordance with the ordinary rule that there is nothing in Hindu law to prevent individual members from holding separate property. In such a case the member will be liable to be taxed on his separate income. In respect of the joint family income, however, the manager will be liable to pay the tax as the karta. It must be remembered that S. 25A is a machinery section. It is not a charging section much less it can be construed as altering the Hindu law as such. Mr. Setalvad's argument that that line of reasoning cannot apply when the joint family status has come to an end does not appeal to me. There appears no reason why in the course of partition, which may take five to ten years if the immovable properties are not capable of being easily sold, the members should not be given the movables which become their absolute property from the moment they are so given to them individually, so that they can deal with them according to their absolute discretion and right and which is under their absolute domain. The income of such assets so irrevocably transferred to each member is his individual income with which the joint family has nothing to do. If such an arrangement can be arrived at when the joint family is in existence, there is nothing in law to prevent the same being done in the course of partition of a joint family. The question whether it has been so done is a question of fact, but in law I find nothing to prevent such a thing being done. In (1944) 12 I. T. R. 176<sup>3</sup> the question submitted for the Court's opinion was this :

"Whether the partition could be said to have been taken place within the meaning of S. 25A on 15th October 1938 when the members began to live separately though all the properties were not divided."

It must be noticed that the question was whether on the date mentioned in the question, on the facts, it could be stated that there was a partition within the meaning of S. 25A. The facts mentioned in the report are these: On 15th October 1938, the brothers agreed to separate and on 22nd January 1941, a deed of partition was executed and registered. The family estate consisted of immovable and movable properties. On 15th October, they divided the cash which they possessed. Each brother was given a house. The other immovable properties were also divided amongst the brothers on that day. On 25th December 1938, they divided the furniture and household utensils. The family had carried on a grocery business but the assets of this business were not divided till 24th February 1939. On these facts the assessee contended that there was a partition within the meaning of section 25A on 15th October 1938. That contention was rejected. To that extent there is no difficulty in agreeing with the conclusion of the Court. In the course of his judgment the Chief Justice observed (p. 179) :

"Partition means a completed partition. The fact that some assets are divided and others are left for division at a future date would not be a partition within the meaning of the section. . . In this case important assets, namely, those of the business were not divided until February 1939 and the Court has been informed that other assets still remain to be divided. In the circumstances it is clear that the date of the partition is not 15th October 1938, and that is the answer to give to the reference."

While agreeing with the answer given by the Court, with respect, I am unable to agree with the conclusion that S. 25A does not contemplate a division amongst the members of assets of a joint family which can from that moment be their individual property and cease to be the joint family property. On the other hand 23 Pat. 68<sup>2</sup> relied upon by the assessee brings out the point very clearly. In that case there was a partition and a severance of the joint family status. Businesses were allotted to members and the profits thereof were enjoyed by them individually for their absolute use and benefit. In giving judgment Manohar Lall J. found as a fact that (p. 77) : "the assessee is no longer a joint undivided Hindu family. . . So far as the businesses are concerned it is impossible to divide them except by sharing of the profits and losses at the close of the year or whenever the accounting comes to be made for the



profit and loss of the business of the relevant years."

As a fact he found that the accounts were kept separately. It was further found that the house property and the jote lands were not partitioned. He then observed as follows (page 77) :

"It must not, therefore, be held that there is no complete partition but only a partial partition. But such a partial partition comes within the operation of S. 25A of the Act as observed by their Lordships in 69 I.A. 119<sup>1</sup> and the Commissioner's view to the contrary is wrong. The members of the assessee's family in these circumstances must be deemed to continue to form a joint Hindu family for the purposes of assessing them on that portion of the income which is derivable from the properties which have not been partitioned in definite portion other than the businesses."

The facts there were very similar to the facts here. Businesses were allotted to individual members while the immovable properties remained to be partitioned. The Court there held that the income of the businesses should be treated as the income of the individual members and for that income the joint family cannot be assessed. In my opinion, that is the correct construction of S. 25A of the Act.

Mr. Setalvad further relied on the wording of S. 25A (2). He argued that where an order has been made as contemplated by cl. (1) of that section, the Income-tax Officer must make the assessment of the total income received by or on behalf of the joint family as such as if no separation or partition had taken place, and each member or group of members shall, in addition to any income-tax for which he or it may be separately liable and notwithstanding anything contained in sub-s. (1) of S. 14, be liable for a share of the tax on the income so assessed according to the portion of the joint family property allotted to him or it. It was argued that it was therefore contemplated by this sub-clause that when there was a rupture of the joint family tie, if the shares were not definitely allotted in individual property to individual members, the assessment must continue as before. The contention overlooks the important words found in the clause, namely "an assessment of the total income received by or on behalf of the joint family as such." The essence of the section is that the income must in the first instance be received by the joint family as such. Once it is so received it makes no difference whether the joint family exists or not on the date of the assessment. This section, in my opinion, clearly brings out, what was pointed out by the Privy Council in 69 I. A. 119,<sup>1</sup> that

the scheme of the section was to tax joint family income as a unit if it was received as such by the joint family, even though at the date of the assessment there may have been a partition. It seems to me therefore that there being nothing in Hindu law to prevent members of the joint family owning individual assets at certain stages when the joint family exists or when it is in the course of partition, in the present case as the businesses were individually allotted and worked by the members separately for their own benefit, as found by the tribunal, the income in question cannot be considered to be the income of the joint family. The question referred to the Court must therefore be answered in the negative. The Commissioner to pay the costs of the reference.

**Chagla J.** — I agree. Section 25A, Income-tax Act, does not create any new rights or obligations nor does it in any way affect the provisions of the Hindu law. The section merely sets up a machinery by which the income of a joint Hindu family, which was in existence in the accounting year but has become defunct in the year of assessment, can be computed and calculated. In Hindu law when there is severance of joint status the joint family ceases to exist as an entity although the properties are not partitioned. As far as the Income-tax Act is concerned the joint family, although its status has been severed, continues to exist as a unit or entity till all the properties belonging to the joint family are completely and finally partitioned. To my mind the scheme of S. 25A is very clear. It is only when not only the status is severed but also all the properties have been partitioned that the order contemplated by S. 25A (1) can be applied for and made, and till such an order is made, for the purposes of income-tax, the joint family continues to exist as a unit although its status may have come to an end. Sub-clause (2) provides for the mode of assessment after the order has been made. It provides that after the order has been made as contemplated by sub-cl. (1) the tax has got to be apportioned to the shares of the different members of the joint family but the tax has got to be assessed on the total income received by the joint family or on behalf of it. But what has got to be remembered is that under sub-s. (2) of S. 25A what has got to be assessed is *the total income of the joint family*. Therefore in every case the income-tax authorities have to ascertain what is the total income of the joint family. It is true that although the



joint family has ceased to exist in the eye of the Hindu law still it may continue in the eye of the Income-tax Act, and till all the properties have been partitioned the income received by the karta from the properties still not partitioned will still be the income of the joint family. But all the same it must be found as a fact that the joint family as recognised by the Income-tax Act has received the income which is sought to be assessed. Therefore, to my mind the question in this case resolves itself into a question of fact, viz., is the income of the business which according to the income-tax authorities is a part of the total income of the joint family and was assessed under sub-s. (2) income of the joint family or not? On this the clear and specific finding of fact is that after 30th July 1941 the three major sons and their family carried on their own businesses separately and they were the owners of those businesses.

Now Mr. Setalvad's contention is that once a joint family becomes disrupted till the final partition takes place all its assets must be deemed to be the assets of the joint family and all the income received must be deemed to be the total income of the joint family. Now in my opinion there is no warrant for that proposition. There is nothing in Hindu law to prevent the members of a joint family which has become disrupted from parting with the assets either to a stranger or to one of themselves. In the Privy Council case, 69 I. A. 119,<sup>1</sup> their Lordships were considering the case of a joint and undivided Hindu family which had merely divided some of its assets, and Sir George Rankin in delivering the judgment of the Board points out that there was no warrant in reading in S. 25A a prohibition that members of a joint and undivided Hindu family cannot part with some of their assets to a stranger or to one of themselves. I find even less warrant for reading in S. 25A a prohibition that members of a family which in Hindu law was joint and undivided but which has ceased to be a joint and undivided family cannot part with assets of that separated joint family either to a stranger or to one of themselves. I agree with the learned Chief Justice that the facts in the Patna case, 23 Pat. 68,<sup>2</sup> are practically undistinguishable from the facts before us. There the learned Judges found as a fact that the assessee whose case they were considering was no longer a joint and undivided Hindu family. They held that whereas the businesses had been partitioned the house pro-

perty and the jote lands had not been partitioned and they came to the conclusion that there was no completed partition but only a partial partition and they further held that such a partial partition came within the operation of S. 25A of the Act. The effect of their finding was that as there was not a complete partition but only a partial partition a Hindu family must be considered to be joint for the purposes of the Income-tax Act to the extent of those assets which had not been partitioned. In other words the Hindu family must still be considered as a unit for the purposes of the Income-tax Act to the extent the family had retained the property which had not been partitioned. To the extent it had parted with the assets the finding of the Court is clear that those assets can no longer be considered to be the assets of the family or forming part of total income of the family or that the family was liable to pay tax thereon under S. 25A (2). Under the circumstances I agree with the learned Chief Justice that we must answer the question referred to the Court in the negative, and the Commissioner should pay the costs of the reference.

D.R./D.H. *Answer in the negative.*

[Case No. 71.]

**A. I. R. (33) 1946 Bombay 333**

SEN AND GAJENDRAGADKAR JJ.

*Purshottam Trikamdas—Petitioner*

v.

*Emperor.*

Criminal Appln. No. 480 of 1945, Decided on 10th October 1945.

(a) Defence of India Rules (1939), R. 26—Restriction and Detention Ordinance (1944), S. 9—Authority directing detention must apply all possible care and attention to materials placed before it before making order of detention—Slight error or carelessness—Inference.

It is incumbent on the authority directing the detention of a person to apply all possible care and attention to the materials placed before it before making the order of detention; and even a slight error or evidence of carelessness would tend to show that the necessary amount of care and attention had not been bestowed in the examination and consideration of such materials by such authority. [P 336 C 2]

(b) Criminal P. C. (1898), S. 491 — Order of detention — Two interpretations possible — One favourable to applicant should be preferred.

Where possibly two interpretations can be put on the order under which a person applying under S. 491 is detained, the Court should be inclined to give preference to the interpretation which is in the applicant's favour. [P 336 C 1]

Cr. P. C. —

(46) Chitale, Preamble, N. 2.



*K. M. Munshi* — for Petitioner.

*C. K. Daphtary, Advocate-General and S. G. Patwardhan, Government Pleader* —  
for the Crown.

**Sen J.** — This is an application under S. 491, Criminal P. C., made by Mr. Purshottam Trikamdas, Barrister-at-Law, and an advocate of the original side of this Court, who is at present under detention in the Arthur Road Prison, Bombay, in accordance with an order passed by the Government of Bombay on 12th July 1945, under S. 9, Restriction and Detention Ordinance, 1944 (No. 3 [III] of 1944), continuing the operation of an order made by the said Government on 22nd December 1942, under R. 26, Defence of India Rules, directing his detention. The applicant is a member of the Indian National Congress and the Bombay Provincial Congress Committee. In his application he has stated the following facts. On 19th November 1942, he was arrested in connection with the Congress movement following the resolution of the All-India Congress Committee dated 8th August 1942. On 2nd December 1942, an order was made against him under R. 26, Defence of India Rules, and he was transferred for detention to the Lahore Central Jail. On 22nd December 1942, there was a further order of the Government of Bombay under which the Inspector-General of Prisons, Punjab, was authorised to detain him in any jail in the Punjab. On 19th October 1943, he was brought back from the Punjab and since 7th November 1943, he has been kept in detention in the Yeravda Central Prison. Some time in February 1944, after the Restriction and Detention Ordinance (Ordinance 3 [III] of 1944) had been made, he was informed, in accordance with the provisions of S. 7 of the said Ordinance, of the grounds of his detention. On 12th July 1944, an order was made by the Government of Bombay, in exercise of the powers conferred on them by the proviso to S. 9 of the said Ordinance, to the effect that after a further consideration of all the circumstances of the case the said Government was pleased to direct that the order of detention made on 22nd December 1942, should continue in force. Similar orders were made also on 9th January 1945, and on 22nd July 1945. Latterly he has been brought from the Yeravda Central Prison to the Arthur Road Jail in Bombay. A few days after the petition had been filed, the applicant filed an affidavit alleging certain other facts which had not been stated in the

original petition. They included statements regarding his having been kept in solitary confinement in certain jails in the Punjab, and it was asserted that the grounds which were communicated to him by Government as the grounds of his detention, which had been characterised in the petition as utterly vague, had been put forward falsely and *mala fide*. One of the grounds on which the application is based is that in the altered situation in India after the war, and after the Indian National Congress as well as the All-India Congress Committee and other committees of the Congress had become legal organisations and members of the Working Committee of the Congress had been released, there was no further ground for keeping the petitioner any longer in detention. Mr. G. G. Drewe, I.C.S., Secretary to the Government of Bombay, Home Department, has made an affidavit in reply to the allegations made on 3rd October 1945, and he has stated therein *inter alia* that the orders in question, particularly the orders with regard to the extension of the order made on 22nd December 1942, were made after the Governor of Bombay had agreed that the petitioner was to be kept in further confinement, that the petitioner's detention was and is necessary with a view to preventing him from acting in a manner prejudicial to the public safety and to the maintenance of public order and that His Excellency the Governor was personally satisfied that the petitioner must be detained accordingly.

Several contentions have been urged before us in support of the petition, but it seems to us that we are really concerned with only one of them; and that is that the order of 22nd December 1942, was superseded by an order made by the Government of Bombay on 19th October 1943, so that the earlier order must be deemed to have ceased in its operation, and that if that was so, it was not possible for the Local Government, by passing the orders that were made on 12th July 1944, 9th January 1945, and 12th July 1945, to revive it or to keep it in operation after 19th October 1943. The order that was made on 22nd December 1942, reads thus:

"Whereas the Government of Bombay is satisfied with respect to the person known as Purshottam Trikamdas that with a view to preventing him from acting in a manner prejudicial to the defence of British India, the public safety, and maintenance of public order, and the efficient prosecution of the war, it is necessary to make the following order:—

And whereas the consent of the Government of the Punjab has been obtained to the detention of



the said Purshottam Tricumdas in a jail in the Punjab ;

Now, therefore, in exercise of the powers conferred by R. 26, Defence of India Rules, and in supersession of the order No. S. D. V. VI-2956 dated 2nd December 1942, the Government of Bombay is pleased to direct that the said Purshottam Tricumdas shall be detained in any jail in the Punjab appointed by the Inspector-General of Prisons, Punjab."

The following is the text of the order dated 19th October 1943:

"Whereas the Government of Bombay is satisfied with respect to the person known as Purshottam Tricumdas that with a view to preventing him from acting in a manner prejudicial to the public safety and the maintenance of public order, it is necessary to make the following order :

Now, therefore, in exercise of the powers conferred by R. 26, Defence of India Rules, and in supersession of its order No. S. D. VI-3595 dated 22nd December 1942, the Government of Bombay is pleased to direct that the said Purshottam Tricumdas shall be detained in the Yeravda Central Prison until the further orders of the Government of Bombay."

It has been contended by the learned Advocate-General that the original order of 22nd December 1942, was an order passed under two parts of R. 26, Defence of India Rules, namely, cl. (b) of sub-r. (1) and sub-r. (5A). Under cl. (b) of sub-r. (1) the Central, or the Provincial Government, if satisfied with respect to any particular person that with a view to preventing him from acting in any manner prejudicial to the defence of British India, the public safety, the maintenance of public order, His Majesty's relations with foreign powers or Indian States, the maintenance of peaceful conditions in tribal areas or the efficient prosecution of the war, it is necessary so to do, may make an order directing that he be detained. Under sub-r. (5A), where the power to determine the place of detention is exercisable by the Provincial Government, the power of the Provincial Government includes the power to determine a place of detention outside the Province. The contention of the learned Advocate-General is that the order of 22nd December 1942, directed not only the detention of the applicant, but also that he be detained in a jail in the Punjab, that the order of 19th October 1943, was necessitated merely because it was found necessary or expedient to transfer the applicant from the Punjab to the Yeravda Central Prison, and that, therefore, it cannot be said that the whole order of 22nd December 1942 was superseded or that there was any intention on the part of the Government to abrogate or cancel the same, the object of the second order merely being to transfer the applicant in

exercise of the powers conferred on the Provincial Government by R. 26 (5). That sub-rule states that so long as there is in force in respect of any person who has been ordered to be detained an order of his detention, he shall be liable to be detained in such place, and under such conditions as to the maintenance, discipline and the punishment of offences and breaches of discipline, as the Central Government or the Provincial Government, as the case may be, from time to time determine.

It is argued that it being perfectly within the competence of the Provincial Government to determine from time to time the places where the applicant was to be detained, nothing more was sought to be done by the order of 15th October 1943, and that though the expression "in supersession of its order," etc., occurs in the said order, it should not be interpreted as a fresh order taking the place of the earlier order. There is no doubt that having passed an order under R. 26 (1) (b) it was open to the Provincial Government to make an order that the applicant should be transferred from the jail where he had been detained for the time being to another jail; and if that was done, it would not have been possible to say that the original order of detention has been superseded. We feel, however, that in this case it is not possible to take that view. In the first place, if the object had been as contended by the Advocate-General, we should in the preamble to the order, have got some reference to the power of Government under R. 26 (5), or to the considerations which apply in the application of that sub-rule. Instead of that, however, we find that the preamble to the order of 19th October 1943, states that "the Government of Bombay is satisfied with respect to the person known as Purshottam Triikumdas that with a view to preventing him from acting in a manner prejudicial to the public safety and the maintenance of public order, it is necessary to make the following order." This preamble has reference to the requirements of R. 26 (1) (b) and not to the objects of sub-r. (5). Secondly, there is no specific reference to sub-r. (5) at all. Besides, in the statement of grounds in the preamble we find that out of the four grounds stated in the order of 22nd December 1942, namely, the defence of British India, the public safety, maintenance of public order and the efficient prosecution of the war, two have been dropped and the reference is merely to the other two, namely, the public safety and the maintenance of



public order. The petitioner has alleged that he was brought to the Yeravda Central Prison on some representation that had been made to Government by his wife.

It would, therefore, appear that before making the order of 19th October 1943, Government considered the facts concerning the applicant afresh and thought it necessary to pass a new order. If that was so—and the form of the order justifies such a conclusion—there was an actual supersession of the order of 22nd December 1942. In terms the latter order supersedes not only the order as to the place where the applicant was to be detained, but also the whole of the earlier order. In this connexion it is instructive to refer to an order made by the Government of Bombay on 2nd December 1942, which is referred to in the order of 22nd December 1942, as having been superseded, and it has not been contended on behalf of Government that in spite of such language the order of 2nd December 1942, has not been superseded and that order still continues to be in force. In a case of this nature, where the circumstances are nearly all in favour of the interpretation for which the applicant has contended, and where possibly two interpretations can be put on the order of 19th October 1943, we should be inclined to give preference to the interpretation which is in the applicant's favour.

It may be useful to point out that this is not the first instance in which this Court has been enabled to come to the assistance of a detenu under the Defence of India Act or Ordinance 3 [III] of 1944 because the order under which the detenu purported to have been detained was invalid on the face of it or in view of certain patent or obvious circumstances. See, for instance, the cases in 47 Bom. L. R. 42<sup>1</sup> and 47 Bom. L. R. 675.<sup>2</sup> In 1944 F. C. R. 57,<sup>3</sup> the Federal Court remarked that where the recital of a duly authenticated order of detention contained a statement as to the existence of the condition necessary to the valid making of that order, such a recital will in the normal case, in the absence of any evidence as to its inaccuracy, be accepted by a Court as establishing that the necessary condition was fulfilled, and that "the presence of the

recital in the order will place a difficult burden on the detenu to prove admissible evidence sufficient to establish even a *prima facie* case that the recital is not accurate." This view was approved by their Lordships of the Privy Council, who also referred in this connexion to the rule of presumption enacted in sub-s. (2) of S. 1, Defence of India Act, a provision which has been reproduced in sub-s. (3) of S. 10 of Ordinance 3 [III] of 1944. The difficult position in which a detenu is placed in such circumstances, therefore, makes it incumbent on the authority directing the detention to apply all possible care and attention to the materials placed before it before making the order of detention; and even a slight error or evidence of carelessness would tend to show that the necessary amount of care and attention had not been bestowed in the examination and consideration of such materials by such authority. Such a conclusion would indeed be regrettable in a case in which the executive is given almost unlimited power and discretion "to deprive His Majesty's subjects of their liberty without the intervention of the Courts of law," to use the words used in a case recently decided by this Court: 47 Bom. L. R. 675.<sup>2</sup> We feel constrained to observe that such a conclusion is not excluded in the circumstances of the present case.

Apart, however, from this consideration, in view of the conclusion we have arrived at that the order of 22nd December 1942, must be deemed to have come to an end and lost all operation by virtue of the order dated 19th October 1943, it is obvious that it was not in existence either on the date on which Ordinance 3 [III] of 1944 was made or promulgated, namely, 15th January 1944, or on any of the subsequent dates on which orders were made purporting to be under the proviso to S. 9 of the said Ordinance and purporting to continue the operation of the order of 1942. It cannot, therefore, be said that the present detention of the applicant is justified by any order or orders validly passed by Government. The application will, therefore, be allowed, and we direct that the petitioner be set at liberty forthwith. In view of the opinion we have arrived at concerning the merits of the contention with which we have dealt, it becomes unnecessary for us to mention or to discuss the merits of any of the other contentions which were raised in support of the petition. We make no order as to costs.

D.S./D.H.

**Application allowed.**

1. ('45) 32 A. I. R. 1945 Bom. 212 : I.L.R. (1945) Bom. 317 : 219 I. C. 392 : 47 Bom. L. R. 42 (F. B.), Emperor v. Keshav Gokhale.
2. ('46) 33 A. I. R. 1946 Bom. 32 : 47 Bom. L. R. 675, Emperor v. Bajirao Yamanappa.
3. ('44) 31 A. I. R. 1944 F. C. 24 : I. L. R. (1944) Kar. F. C. 2 : 1944 F. C. R. 57 : 212 I. C. 472 (F. C.), Keshav Talpade v. King-Emperor.



[Case No. 72.]

**A. I. R. (33) 1946 Bombay 337**

KANIA AG. C. J. AND CHAGLA J.

*Chaturbhuj Vallabhdas — Assessee*

v.

*Commissioner of Income-tax.*

Income-tax Reference No. 3 of 1945, Decided on 18th September 1945.

(a) Income-tax Act (1922), S. 4—'Charitable purpose' — Use of word 'charity' without any qualification or limitation indicates such purpose.

The word 'charity' without any further qualification has a recognised meaning in law. It amounts to a general charitable intention for objects well recognised as charitable in law. It is not an indefinite word so as to include public or private charity or benevolent or philanthropic objects. The words 'charity', 'charitable objects' or 'charitable purpose' are defined in various sections of different Acts of the Indian Legislature and in all of them the idea of public benefit is clearly involved. One of the tests to be applied is whether the gift in question is valid in law. If the gift to charity is valid it is a relevant factor to be considered in deciding if it is a charitable purpose within the meaning of the Income-tax Act. The word 'charity' used generally gives rise to a good bequest or gift. The word 'charity' if used generally or without any qualification or limitation falls within the definition of 'charitable purpose' found in S. 4.

[P 337 C 2 ; P 338 C 1, 2]

A clause in a Gujarathi will was to this effect, "my trustee shall utilise my residuary property for such acts of charity as he deems proper . . ." and the English word 'charity' was especially used by the Gujarathi testator :

*Held* that the bequest was valid in law and it fell within the definition of 'charitable purpose' in S. 4 : ('44) 31 A.I.R. 1944 P. C. 88, *Expl.*; ('39) 26 A.I.R. 1939 P. C. 208, *Foll.*; 23 Bom. 725 (P.C.) and 31 Bom. 583, *Ref.* [P 338 C 2; P 340 C 1]

(b) Income-tax Act (1922), S. 4 (3) (i)—Direction in will to trustees to utilise three-fourths of residuary property for charity — Property is held in trust 'wholly' for charitable purpose.

A clause in a will was to this effect: "My trustee shall utilise my residuary property for such acts of charity as he deems proper. But if my trustee thinks fit, he can give a one-fourth part of my residuary property to all . . . my daughters:"

*Held* that residuary estate was recognised as property in law and so, a clearly defined portion of it was equally 'property' within the meaning of law. In this case the direction in the will related to three-fourths of the residuary estate and hence this residuary property was property held in trust 'wholly' for religious or charitable purpose within cl. (i) of S. 4 (3) : ('30) 17 A.I.R. 1930 P. C. 226, *Expl.* [P 339 C 1, 2]

*Sir Jamshedji Kanga and R. J. Kolah —*  
for Assessee.

*M. C. Setalvad —* for Commissioner.

**Kania Ag. C. J.**— This is a reference under S. 66 (1), Income-tax Act, 1922, by the Tribunal of Income-tax, inviting the Court's opinion on the following question :

"Whether in the circumstances of the case and on a true construction of cl. 15 of the will of the late Gordhandas Khetsey the income from the deceased's residuary estate is income from property held in trust or other legal obligation, wholly for religious or charitable purposes so as to be exempt from assessment under S. 4 (3) (i) of the Act ?"

The material facts are few. Gordhandas Khetsey made his will dated 30th April 1934, and died on 27th February 1935. He left a large estate. Clause 15 of the will runs as follows :

"My trustee shall utilise my residuary property for such acts of charity as he deems proper. But if my trustee thinks fit, he can give a one-fourth part of my residuary property to all or one or more than one of my daughters or to the sons of my daughters."

In the statement of case it is stated that the residuary estate consists of immovable properties in Bombay and its suburbs and also securities. The taxing authorities sought to tax the whole income of the residue on the ground that it did not fall under S. 4 (3) (i) Income-tax Act. Before the Assistant Commissioner it was in fact found that a certain amount was spent for religious and charitable purposes and he permitted the amount to be exempted from tax. Except for that, he directed that the balance should be taxed at the maximum rate. The assessee appealed. The Commissioner did not appeal against the order of the Assistant Commissioner. Before the Tribunal it was argued that the word "charity" used in cl. 15 of the will was not covered by the definition of "charitable purpose" found at the end of S. 4 of the Act. That definition runs as follows :

"In this sub-section 'charitable purpose' includes relief of the poor, education, medical relief, and the advancement of any other object of general public utility."

It was contended on behalf of the Commissioner that the word 'charity' was indefinite and may include public or private charity, and also benevolent or philanthropic objects. Therefore, the income of the residue was not exempt from taxation under the Act. This line of reasoning is found in the judgment of the Tribunal. The assessee asked the abovementioned question of law to be referred to the Court and the matter has thus come before us.

In my opinion the meaning put on the word "charity" (used in cl. 15 of the will) in the judgment of the Tribunal is incorrect. "Charity" without any further qualifications has a recognised meaning in law. It amounts to a general charitable intention for objects well recognised as charitable in law. It is to be noticed in this case that the original will is in Gujarati but the testator has deli-



berately used the word "charity" (an English word) in writing out cl. 15. This may be due to the fact that the Gujarati word "*dharam*" has been held to be void for uncertainty. We are not concerned in this case with what the Gujarati equivalent may be, or what effect can be given if a Gujarati word was used. Taking the word "charity" as used in cl. 15 I see no justification for the conclusion of the Tribunal that it would include benevolent or philanthropic objects or it may be private charity. The expression "private charity," strictly speaking, is a misnomer. The words "charity" or "charitable purpose" or "charitable object" are defined in various sections of different Acts of the Indian Legislature. In all of them the idea of public benefit is clearly involved.

It was sought to be argued on behalf of the Commissioner that in the present case by the use of the word "charity" without the word "public" the use for public was not necessarily indicated. In this connection Mr. Setalvad relied on the judgment of the Privy Council in 47 Bom. L. R. 233.<sup>1</sup> In that case the Court was considering whether the objects of the association were charitable or not. It must be noted that the word "charity" was not used as one of the objects of the association. Their Lordships emphasised that in the definition given in the Income-tax Act the word "public" was used and it was of importance. From that observation it was sought to be argued on behalf of the Commissioner that unless the word "public" was used in connection with the objects mentioned in the settlement, the same was not within the meaning of "charitable purpose" as defined in the Act. In my opinion that argument is unsound. Their Lordships were only considering the particular objects of the association before them, and in considering the different objects emphasized the view that if the use was for the benefit of the public or a section of the public it was an important factor to be considered in determining whether the object was charitable or not. In my opinion it is misreading that case to say that when in a settlement the word "charity" is used without any qualifications or limitations it is not covered by the definition found in the Income-tax Act, unless the word "public" is expressly used in connection with "charity." I would put the position

in a different way. The word "charity," if used generally, necessarily connotes the use for the public. Therefore when the word "charity" is used, there is nothing to include in it objects of private benefit only. In my opinion, the word "charity," if used generally or without qualifications or limitations, falls within the definition of 'charitable purpose' found in S. 4 of the Act. One of the tests to be applied is whether the gift in question is valid in law. This argument was supported by the observations of the Privy Council in 66 I. A. 241.<sup>2</sup> In the course of the judgment it was observed as follows (page 251) :

"Their Lordships are in agreement with this view and see nothing in the Income-tax Act to discharge the Court of its responsibility in coming to a finding as to the character of the object of a trust—a matter which bears directly upon its validity."

Therefore if a gift to charity is held valid according to the laws of India, it is a relevant factor to be considered in deciding if it is a charitable purpose within the meaning of the Act. 23 Bom. 725<sup>3</sup> and 31 Bom. 583<sup>4</sup> show that the word "charity," used generally, gives rise to a good bequest or gift in India. In my opinion, therefore, the construction put upon that word in cl. 15 of the will by the Tribunal is not correct. The word "charity" used generally and without limitations by itself is sufficient to fall within the definition of charitable purpose given in the Income-tax Act and the argument of the Commissioner on this point must be rejected. It was next argued that in the present case by cl. 15 no specific property is set apart for charity and therefore the case is covered by the second part of S. 4 (3) (i) which runs in these terms :

"4. (3) This Act shall not apply to the following classes of income :—(i) Any income derived from property held under trust or other legal obligation wholly for religious or charitable purposes, and in the case of property so held in part only for such purposes, the income applied, or finally set apart for application, thereto."

It was argued that in the present case the residuary estate was not property held in trust or for other legal obligation 'wholly' for religious or charitable purpose. At most therefore, only such portion of the income as is proved to be applied for such purposes should be exempted from tax. Mr. Setalvad

1. ('44) 31 A. I. R. 1944 P. C. 88 : I. L. R. (1945) Bom. 153 : I. L. R. (1945) Kar. P. C. 17 : 71 I. A. 159 : 220 I. C. 197 : 47 Bom. L. R. 233 (P.C.), All India Spinners Association v. Commissioner of Income-tax.

2. ('39) 26 A. I. R. 1939 P. C. 208 : I. L. R. (1939) Lah. 475 : I. L. R. (1939) Kar. P. C. 337 : 66 I. A. 241 : 182 I. C. 882 (P.C.), Tribune Press Trustees, Lahore v. Income-tax Commissioner, Punjab.

3. ('99) 23 Bom. 725 : 26 I. A. 71 : 7 Sar. 543 (P.C.), Runchordas v. Parvatibai.

4. ('07) 31 Bom. 583, Trikumdas Damodar v. Haridas.



relied on the judgment of the Privy Council in 4 I. T. C. 486.<sup>5</sup> In that case a property was settled on trust under a deed dated 25th August 1917. The objects of the trust were further explained and extended by another deed dated 25th November 1922. An examination of the documents showed clearly that the income of the trust property was applicable to purposes many of which were neither religious nor charitable. On the construction of the documents their Lordships held that the income of the property so settled was not held in trust wholly for religious or charitable purposes. There can be no doubt on that point. Their Lordships then observed as follows (p. 487) :

"Nor is it suggested that any part of the property is set aside for any charitable or religious purposes, so that it can be identified as appropriated exclusively to such purposes, . . . ."

Relying on that observation and the statement in the case here that the residuary estate consists of immovable properties in Bombay and its suburbs as well as securities it was argued that the assessee cannot point out any particular property which was set apart exclusively for charitable purposes, and therefore, the case was not covered by Part 1 of S. 4 (3) (i) of the Act. In my opinion, this argument is unsound. What their Lordships of the Privy Council were concerned with was a case in which several objects were mentioned in a deed to which income could be applied. It was not stated in the deed what portion of the income was to be applied for the purpose set out in a particular clause. The result was that the trustees could use any portion of the income or the whole income for either charitable or non-charitable purposes. In such circumstances it was obvious that the Board had to hold that exemption could be granted only in respect of what was actually used for charitable purposes. The observation quoted above has to be read in the light of those facts. Their Lordships had under those circumstances to state that as it could not be identified that any part of the property was appropriated exclusively to charitable purposes Part 1 of cl. (i) of sub-s. (3) could not be applicable. I am unable to read that observation as meaning that the trustees must point out a particular property (i. e. a house, or a security giving the number) to bring into operation Part 1 of the clause. Residuary estate is recognised as property

in law. If so, a clearly defined portion of the residuary estate is equally "property" within the meaning of law. In the present case by cl. 15 the testator had directed his trustee to utilise three-fourths of the income of the residuary estate for charity. That clearly falls within Part 1 of cl. (i) of sub-s. (3) of S. 4 of the Act. As regards the remaining one-fourth part the trustee is given the option to spend it either for charity or to give the same over to one or more of the testator's daughters or the sons of his daughter. To that part the second portion of cl. (i) may be applied. We are not concerned with that point as it is agreed between the parties that the question before the Court should be limited only to three-fourths of the income of the residue. In my opinion that income is clearly covered by S. 4 (3) (i), Part 1. That portion of the residue is held wholly for charitable purposes within the meaning of the Income-tax Act and is completely exempt from tax. Our answer to the question submitted for the Court's opinion (limited to the three-fourths of the income of the residuary estate) is in the affirmative. The Commissioner to pay the costs of the reference.

**Chagla J.** — I agree. In my opinion when an assessee claims exemption under S. 4 (3) (i) on the ground that the income is derived from property held under trust or other legal obligation wholly for religious or other charitable purposes, the responsibility is cast upon the Court to determine and decide whether such trust is a valid one. In the case in 66 I. A. 241,<sup>2</sup> the trustees of the Tribune claimed exemption under sub-s. (3) of S. 4 on the ground that the income was spent for the advancement of an object of general public utility and their Lordships of the Privy Council there pointed out that it was the duty of the Court to determine what the character of the object was ; whether in the opinion of the Court the object was such as would advance public utility. In the case before us the testator has not indicated the object of the charity. All that he has stated is that the trustee should spend the income of his residue for such acts of charity as he deemed proper. Now, in my opinion, considering the fact that this is the will of a Gujarati speaking person writing in the Gujarati language, it is clear that the intention of the testator, by using the word "charity" which is an English expression, was to indicate and disclose a dominant and overriding charitable intention which was not the case before the Privy Council, to

5. (1930) 17 A. I. R. 1930 P. C. 226 : 58 Cal. 398 : 26 N. L. R. 256 : 57 I. A. 260 : 125 I. C. 879 : 4 I.T.C. 486 (P.C.), Mahomed Ibrahim Raza Malak v. Commissioner of Income-tax, Nagpur.



which I have referred. Their Lordships cast a duty upon the Court to determine whether the printing of the paper was for the purpose of public advancement. Similarly it is our duty to determine whether the bequest contained in cl. 15 is a valid charitable bequest. It is clear on the authorities, and I need not refer to them, that if a dominant charitable intention is disclosed although the object of the charity is not indicated the Court will not permit the charitable bequest to be defeated but if necessary may administer the trust and undertake the control of the trust. Therefore in my opinion this is a good charitable bequest, and if it is a good charitable bequest, it falls within the terms of S. 4 (3) (i) and is a trust for charitable purposes. I, therefore, agree that the answer to the question referred to the Court should be in the affirmative and the Commissioner should pay the costs of the reference.

D.R./D.H.

*Reference answered.*[*Case No. 73.*]**A. I. R. (33) 1946 Bombay 340****BLAGDEN J.***Mariambai — Plaintiff***v.***Abdul Hamid Suleman and others**— Defendants.*

O. C. J. Suit No. 1319 of 1943, Decided on 3rd July 1945.

(a) Civil P. C. (1908), S. 132 — 'Personal appearance in Court.'

The phrase 'personal appearance' is synonymous with 'attendance': ('42) 29 A. I. R. 1942 Cal. 143, *Rel. on.* [P 341 C 1]

(b) Civil P. C. (1908), S. 132 — 'Personal appearance in Court' — Woman conveyed to Court building completely veiled in burkah and examined in private room cannot be said to make personal appearance in Court.

A woman who is conveyed to the Court building in some suitably curtained vehicle and then escorted to a private room in that building, suitably and completely veiled in a burkah or some other garment, and is examined in a private room cannot be said to be making "a personal appearance in Court." [P 342 C 1]

*K. A. Somjee — for Plaintiff.**R. J. Kolah and M. L. Manecksha — for Defendants 1, 2, 3, 6; and 4 and 5 respectively.*

**Judgment.**—This is a summons by the plaintiff in the suit for her examination *de bene esse* on two grounds: first, that she is a woman who, according to the custom and manners of the country, ought not to be compelled to appear in public; and, secondly, on the ground that she is seven months gone in pregnancy. I need say nothing

about the merits of the case, except that it is obvious from the nature of the plaint that the plaintiff herself is a most material—I might almost say vital—witness, which makes it very desirable that, if possible, her evidence should be heard by the learned Judge who tries the case himself. I shall deal first with the second of the two grounds on which the present summons is based. The defendants have adopted what seems to me a very reasonable attitude in this case, and they say that they are quite prepared that the hearing of the suit should be adjourned for, say, three months, or such other period as will enable the plaintiff to have completely recovered from the effect of giving birth to the present child and not yet to be concerned with producing another. That would completely meet the case except for one fact, which is that a child birth, at best, is a transaction entailing a certain amount of danger, and it may be that the plaintiff may desire to be examined *de bene esse* on the ground that she may possibly be permanently incapacitated from giving evidence as a result of what she is about to do in two months' time. I should be prepared to make an order on this ground if the plaintiff thinks it worth while to have it. I would give her, say, three weeks to consider whether she would like to be examined *de bene esse* in view of the risk of child birth. If she decides to take the order for *de bene esse* examination on that ground, it would be on the terms that if at the trial the plaintiff is still alive, her deposition is not to be read without the leave of the trial Judge. If, on the other hand, she unfortunately dies and the suit is continued by her personal representatives, then of course her deposition will be available for what it is worth. But the other ground, on which this order is sought raises a question of much more general importance and one on which apparently there is no reported decision of this Court, though it has been considered at least once in Allahabad and Madras and on a number of occasions in Calcutta. Section 132 (1), Civil P. C., says:

"Women who, according to the customs and manners of the country, ought not to be compelled to appear in public, shall be exempt from personal appearance in Court."

It is interesting to compare the wording of that section with that of O. 26, R. 1, which empowers the Court to issue a commission for the examination of any person resident within the local limits of its jurisdiction who is exempted under the Code from "attending



the Court." In 56 Cal. 865<sup>1</sup> Lort-Williams J. took the view that "personal appearance in Court" means a different thing from "attending in Court" and that a woman cannot be said to be "personally appearing" in Court when she is in a palki, or veiled completely in a burkha, or otherwise so enclosed that no part of her anatomy is visible to the public gaze. If the matter were *res integra*, I think I should agree with the learned Judge, because the Legislature having used two different expressions the Legislature presumably intended to convey two different shades of meaning; though this view does involve this serious difficulty that in the very next section to S. 132, namely, S. 133, the Legislature has used the words "personal appearance" obviously as synonymous with "attendance." Lort-Williams J. however appears to be in a minority of one among the learned Judges in this country who have considered this question, because in all the other cases which are very fully reviewed in the last reported case, a decision of Edgley J. in I.L.R. (1941) 2 Cal. 155,<sup>2</sup> the two phrases have been considered synonymous, and I think this body of authority is so strong that I must regard it as settled that they are. That, however, does not conclude the matter. I have to ask myself what women, according to the customs and manners of this country, "ought not to be compelled to appear in public," and if so whether the plaintiff has satisfied me that she is one of them. The matter stands thus: I am entitled to take judicial notice of the fact that among the Muslims and some other communities a considerable number of women observe purdah, some less strictly than others: but also that women of the plaintiff's community — she is a Kutchi Memon — often do attend Court (veiled) and give evidence. It is common ground that the plaintiff here does observe purdah, but it is disputed how strictly she does so. Her husband, who has made the only affidavit in support of the summons, deposed that she "has never appeared in public." That cannot be literally true. Strictly construed, it means that she has never, since the day of her birth, left the place of her birth. Of course, that cannot be what the deponent intends to convey. What, I think, he means is that she has never exposed herself to the

public gaze, that if and when necessity compelled her to go out into the public street, she has always gone as completely covered as the circumstances reasonably permitted, and that she did not, without necessity, go in public places. As against that, it is not disputed that she attended this Court on one occasion, when the plaint was sworn, and she attended two different offices in this Court, that of the Interpreter and that of the Officer before whom she swore her plaint. It has been pointed out by Mr. Somjee that Edgley J. considered a very similar point in the case to which I have just referred, and what is more, in the two earlier Calcutta cases similar facts have been considered. For example, in the earliest of them, 26 Cal. 651<sup>3</sup> Trevelyan J. said (p. 651n):

"... I should be exceedingly careful before I forced into the public gaze a woman who may have gone outside the *purdah* either by way of experiment or otherwise. Many a woman may desire to taste the sweets of unsecluded life and have gone out of the *purdah*, and may desire to go back. Because a woman may once or twice have gone outside the *purdah* is the Court to keep her outside?"

The mere fact that the plaintiff has attended this Court, possibly by mistake as to what she ought to do—but I do not feel at all convinced of that—cannot, in itself, compel me to refuse her the relief which she now seeks. The question, however, remains, whether on this evidence, and in the face of S. 132, I am necessarily bound to make an order for her examination either *de bene esse* or on commission merely on the ground that she is a strict observer of purdah. Such an order has been made on that ground by this Court in one case which has not been reported but the record of which has been produced to me, and Mr. Somjee tells me that he is informed by his professional clients, the solicitors concerned, that it was contested; but I do not know what the facts on that occasion were. It is, as I say, eminently desirable, if at all possible, that the learned Judge who tries the case should hear this lady. Even if it is not possible to observe the lady's countenance while she gives her evidence, he will at least have some opportunity of observing her demeanour for himself, as for example, noting the hesitancy or lack of hesitancy with which she answers the questions put to her. Should I by refusing to make an order for her examination on commission be compelling her to appear in public? The answer is, I think,

3. ('92) 26 Cal. 651n, *Chamatkar Mohiney v. Mohesh Chunder*.

1. ('29) 16 A. I. R. 1929 Cal. 528 : 56 Cal. 865 : 121 I. C. 635, *Bilasroy Serowgee, In re*.

2. ('42) 29 A. I. R. 1942 Cal. 143 : I. L. R. (1941) 2 Cal. 155 : 199 I.C. 150, *Kissen Lal v. Purshotam Das*.



"No." Nothing that I say now is to prejudice in any way any application she may choose to make to the trial Judge to examine her himself at her own place of residence, or, if he is not willing to do that, in his private Chamber. The question does not seem to have been before considered whether the expression "in Court" in S. 132 means "in the Court room" i. e., the room in the Court building where the Court sits in public, or whether it includes any part of the Court building. In this connection Mr. Somjee pertinently referred me to S. 133, which provides for the exemption of persons of exalted rank from personal appearance in Court, in which, I suppose, undoubtedly the words "in Court" mean "in the Court building." If a person is exempted on the ground of rank from attending in Court, I could not, I presume, compel him to appear in my private Chamber, but I do not wish to express any positive opinion on that point. However that may be, I do not think (apart from the authorities) that a woman who is conveyed to the Court building in some suitably curtained vehicle and then escorted to a private room in that building, suitably and completely veiled in a burkah or some other garment, and is examined in a private room, could be said to be making, "a personal appearance in Court." Literally, she would not be doing so if she were conveyed suitably veiled into the Court room. Granted, however, that on a true construction of the section she would be doing so, I see no reason to extend that construction still further, and apply it to an examination of a veiled woman in the privacy of a Judge's Chamber. There she will be, even to the Judge not an observable form, but only an observable voice. It is also open to doubt whether a private room where the Judge can hear her evidence is "Court" at all. But even if it is, and if, contrary to my own belief, it would really offend the plaintiff's ideas of modesty to attend in that room, it will still be open to the plaintiff, if she can, to persuade the learned trial Judge to proceed to her place of residence to take her evidence. The further point which requires to be noticed is that in many, though not all, of the cases to which I have been referred, the person it was desired to exempt from personal appearance on the ground that she could not be compelled to come to Court was not a party but a mere witness. A witness, in the ordinary course, is compelled to come to Court because a witness summons is served on him or her and he or

she can be sent to jail if he or she does not obey the summons; but no such summons will be issued on the plaintiff if she cannot get the Judge to examine her privately, either in her own place of residence, or in the Judge's private Chamber. Nothing will compel her to give evidence at all. At most, she will lose her case, but if she chooses to lose her case rather than to have the Judge hear her voice, that is her affair. No compulsion is put on her at all.

To sum up, then, assuming—about which I am far from satisfied—that the plaintiff is a person who observes purdah so strictly that she would regard it as a violation of purdah to appear in a public Court even completely veiled in a burkah, still she can give her evidence to the learned trial Judge either in his Chamber or at her residence, if he is prepared to go there. If she is not a person who observes purdah so strictly as that, then I think she is not, within the meaning of S. 132, "a woman who ought not to be compelled to appear in public," assuming that she can be said to appear in public at all if she merely goes into a public place completely shrouded from the public gaze. The order, therefore, I propose to make is this: The plaintiff to be at liberty to take an order for her examination *de bene esse* under O. 18, R. 16, if she so desires at any time within the next three weeks on the terms that her deposition, if she is alive at the hearing, be not read on behalf of the plaintiff without the leave of the learned trial Judge. If the plaintiff does not take up that order, then no order except that the cost of this application be reserved to the learned trial Judge. Counsel certified. Liberty reserved to the plaintiff to make any application to the learned trial Judge she may desire for her examination privately by him either in his Chamber or at her residence or otherwise.

D.S./D.H.

*Order accordingly.*

[Case No. 74.]

**A. I. R. (33) 1946 Bombay 342**

CHAGLA J.

*Abdul Karim Adenwalla — Plaintiff*  
v.*Rahimabai and others — Defendants.*

O. C. J. Suit No. 1565 of 1942, Decided on 28th June 1945.

(a) Muhammadan law — *Wakf-alal-aulad* — Nature and essentials of.

A wakf-alal-aulad is a method whereby a Mussalman can make provision for the maintenance and



support of his family and descendants. Under ordinary law such a trust would be bad as offending against the law of perpetuity. But there is an exception in the case of Mussalmans which is to be found in the Mussalman Wakf Validating Act, 1913. Under that Act, a Mussalman can tie up his property in perpetuity for the maintenance and support of his family, children and descendants provided he makes a provision that the ultimate benefit goes to a charitable object recognised by the Muhammadan law as charitable and the charitable purpose is of a permanent nature. It is open to him to postpone benefit being conferred upon charity till the extinction of all his family and descendants. [P 344 C 1, 2]

(b) Muhammadan law — Wakf-alal-aulad — Deed of — Construction — Objects not charitable — Whole of trust property not given to charity as ultimate bequest — Provisions of Mussalman Wakf Validating Act (1913) not satisfied — Wakf held invalid.

In a wakf deed, a Muhammadan settlor directed that a portion of the income of the trust property should be spent for the following purposes which he considered as charitable according to Muhammadan law: (1) The marriage expenses of persons mentioned by him; (2) A sum of Rs. 200 to be paid every year each to not more than three persons belonging to the family of the settlor who might be poor and in need of money; (3) a sum of Rs. 300 to be spent amongst Sayyeds and Fakirs every year in the month of Ramzan; (4) a sum of Rs. 1000 to Rs. 1200 for feasting Cutchi Memons of his community on the day of the anniversary of his death:

*Held* (i) that objects (1), (3) and (4) were not charitable according to Muhammadan law.

[P 344 C 2; P 345 C 1]

(ii) though object (2) was charitable according to Muhammadan law, it was necessary to consider whether the charity selected by the settlor which was ultimately to be benefited was or was not of a permanent nature. It was not possible to say with any certainty that there would be any members of the family of the settlor in existence when the descendants of the settlor became extinct; and even if such persons existed, whether they would be poor and necessarily in need of money.

[P 344 C 2; P 345 C 1]

(iii) it was impossible to infer any general or dominant charitable intention on the part of the settlor in making the provisions under the deed.

[P 345 C 1]

(iv) as the net income of the trust property was about Rs. 16,000 and the alleged charitable provisions would hardly exhaust a very small proportion of the income, the whole of the trust property was not given to charity as ultimate bequest and accordingly the important provision of the Mussalman Wakf Validating Act, 1913, was not satisfied and the wakf deed was, therefore, not valid and proper.

[P 345 C 2]

(c) Muhammadan law — Wakf — Reservation of income in the income of trust property to settlor for his life for his absolute use and after his death for absolute use of his family — Wakf not within Wakf Validating Act, 1913 and is void as offending against rule of perpetuity.

A reservation of a life interest in the income of a trust property is a very different thing from securing to himself for his own maintenance and support the income of the trust property. The

difference in law between these two provisions is clear and of considerable importance. If what the creator of the trust reserves to himself is for his own maintenance, that is not transferable as property under the Transfer of Property Act, nor attachable under the provisions of the Civil Procedure Code. Whereas if he had reserved for himself a life interest, that provision would not attract to itself the provisions of S. 6, T. P. Act, or of S. 60, Civil P. C.

[P 345 C 2]

The Mussalman Wakf Validating Act, 1913, protects such wakfs where the settlor creates the trust for the support and maintenance of himself or of his family, children and descendants. Where the provision in a wakf-deed amounts to the reservation of the income of the trust property to the settlor himself for his life for his absolute use and after his death, to the absolute use of his family, children and descendants, and not for their support and maintenance, the wakf is not within the ambit of the above Act and is void and inoperative as offending against the rule of perpetuity.

[P 345 C 2; P 346 C 1]

(d) Muhammadan law — Wakf — Gift to charity *in præsentis* with direction not to spend on it during settlor's lifetime — Gift is valid if object is recognised as charitable.

There is nothing in Muhammadan law to prevent a Mussalman from creating a trust whereby he provides that after his death the trustees should spend a certain proportion of the income of the property on certain specified charitable objects. Such a provision would not amount to a provision for his descendants with an ultimate gift to charity. It is really a gift to charity *in præsentis* through the medium of a trust. Of course the charitable objects must be such as are recognised as good under the Muhammadan law.

[P 346 C 1]

*V. F. Taraporewalla and M. P. Laud*

— for Plaintiff.

*A. A. Peerbhoy and N. Kazi; M. M. Sheikh and Sir Jamshedji Kanga; and J. R. Vimalal and C. K. Daphtary, Advocate-General*  
— for Defendants Nos. 1, 2, 3, 8; 4, 5, 7; and 9 respectively.

**Judgment.** — The plaintiff has filed the suit for a declaration that the deed of wakf executed by Mahomed Moosa Adenwalla on 16th October 1928, is void and inoperative and that defendants 1, 2 and 3, who are the present trustees under that deed, hold the properties, the subject-matter of the trust, as trustees for the heirs of the deceased other than Fatmabai and Ebrahim Haji Ahmed Moosa. The wakf which was executed by Haji Ahmed Moosa purports to be wakf-alal-aulad, and what I have to determine is whether it is a good wakf within the meaning of the Mussalman Wakf Validating Act of 1913. The settlor recites his desire of making a wakf-alal-aulad in respect of his two immovable properties in order to provide himself and his children in the manner provided in the trust deed. He declares that he would be the first mutawalli or trustee under the deed and then he gives directions as to how the rents and profits of the two



properties are to be distributed. He directs the trustees first to pay the outgoings and then to pay the net balance of the income of the two properties to the settlor during his life for his absolute use; and then he directs that the trustee or mutawalli who is to come after him should, after his death, set apart 25 per cent. of the gross rents of the trust properties to meet expenses of heavy repairs and utilise the balance of the income in the following manner: (1) one-third share for charitable purposes according to the Muhammadan law which are mentioned specifically in the clauses that follow; (2) one-eighth of the balance to his widow and one-half of the remaining balance to his son Abdul Karim Haji Ahmed and his descendants; (3) one-fourth of the balance to his daughter Rabiabai; and (4) the remaining one-fourth to his daughter Rahimabai and her descendants.

The settlor further provides that if there be no descendants of any of his said children, the share of the income should be utilised for the same charitable objects which are subsequently mentioned in the deed and to which reference was made when he set apart one-third share of the balance of his income. Then in four clauses the settlor deals with what he considers to be charitable objects under the Muhammadan law for which the one-third share of the income has to be expended and for which purpose also the share of the income of any of the line of the descendants which might become extinguished should also be utilised. These four objects are : *firstly*, the marriage expenses of the persons mentioned in that clause ; *secondly*, a sum of Rs. 200 to be paid every year each to not more than three persons belonging to the family of Moosa or Moosani, which was the family of the settlor, who might be poor and in need of money; *thirdly*, a sum of Rs. 300 to be spent amongst the Sayyeds and Fakirs every year in the month of Ramzan; and *fourthly*, a sum of Rs. 1000 to Rs. 1200 for feasting Cutchi Memons of his community on the day of his anniversary of his death.

A wakf-alal-aulad is a method whereby a Mussalman can make provision for the maintenance and support of his family and descendants. Under ordinary law such a trust would be bad as offending against the law of perpetuity. It is not open to a person to tie up his property in perpetuity and give the income of it to his children and his descendants. But the law has made an exception in the case of Mussalmans, and that

exception is to be found in the Mussalman Wakf Validating Act (4 [IV] of 1913). That Act makes it lawful for a Mussalman to create a wakf for the maintenance and support wholly or partially of his family, children or descendants, provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognised by the Muhammadan law as a religious, pious or charitable purpose of a permanent character. And S. 4 of that Act goes on to state that no such wakf shall be deemed to be invalid merely because the benefit reserved therein for the poor or other religious, pious or charitable purpose of a permanent nature is postponed until after the extinction of the family, children or descendants of the person creating the wakf. Therefore a Mussalman can tie up his property in perpetuity for the maintenance and support of his family, children or descendants provided he makes a provision that the ultimate benefit goes to a charitable object recognised by the Muhammadan law as charitable and the charitable purpose is of a permanent nature. It is open to him to postpone benefit being conferred upon charity till the extinction of all his family and his descendants.

Now in the trust before me one thing is perfectly patent that the settlor wanted specific charities which he has mentioned in the four clauses in the trust to benefit in the event of the share of any line of his descendants or children becoming extinguished. It is clear that the first of these so-called charitable objects, the payment of marriage expenses, is not charity according to the Muhammadan law. Those payments have already been made by the trustees, and the question in that sense becomes academic. With regard to the second object, payment of Rs. 200 every year to a person belonging to the family of the settlor who may be poor and in need of money, payment to poor relatives is really good charity under the Muhammadan law; but as Mr. Taraporewalla has pointed out, when we are dealing with the Mussalman Wakf Validating Act, we must consider a particular charity benefiting on the extinction of the family of the settlor and, therefore, it is necessary to consider whether the charity selected by the settlor which is ultimately to be benefited is or is not of a permanent nature. It is not possible to say with any certainty that there would be any members of the family of the settlor in existence when the descendants of the settlor became



extinct; and even if such persons were to be in existence, whether necessarily they would be poor and in need of money. The third object is the payment of Rs. 300 every year to Sayyeds and Fakirs. It may be said that payment of money to Fakirs—not indeed professional beggars but treating that expression to mean the “poor”—would be a good charitable gift; but as far as the Sayyeds are concerned, I am not sure whether payment to Sayyeds is a good charitable gift according to the Muhammadan law. Sayyeds are members of the Prophet’s family; and even assuming that that was a good charitable object, it would be impossible to ascertain after this period of time as to who were genuinely the members of the Prophet’s family and to benefit that particular class of people. Under the trust deed the obligation is cast upon the mutawalli to spend a sum of Rs. 300 upon both these objects, the Sayyeds and the Fakirs, and as one of the objects is clearly non-charitable, the whole provision is bad. As regards the fourth object, namely, spending about Rs. 1000 to Rs. 1200 for feasting the Cutchi Memons every year on the anniversary of the death of the settlor, I am clearly of opinion that that is not a good charitable object according to Muhammadan law. It should be noted that there is no suggestion that any prayers are to be said in this feast or any religious ceremony to be performed. All that the settlor says is that a feast is to be held where a certain amount has to be spent every year.

Therefore the settlor was anxious to benefit these particular charities and that is clear also from the fact that even before the extinction of his family or descendants he has provided that a portion of the income should be spent on these objects immediately after his death. It is impossible to infer that any general or dominant charitable intention is shown by the settlor in making provision under this particular deed. The matter becomes even more clear when one remembers that the net income of the two properties—the subject-matter of the trust—is about Rs. 16,000 a year and the charitable provisions, assuming that they were all charitable, would hardly exhaust a very small proportion of the income of these properties. The part of the income set apart for being expended on these charitable objects after the death of the settlor is in itself sufficient to defray all the expenses and, therefore, in the event of the family and the descendants becoming extinct and the income becoming available for charity it would be

impossible to spend that income on the specific objects enumerated by the settlor. Therefore, in my opinion, the whole of the trust property is not given to charity as an ultimate bequest, and unless that is done, the most important provision of the Mussalman Wakf Validating Act of 1913 is not satisfied.

The trust deed may also be looked at from another point of view. It is open to a settlor when he belongs to the Hanafi sect to reserve for his own maintenance and support during his lifetime the income of the trust property. In this case what the settlor has done is that he has reserved for himself during his life for his absolute use the whole income of the trust property. The income is not reserved for his maintenance and support but for his absolute use. The Legislature advisedly did not permit a Hanafi Mussalman to reserve the income of the trust property during his life for his own benefit or for such use as he may put it to. It was only when he reserved that income for his maintenance and support that he was permitted to do so without offending against the provisions of the Act. What the settlor has done in this deed is that he has reserved to himself a life-interest in the income of the trust property. Now a reservation of a life-interest in the income of a trust property is a very different thing from securing to himself for his own maintenance and support the income of the trust property. The difference in law between these two provisions is clear and of considerable importance. If what he had reserved to himself was for his own maintenance, that would not be transferable as property under the Transfer of Property Act nor could it be attachable under the provisions of the Civil Procedure Code. Whereas if he had reserved for himself a life-interest, that particular provision would not attract to itself the provisions of S. 6, T. P. Act, and S. 60, Civil P. C., with regard to non-transferability and non-liability to attachment contained in the provisions of the two sections. What is even more significant is that the trust deed nowhere indicates that the settlor is making this provision for the maintenance and support of his family, children or descendants. Now that again is important because it is only when the trust is for the maintenance and support of the family, children and descendants of the settlor that it comes within the ambit of the Mussalman Wakf Validating Act of 1913. As far as one can see, on the provisions of this trust deed, the trust is



created not for the maintenance and support of his family, children and descendants but in order to give them income in the manner specified in the trust deed for their absolute use. Therefore, taking everything into consideration, in my opinion the wakf deed is not a valid and proper wakf-alal-aulad to which the Act of 1913 applies, and as every wakf created by a Mussalman which offends against the rules of perpetuity is bad unless it is protected by that Act, I must hold that this particular deed is void and inoperative.

But there is one provision of the deed to which I must refer. As I have pointed out, the settlor provides in this deed that after his death the trustees should spend a certain proportion of the income of the property on certain charitable objects which he has specified and to which I have referred. That particular provision in the deed would not amount to a provision for his descendants with an ultimate gift to charity. It is really a gift to charity *in præsenti* through the medium of a trust. What the settlor says is this :

"I make the gift to charity. I appoint trustees. I hand over the subject of the gift to trustees. But I make a stipulation with the trustees that they should not spend the money on charity so long as I am alive and give the income to me."

As far as I can see, there is nothing in Muhammadan law to prevent a Mussalman from creating a trust of that nature. Of course the charitable objects must be such as are recognised as good under Muhammadan law. I have already held that the provisions with regard to feasting the Cutchi Memons and the payment of Rs. 300 among the Sayyeds and the Fakirs are not charitable objects as understood by the Muhammadan law. But as far as the provision with regard to the payment of Rs. 200 every year to not more than three persons belonging to the family of the settlor who may be poor and in need of money is a perfectly good charitable object. Therefore, there is no reason why the trustees should not carry out this particular provision in the trust deed although the deed itself should be void as a wakf-alal-aulad and to the extent that it ties up property in perpetuity. I would, therefore, direct the trustees that they must set apart sufficient amount out of the sale proceeds of the trust properties if it be necessary to sell those properties as would fetch a sum of Rs. 600 every year so as to carry out this particular charitable object. With regard to the rest of the trust estate, as I have held that the wakf is void, they are merely trustees for the heirs of the settlor and they

must hand over the balance of the trust estate to these heirs.

With regard to the heirs, all the heirs are before me except two who are Fatmabai and Ebrahim Haji Ahmed Moosa. There were three administration suits filed to administer the estate of the settlor and a consolidated consent decree was taken in these three suits and the consent decree which has been put in shows that as far as these two heirs are concerned, they have released all their right, title and interest in the estate of the settlor and also their interest under this wakf deed. Therefore neither Fatmabai nor Ebrahim Haji Ahmed Moosa has any interest in these trust properties. Parties want to take directions from me with regard to the disposal of the trust properties and other matters and they want to do that after they have consulted the Advocate-General. I therefore stand this suit over for that purpose. Suit adjourned to 9th July 1945. Costs of all parties to come out of the trust estate. Costs of defendants 1, 2 and 3 and of the Advocate-General as between attorney and client.

D.R./D.H.

*Order accordingly.*

[Case No. 75.]

**A. I. R. (33) 1946 Bombay 346**

SEN AND RAJADHYAKSHA JJ.

*Dinkar Wasudeo Joshi —*

*Plaintiff—Appellant*  
v.

*Registrar, Co-operative Societies, Bombay-Poona—Defendants—Respondents.*

First Appeal No. 306 of 1944, Decided on 9th August 1945, from decision of Civil Judge (Senior Division), Ratnagiri, in Special Suit No. 96 of 1943.

Bombay Co-operative Societies Act (7 [VII] of 1925), S. 54 (before amendment of 1943) — Terms 'dispute' and 'servant' explained—Discovery of defalcation in accounts of society — Death of servant in charge of accounts—Subsequent resolution by society to refer matter to Registrar for action against servant's legal representative — Registrar referring dispute under S. 54 to nominee — Section held not applicable: ('43) 30 A.I.R. 1943 Bom. 341, *Dissent*.

Before there can be any reference under S. 54 two conditions must be fulfilled. In the first instance there should be a dispute touching the business of the society and secondly such dispute must be between the society or its committee and officer, agent, member or servant of the society.

[P 347 C 2]

The word 'dispute' in S. 54, cannot be altogether divorced from the connotation of a claim or demand or a question at issue, and it cannot be said to be the same thing as a cause of action or the mere incurring of a liability.

[P 348 C 2]

During the audit of a co-operative bank in 1942 defalcation of certain amount was discovered but



before the audit was complete the clerk in charge of the accounts of the bank died on 18th May 1942. On 28th August 1942 the society of the bank passed a resolution that the question of the recovery of the defalcated amount should be referred to the Registrar and steps against the legal representatives of the clerk taken. The Registrar acting under S. 54 appointed a nominee and the dispute was registered before the nominee:

*Held* that before the passing of the resolution there was nothing which amounted to a 'dispute' within the meaning of S. 54, that the dispute arose on the date of the resolution when the society intended to take action in the matter of defalcation; but it was not between the society and its servant as the term 'servant' did not include a past servant. The dispute was between the society and the legal representatives of the deceased. The legal representatives could not be held to be covered by the term 'servant' and a dispute between the society and the legal representatives of a deceased servant of the society could not be referred under S. 54 to the Registrar: ('43) 30 A.I.R. 1943 Bom. 341, *Dissent.*; ('36) 23 A.I.R. 1936 Mad. 81, *Rel. on.* [P 349 C 1; P 350 C 1, 2]

G. R. Madbhavi and P. V. Vaze —

for Appellant.

S. G. Patwardhan, Govt. Pleader; K. N. Dharap and V. S. Desai; and V. M. Bapat—for Respondents 1; 3; 4 and 5 respectively.

**Sen J.** — The plaintiff-appellant brought this suit for a declaration that defendants 1 to 3 had no right to proceed with the arbitration case No. 9 of 1942 and that the attachment levied against the property mentioned in the plaint was illegal and void, for a permanent injunction restraining the said defendants from proceeding with the case, and for damages amounting to Rs. 1000. The material facts are these. One Rajaram Govind Joshi was a clerk in the service of defendant 3, the Deogad Urban Co-operative Bank, Limited, having been appointed as such on 27th July 1936. He became a member of the bank in October, 1937, and on 18th September 1941, he passed an indemnity bond furnishing security against misappropriation. In 1942 the accounts of the bank were audited, and it appears that the auditors discovered that between January 1939 and March 1942 there had been defalcation to the extent of Rs. 16,008-12-0, and as Rajaram was in charge of the accounts of the bank, he was believed to have embezzled the money. Rajaram, however, died on 18th May 1942, before the audit had been completed. On 28th August 1942, the society of the bank passed a resolution that the question of the recovery of the amount defalcated should be referred to the Registrar and steps taken against the legal representatives of Rajaram, *viz.*, the plaintiff-appellant, his uncle, defendant 4, his cousin and defendant 5, his widow. The Assistant

Registrar, Belgaum, purporting to act under S. 54, Bombay Co-operative Societies Act, 1925, appointed defendant 2 as his nominee, and the dispute was registered before the said nominee as case No. 9 of 1942, the parties being the Chairman, Deogad Urban Co-operative Bank, Limited, on the one hand and the plaintiff and defendants 4 and 5 on the other. Certain properties were attached on 16th September 1942, as belonging to the deceased by the nominee purporting to act under S. 55 of the Act. This suit was filed on 9th August 1943, while the proceedings before the Assistant Registrar's nominee were still going on. The suit was resisted by defendants 1 and 3 on the ground, *inter alia*, that the Court had no jurisdiction to entertain it. Certain issues were raised, among which three have been tried as preliminary issues, *viz.*:

- "(1) Has the Court no jurisdiction to try the suit?
- (2) Whether the plaintiff proves that the arbitration suit No. 8 of 1942 is illegally filed? and
- (3) Whether the attachment of the property is bad at law?"

The findings on all these issues are in the negative, with the result that the suit has been dismissed. The plaintiff has now appealed. The main argument advanced on his behalf is that this was not a dispute which could have been referred to the Registrar for decision under the provisions of S. 54, Bombay Co-operative Societies Act, and that, therefore, the plaintiff was entitled to get the declaration and the injunction as well as the damages sought by him. The first part of S. 54, Bombay Co-operative Societies Act (Bom. Act 7 [VII] of 1925) reads thus:

"If any dispute touching the business of a society arises between members or past members of the society or persons claiming through a member or past member or between members or past members or persons so claiming and any officer, agent, or servant of the society, past or present, or between the society or its committee, and any officer, agent, member or servant of the society, past or present, it shall be referred to the Registrar for decision by himself or his nominee, or if either of the parties so desires, to arbitration of three arbitrators who shall be the Registrar or his nominee and two persons of whom one shall be nominated by each of the parties concerned."

Before there could have been any reference under the said section in this case it was necessary that two conditions should have been fulfilled. It was necessary, in the first instance that there should have been a dispute touching the business of the society, and, secondly, such dispute had to be between the society or its committee and any officer, agent, member or servant of the



society. It is to be observed that when the society passed a resolution to the effect that the question of recovery of the amount defalcated should be referred to the Registrar, i. e., on 28th August 1942, Rajaram who was alleged to have committed the defalcation had already died, and the bank ultimately, in accordance with the said resolution, had to proceed against his legal representatives, viz., the plaintiff and defendants 4 and 5.

The first question that arises, therefore, is whether it can be said that there was any dispute touching the business of the bank. As to the meaning to be attached to the expression "dispute," Mr. Dharap on behalf of the bank has argued at great length before us that it must be interpreted to mean nothing more than a cause of action, such as would entitle the bank to bring a suit even after the death of the person who had committed the defalcation against his legal representatives. He has contended that the word "dispute" cannot be taken to mean all disputes whatsoever touching the business of the society, for instance, a dispute between two directors of the society or a director and an officer of the society as to any transaction in which the society has taken part or intends to take part. According to him a dispute must be said to arise as soon as any legal liability has been incurred whereupon a claim can be made, and it is not necessary that the parties in question should have any actual disagreement regarding any matter. He has further contended that the provisions regarding arbitration in the Bombay Co-operative Societies Act are intended to give the special Court constituted under the Act jurisdiction to try matters which would otherwise have gone to an ordinary Court of law, and that, therefore, the word "dispute" should not be construed to mean anything more than what would enable any of the parties mentioned in S. 54 to bring a suit in a Court of law if these provisions were absent. His argument, therefore, is that just as in such a case the existence of a cause of action would suffice for the filing of a suit, nothing more should be deemed to be required before a reference under S. 54 can be made to the Registrar. It seems to us, however, that it would be attaching an unusual meaning to the word "dispute" if this view is to be accepted, viz., that "dispute" means nothing more than the occurrence of a liability or the existence of a cause of action. It may be conceded that every kind of dispute is not intended under this section to be referred to for decision by

the Registrar or by his nominee or by arbitration otherwise. In ordinary connotation the word "dispute" implies some kind of disagreement between the parties concerned; and there can be little doubt that some reference to a legal claim or liability is intended by the use of the said word. It is, however, difficult to hold, as Mr. Dharap has asked us in effect to hold, that as soon as an act of misfeasance, for instance, has been committed, or as soon as some legal liability has been incurred, it can be said that there has been a dispute touching the business of the society within the meaning of S. 54. In para. 2 of the said section it is stated that "a dispute includes claims by a society for debts or demands due to it from a member," etc., "whether such debts or demands be admitted or not." Mr. Dharap has contended that the last words of this paragraph show that even if a claim or demand be admitted, it would be a case of a dispute. But this paragraph may have been inserted to make it clear that what might not otherwise have been regarded as a dispute is, for the purposes of this section, to be regarded as such. In any case, this paragraph speaks distinctly of claims or demands and not merely of the incurring of a liability. The proviso to S. 54, again refers to "the question at issue between a society and a claimant, or between different claimants." We are of opinion that the word "dispute" cannot be altogether divorced from the connotation of a claim or demand or a question at issue, and that it cannot be said to be the same thing as a cause of action or the mere incurring of a liability.

The next question that arises in this case is: When can it be said that a dispute arose which was referred under S. 54 to the Registrar? Mr. Madbhavi on behalf of the plaintiff has contended that it was only when the society passed its resolution on 28th August 1942 that a dispute can be said to have arisen. Mr. Dharap, on the other hand, has argued that the dispute arose as soon as the defalcation took place, as such defalcation provided a cause of action on which a suit could have been filed. Under S. 54 of the Act the dispute has to be referred to "the Registrar for decision by himself or his nominee or if either of the parties so desires, to arbitration of three arbitrators." The section does not state who makes such a reference. In the present case it seems that the society of the bank, after the passing of the resolution on 28th August 1942, approached the Assistant Registrar, Belgaum, for action



under S. 54. It does not seem to us possible to hold that the dispute which was referred to the Assistant Registrar arose at any time earlier than the resolution of the society. It cannot be said that before that resolution was passed, the society intended to take any action in the matter of the defalcation. The society must have received the report of the auditors before they passed the resolution. Even that report must have been after the death of Rajaram, because Rajaram is said to have died while the audit was still going on. As we have been unable to accept the contention of Mr. Dharap as to the meaning to be put on the word "dispute," we must hold that it could not have arisen earlier than the date of the resolution, viz., 28th August 1942.

That being so, it becomes necessary to see whether at that date the dispute was between the society or the bank and any officer, agent, member or a servant of the society. Rajaram had already died. The lower Court seems to have taken the view that the word "servant" implies not only a present servant but a past servant also. It has relied on a decision in 45 Bom. L. R. 676<sup>1</sup> in support of this conclusion. In that case the G. I. P. Railway Employees Co-operative Bank sued one Bhikaji, an employee of the bank, under S. 33, Arbitration Act, 1940. Prior to the filing of the suit there had been proceedings under S. 54, Bombay Co-operative Societies Act, Bhikaji himself having applied to have his dispute referred to arbitration. In the course of the argument it was contended on behalf of the bank that under S. 54, Bombay Co-operative Societies Act, the dispute could not have been referred to arbitration under the said Act as Bhikaji had not been in the service of the bank at the time when the dispute had been referred to arbitration. This contention was negatived on the ground that Bhikaji had applied to have his dispute referred to arbitrators at a time when he was still in the service of the bank. Having arrived at this conclusion, Chagla J. proceeded to remark (page 682):

"Even if he were not, (that is, if he were not then in the service of the bank) I am not prepared to accept the contention sought to be placed by Mr. Daphtary (counsel for the bank) on this particular clause of S. 54 of the Act. . . . The section does not provide that at the time of the initiation of the arbitration proceedings the party other than the society must be in its employment. The curi-

ous result that would follow, if I were to accept Mr. Daphtary's contention, would be that a servant would be entitled to agitate his claim before the arbitrators before his dismissal with regard to any grievance that he may have relating to the contract of service, but as soon as he was dismissed he would no longer have the right to resort to the summary proceedings provided by S. 54, Bombay Co-operative Societies Act."

As against this argument, Mr. Madbhavi has referred to the case in A.I.R. 1936 Mad. 81<sup>2</sup> where King J. sitting singly, in a case arising under the Madras Co-operative Societies Act, held that the expression "officers" in S. 51 of the said Act, which is worded in almost the same terms as Sec. 54, Bombay Co-operative Societies Act, could not mean officers past and present. The two clauses of S. 51 referred to were cls. (b) and (c). Clause (b) referred to a dispute between a member, past member or person claiming through a member, past member or a deceased member and the society; and cl. (c) related to disputes between the society and its committee and any officer, agent or servant of the society. King J. remarked that *prima facie* he would have been inclined to hold that cl. (c) would apply to the case where the dispute was between a co-operative bank and its directors, five of whom were no longer directors of the bank, but that on a reference to two other sections, viz., Ss. 51 and 49 (corresponding respectively to Ss. 54 and 50A, Bombay Co-operative Societies Act), he could not take this view. After referring to the material parts of the two last-mentioned sections, he observed (page 82):

"When we find these two instances of particular reference being made in the Act itself to past officers and past members it seems to me that if this cl. (c) was intended to apply to a dispute of this kind between the society and its past officers specific mention would have been made to past officers in this clause also. In the absence of such specific reference, that clause cannot, I think, apply to the present dispute."

With respect, the line of reasoning adopted in the Madras case appears to us to be preferable to that adopted by Chagla J. It is also to be observed that the opinion of Chagla J. on the point under consideration was *obiter*, as it was not necessary for him to hold that the word "servant" included in its connotation past servant. It does not appear that the Madras decision was referred to in the arguments that were addressed to Chagla J. nor is there any reference to the wording of S. 50A or of the earlier part of S. 54 in his judgment where

1. ('43) 30 A. I. R. 1943 Bom. 341 : I.L.R. (1943) Bom. 320 : 209 I. C. 413 : 45 Bom. L. R. 676, G. I. P. Railway Employees Co-operative Bank, Ltd. v. Bhikaji Merwanji.

2. ('36) 23 A. I. R. 1936 Mad. 81 : 159 I. C. 578, Narayana Ayyar v. Co-operative Urban Bank, Ltd.



"members or past members" and "a member or past member" have been specifically referred to. We, therefore, do not think that the Legislature in using the words "servant of the society" intended to include past servant in the connotation of that expression. In 1943 by an amending Act it was provided that the words "past or present" should be inserted between the words "servant of the society" and "or between the society." It seems to us that the object of this amendment was to fill up a lacuna which existed in the original section. That being our view, it cannot be said that at the date of the suit there was any dispute between the society and any servant of the society, even if it be possible for a dispute to exist between a party who is alive and a dead person. The dispute in this case was really between the society and the three persons who have been proceeded against as the legal representatives of the deceased Rajaram, and it seems to us clear that such legal representatives cannot be held to be covered by the expression "servant." The learned Government Pleader, however, has relied on 28 Bom.L.R. 598<sup>3</sup> and has contended that the word "servant" must be regarded as including the legal representatives of the servant as well. That was a case in which there had been arbitration under the old (Central) Act 2 [II] of 1912, R. 28 of the Rules framed under which provided *inter alia* that any dispute touching the business of a Co-operative Society between persons claiming through a member and the committee should be referred to the Registrar. Proceedings were taken against the sons of a deceased debtor of a Co-operative Society who had been a member and his two sureties as well as one Bharmakka, who was described as one of the legal representatives of the principal debtor. Macleod C. J. remarked (page 600):

"Once it is conceded that where a dispute lies between a co-operative society and a member who is dead, proceedings can be continued or entertained between the society and the legal representatives of the deceased debtor, the arbitrators would be competent to decide who were the legal representatives of the deceased debtor and would have jurisdiction to decide that question."

Section 54 with which we have to deal is not in the same terms as R. 28 of the old Co-operative Societies Act, and in this case it is not conceded by the plaintiff that proceedings can be continued or entertained by the society against the legal representative of the deceased. It seems to us, therefore, that the

case in 28 Bom. L. R. 598<sup>3</sup> cannot be regarded as any authority for the purposes of the present suit, and we must hold that under the present Act a dispute between the Society and the legal representatives of a deceased servant of the Society cannot be referred under S. 54 of the Act to the Registrar. In the result, therefore, the appeal must be allowed and the order of the lower Court set aside, and the suit will be sent down to the trial Court for determination of the issues not decided and decision according to law. The plaintiff-appellant will get his costs in this Court. Costs so far incurred in the lower Court will be costs in the cause.

D.R./D.H.

*Appeal allowed.*

[Case No. 76.]

**A. I. R. (33) 1946 Bombay 350****KANIA Ag. C. J. AND CHAGLA J.***D. M. Vakil and others — Assesseees*

v.

*Commissioner of Income-tax.*

Income-tax Reference No. 1 of 1945, Decided on 17th September 1945, made by Income-tax Appellate Tribunal.

(a) Income-tax Act (1922), Ss. 3, 4, 2 (15), 6 and 9— Expression "income from property" in S. 9, meaning of — Beneficiaries occupying house property and not permitted by will to let it out — Trustees are liable to pay tax on annual rental value of property.

Sub-ss. (1) and (2) of S. 9 when read together make it clear that "income from property" is an artificially defined income and the liability arises from the fact that the assessee is the owner of the property. This liability to tax does not depend on the power of the owner to let the property nor on the capacity of the owner to receive the *bona fide* annual value of the property. The law has laid down an artificial rule by which the amount is to be considered the income of the assessee from immovable property and has provided that he should be taxed on that footing. By reason of the fact that the property is not let out the assessee cannot escape taxation. [P 352 C 1]

Where, therefore, under the terms of a will the beneficiaries were to occupy certain house property the trustees were held liable to pay income-tax on the basis of the annual letting value of the property and the fact that by the terms of the will the property could not be let out did not make any difference: 1892 A. C. 150 and ('33) 20 A. I. R. 1933 P. C. 145, *Disting.*; I.L.R. (1937) 2 Cal. 192, *Rel. on.* [P 352 C 1]

(b) Income-tax Act (1922), S. 41 — Rate of taxation.

If in making a settlement the settlor does not define clearly the specific and individual shares of the beneficiaries the assessment must be at the maximum rate. [P 353 C 1]

*Y. P. Pandit — for Assesseees.**M. C. Setalvad — for Commissioner of Income-tax.*

3. ('26) 13 A.I.R. 1926 Bom. 352 : 96 I. C. 350 : 28 Bom. L. R. 598, Bharmakka v. Mallappa.



**Kania Ag. C. J.** — This is a reference made under S. 66 (1), Income-tax Act, by the Income-tax Appellate Tribunal. The material facts, as found in the statement of the case, are these. The late Bai Bhicaiji Dhunjibhoy appointed her husband and her son and three daughters as the trustees under her last will and testament, dated 28th January 1937. By cl. 5 of that will it was provided as follows :

"After deducting my death-bed and medical expenses and after payment of my debts, during the lifetime of my husband Dhunjibhoy Motabhoy Vakil, my trustees shall pay out of the net income of my movable and immovable properties such amounts as may be sufficient for the maintenance of my husband Dhunjibhoy Motabhoy Vakil, my daughter Motibai and my son Motabhoy Dhunjibhoy Vakil and the balance shall be accumulated and invested in Government Securities. During the lifetime of my husband Dhunjibhoy Motabhoy Vakil my said husband, my daughter Motibai and my son Motabhoy shall have the right to use and occupy free of rent such portions of my immovable property at Warden Road as are now occupied by me and the other members of the family. Besides these three such of my children and grandchildren as may be invited shall alone have the right to reside and besides them none others shall be allowed to reside."

In pursuance of that provision, the parties named in the clause occupied the Warden Road property for the assessment year 1942-43. The trustees were sought to be assessed under the head of "income from property" in respect of this Warden Road bungalow. It was contended on their behalf that the trustees cannot be said to have realized any income whatsoever from the property in question which could be computed under S. 9, and, therefore, they were not liable to pay any income-tax in respect of this Warden Road property. The Income-tax Officer rejected that contention of the trustees but on appeal they succeeded before the Assistant Commissioner of Income-tax. The taxing authorities took the matter up to the Income-tax Appellate Tribunal and the Tribunal restored the order of the Income-tax Officer. The present reference is made at the instance of the trustees. The question submitted for the Court's consideration is in these terms :

"Whether upon the facts found by the Tribunal, the annual value of the property on Warden Road, Bombay, has been rightly included in the assessment under S. 9, Income-tax Act?"

On behalf of the trustees it was argued before us that the Income-tax Act was enacted with the object of taxing income. In the present case the trustees cannot by virtue of the express provision of cl. 5 of the will let these premises to any one and are obliged

to give the bungalow for occupation to the persons named in the clause free of rent. It was therefore contended that there being no income, Ss. 3 and 4, Income-tax Act, could not be relied upon to tax the annual letting value of this bungalow, as was sought to be done by the taxing authorities. It was argued that under S. 41, Income-tax Act, the liability of the trustees was only to be taxed to the same extent as the beneficiaries were liable to be taxed, and as the right to occupy premises did not amount to receipt of any income, the beneficiaries would not be liable to be taxed in respect of this right of occupancy. In this connection the assesses relied on (1892) A. C. 150<sup>1</sup> and particularly on the following observation of Lord Halsbury, Lord Chancellor, (p. 157) :

"I am of opinion, in the words of Lord Young, that the thing sought to be taxed is not income unless it can be turned into money."

The assesses also relied on 60 I. A. 196<sup>2</sup> in support of their contention that when a sum of money is charged on the property such sum is not the income of the owner of the property although initially he receives the same. On behalf of the Commissioner it was urged that this line of reasoning is incorrect. The only question to be considered under the Income-tax Act is : what is the income under the charging Ss. 3 and 4 ? The expression there used is "total income" which is defined in S. 2 (15), Income-tax Act, in these terms :

" 'total income' means total amount of income, profits and gains referred to in sub-s. (1) of S. 4 computed in the manner laid down in this Act."

Therefore to ascertain what is the total income the Court must look at Ss. 6 and 9 which contain the heads of income and how computation was to be made in respect of the head "income from property." It was argued that the scheme of the Income-tax Act was that once a party was shown to be the owner of a property, he must be taxed under the head "income from property" and the computation of the income must be in accordance with S. 9, Income-tax Act. It was contended that the actual receipt of the rent in the hands of the owner is quite immaterial for the purposes of assessment. The law has laid down a particular method of computation in respect of income from property and that must be applied to arrive at the figure to be inserted against the head

1. (1892) 1892 A. C. 150 : 61 L. J. P. C. 11 : 66 L. T. 327, *Tennant v. Smith*.

2. ('33) 20 A. I. R. 1933 P. C. 145 : 60 Cal. 1029 : 60 I. A. 196 : 143 I. C. 145 (P. C.), *Bejoy Singh Dudhuria v. Income-tax Commissioner, Calcutta*.



"income from property" in the individual assessee's assessment. In my opinion the contention of the trustees is not correct. The word "income" has not been defined in the Act, but for the purposes of the Income-tax Act the expression "total income" is defined in S. 2 (15). The Legislature has used there the words "computed in the manner laid down in this Act." Therefore in order to ascertain the total income of an assessee, his income must be computed in the manner laid down in the Act and particularly Chap 3. In this connection the words used in S. 9 may be particularly noted. The section provides as follows :

"The tax shall be payable by an assessee under the head 'Income from Property' in respect of the *bona fide* annual value of property consisting of any buildings . . . ."

The Legislature has therefore expressly provided that the tax shall be payable by the assessee in respect of the *bona fide* annual value irrespective of the question whether he receives that value or not. Section 9 (2) provides that for the purposes of this section, the expression "annual value" shall be deemed to mean the sum for which the property might reasonably be expected to let from year to year. It is again significant to note that the word used is "might" and not "can" or "is." Reading these two paragraphs of S. 9 together, it is clear that the income from property is thus an artificially defined income and the liability arises from the fact that the assessee is the owner of the property. It is further provided in the section that if the owner occupies the property, he has to pay tax calculated in the manner provided therein. Therefore, by reason of the fact that the property is not let out the assessee does not escape taxation. On behalf of the trustees it was argued that in the present case the trustees are prevented from letting out the property to any one by virtue of cl. 5 of the will itself. That, however, in my opinion, makes no difference. The liability to tax does not depend on the power of the owner to let the property, as it also does not depend on the capacity of the owner to receive the *bona fide* annual value of the property. The law has laid down an artificial rule by which the amount is to be considered the income of the assessee from immovable property and provided that he should be taxed on that footing. In my opinion the argument of the Commissioner on this point is correct. The observation of Lord Halsbury, Lord Chancellor, in (1892) A. C. 150<sup>1</sup> at p. 157, does not help the assessee. In

that case the Court was concerned only with the liability of the occupant of the property to pay tax. On p. 154 of the report at the bottom it is noted as follows :

"But the bald, dry proposition that the mere fact of occupying a house, which house as property is already taxed, is not income in any sense, could, I think, hardly be disputed."

The Court, therefore, was considering the question of the liability of the occupant to pay tax in respect of a property the income of which was already taxed in the hand of the owner. That question does not arise for consideration here. It may be observed that the rules of taxation found in the schedules annexed to the English Act are materially different from the rules of taxation contained in the Indian Income-tax Act. This has been noticed frequently by all Courts, and therefore it will not be proper to apply the observations made in respect of the liability of the occupant to pay tax under the English Act to the liability of the trustees, the owners of the property, under the Indian Income-tax Act. 60 I. A. 196<sup>2</sup> does not help the trustees because in that case the Court was not concerned with the taxation of income from immovable property. There it was a general question in respect of the income of the assessee and the Court decided that if in fact the income was charged with the payment of a certain sum and payment was made to satisfy that charge, the amount so paid was never the income of the assessee and could not be considered his income. The report of the case shows that the recipient of the amount was assessed on the amount received and that question was not before the Court. In this connection Mr. Setalvad drew our attention to 5 I. T. R. 233.<sup>3</sup> In that case on the insolvency of a party a certain house became vested in the Official Assignee. That was the only property of the insolvent. The Official Assignee disputed his liability to be taxed under S. 9. The Court rejected that contention. At page 245, after noting the observations in (1928) 14 Tax Cas. 78,<sup>4</sup> the Court observed as follows :

"In the present case the income was in the nature of statutory income arrived at upon the basis of the *bona fide* annual value of the property in question."

The objection of the Official Assignee was overruled on that ground. In my opinion that is the correct view of the liability of an owner to pay income-tax having regard

3. (37) I. L. R. (1937) 2 Cal. 192 : 5 I. T. R. 233, In the matter of the Official Assignee.

4. (1928) 14 Tax Cas. 78 : 1928 Sc. L. T. 530, Commissioners of Inland Revenue v. Fleming.



to the combined effect of Ss. 3, 4, 2 (15), 6 and 9, Income-tax Act. Section 41, Income-tax Act, does not help the assessee because under that section two things have to be considered: *first* the trustees become liable in the like manner and to the same amount as the tax would be leviable upon and recoverable from the beneficiaries; and *secondly*, where the individual shares of the persons on whose behalf the income is receivable are indeterminate or unknown, the tax is ordered to be levied at the maximum rate. In India we have no distinction between legal and equitable estate. In 61 I. A. 209<sup>5</sup> the Judicial Committee of the Privy Council has held that the trustees in whom the property is vested are liable to be taxed under the Income-tax Act. The extent of the liability is to be determined on the true interpretations of Ss. 3, 4, 2 (15), 6 and 9, Income-tax Act. The argument that under S. 41 the tax is to be levied in the like manner and in the same manner as to be recoverable from the beneficiaries does not help the assessee. If in the present case the ownership of this property is deemed to be vested in the beneficiaries, they could not avoid taxation on the ground that they themselves were occupying the property. It seems to me, therefore, that S. 41, Income-tax Act, does not help the assessee.

The question of rate of taxation is not relevant to the present discussion. If in making a settlement the settlor does not choose to define clearly the specific and individual shares of the beneficiaries, the assessment must be at the maximum rate. Whether the taxation should be at the highest rate or not is a matter of policy, with which we are not concerned. In my opinion, therefore, the answer to the question submitted to us is in the affirmative. The assessee to pay the costs of the reference.

**Chagla J.** — I agree. It is true that under the Income-tax Act the only thing that can be taxed is income and nothing else. The charging section is S. 3; it charges the total income of an assessee; and "total income" is defined in S. 2 (15) as the total amount of income, profits and gains computed in the manner laid down in this Act. Before income can be computed in the manner laid down in the Act there must be income to which the mode of computation

can be applied. Now, it cannot be disputed that income from property is taxable income. The only question is: What is income from property or how is it to be computed? And for that purpose one must turn to S. 9, Income-tax Act. The scheme of the Income-tax Act is that the income from property which is made liable to tax is not the actual income but an artificial or statutory income as defined in S. 9 and that artificial or statutory income is the bona fide annual value of the property. Therefore the fact that the owner of the property receives no income in fact or even that there is no possibility of his receiving an income is irrelevant for the consideration of the question as to what the artificial or statutory income of an assessee is from property. The test and the only test laid down in the Act is the bona fide annual value of the property, and in the case of every property that test can be complied with and the annual value of the property can be determined. Therefore, what the Act does is to make the annual rental value of the property the income of the owner of that property and it is that income that has got to be taxed under the Act. I, therefore, agree with the learned Chief Justice that the answer to the question should be given in the affirmative.

N.S./D.H.

*Reference answered  
in affirmative.*

[Case No. 77.]

**A. I. R. (33) 1946 Bombay 353**

KANIA AG. C. J. AND

GANJENDRAGADKAR J.

*Sangabasavaswami Mahantaswami  
and others—Plaintiffs—Appellants  
v.*

*Baburao Ganesh and others — Defendants — Respondents.*

Second Appeal No. 262 of 1943, Decided on 26th July 1945, from order of District Judge, Bijapur, in Appeal No. 100 of 1941.

(a) Civil P. C. (1908), Ss. 9 and 100 — Right to take processions — There is no general right of public to take out processions whether religious or not—Procession whether religious is question of fact — Carrying of Vyasantol by Lingayats or Veershaivas in procession is not religious observance and no suit lies to establish the right.

There is no general right of public to take out procession irrespective of the question whether it is religious or not. [P 355 C 2]

The question whether a particular procession is a religious procession within the accepted description recognised by law is a question of fact. Carrying of Vyasantol in processions by the Lingayats or

5. ('34) 21 A. I. R. 1934 P. C. 116 : 58 Bom. 317: 61 I. A. 209 : 148 I. C. 855 (P. C.), Currimbhoy Ebrahim Baronetcy Trust v. Income-tax Commissioner, Bombay.



Veershaivas is not taking out a religious procession with appropriate religious observances and hence no suit lies to establish such right: ('25) 12 A.I.R. 1925 P. C. 36 and ('44) 31 A. I. R. 1944 P. C. 33, *Rel. on.* [P 355 C 2; P 356 C 1]

**C. P. C.—**

('45) Chitaley, S. 9, N. 24, Pts. 2 and 3.

('41) Mulla, S. 9, Page 29, Note 'Religious procession.'

(b) **Precedents — Judicial— Construction of —** Observations must be read along with facts of case.

The observations in a case must be read along with the facts of the case, and should not be, unless expressly so pronounced, read as laying down any general propositions of law. [P 355 C 1]

**C. P. C.—**

('45) Chitaley, Preamble N. 15, Pt. 9.

*A. G. Desai, G. R. Madbhavi and K. R. Bengeri*  
— for Appellants.

*A. G. Desai and H. F. M. Reddi—*  
for Appellant 1.

*R. A. Jahagirdar —* for Respondents.

**Kania Ag. C. J. —** This is a second appeal from the judgment of the District Judge at Bijapur. The dispute between the parties relates to the claim of the appellants to take out a religious procession with what is described as *vyasantol*, which is equivalent to carrying the symbol of a cut arm of Vyas, the great Hindu mythological writer. It is alleged that he wrote verses in praise of God Vishnu. That enraged God Shiva, and thereupon the Nandi (bull) of Shiva attacked Vyas and the arm was cut off. Thereafter Vyas recognised the supremacy of Shiva over Vishnu. The plaintiffs now contend before us that under the circumstances this is a part of their religious belief. The plaintiffs filed this suit claiming that they and the public have an inherent right, as citizens, to take out a procession with *vyasantol* according to their religion in the streets of Mangoli, in taluka Bage-wadi, in Bijapur District. It is stated that they have got such right to take out a procession on Bhadrapad Shud 5, at 9 A. M. every year, and they have been doing so for many years past over the route marked on the plan annexed to the plaint. The procession terminates at 3 P. M. at the end of the route shown on the map. The defendants are alleged to have wrongfully obstructed the taking out of the procession with this symbol. The prayer is in these terms:

"As the plaintiffs and their people have got a birthright to take out parading of *vyasantol* . . . in a procession according to their religion along the public streets as shown in the map on Bhadrapad Sud 5 or any other festival, the defendants should be permanently restrained from obstructing the plaintiffs and their party people."

The defences are that this is not a part of the religious observance of the procession, and

that the claim was barred by limitation. On the second question it was pointed out by the defendants that in 1931 the Sub-Divisional Magistrate, S. D., Bijapur, prohibited the taking out of a procession with *vyasantol* so long as the plaintiffs did not obtain a decree establishing their right in a civil Court or an order from the Magistrate giving such permission. That order was served on the plaintiffs on 27th January 1932. The plaintiffs took no steps thereafter till they filed this suit. On both points the plaintiffs failed in the trial Court and in appeal. They filed this second appeal in the High Court. When the appeal came before Macklin J. he thought that the question of limitation may be determined first before going into the merits. He referred the appeal to a bench of Judges. Mr. Desai who appears for the appellants, contends that the question of limitation is bound with the question of the inherent right as claimed by him, and, therefore, the question whether the appellants have the inherent right should be decided first. We have heard the whole appeal.

Mr. Desai commenced his argument by contending that although in the plaint it was contended that the plaintiffs had a right to take out a procession according to their religion, the public right was not limited to religious processions only. According to him, every member of the public, as a citizen, had a right to take out a procession, irrespective of the question whether it was a religious procession or not. In answer to Court, Mr. Desai admitted that in no decided case he had found such a general right admitted or conceded or upheld. He, however, relied on certain observations in two judgments of the Privy Council. The first case was 27 Bom. L. R. 170.<sup>1</sup> That was a case in which certain members of the Shiah community desired to take out the Mohar-ram procession with the ceremony called "*matam*." That meant that they stopped for a little while at intervals and wailed. The procession used to pass along the mosque of the Sunnis. The Sunnis objected to the inclusion of this particular ceremony, and, therefore, the matter came to Court. Their Lordships of the Privy Council considered whether a civil suit lay for establishing such a right. In discussing the rights of the parties to take out processions, their Lordships were discussing clearly the question of religious processions. Having regard

1. ('25) 12 A.I.R. 1925 P. C. 36 : 47 All. 151 : 52 I. A. 61 : 86 I.C. 236 : 27 Bom. L. R. 170 (P.C.), *Manzur Hasan v. Muhammad Zaman*.



to the controversy between the parties, there was no occasion to discuss the rights of citizens at large to take out processions, irrespective of the same being religious. In the course of his judgment, Lord Dunedin, after noticing certain decisions of the Madras High Court which dealt with religious processions, observed as follows (p. 173) :

"Two other questions have, however, emerged. In several cases one set claimed the exclusive use of the highway for their worship. This has been consistently refused. The other question, which goes deep into what ought to be done in the present case, is this : Does a civil suit lie against those who would prevent a procession with its observances ?"

Mr. Desai argued that the second question framed by the Court was not limited to religious processions, and, therefore, impliedly assumed the right of a citizen to take out a procession for any purpose whatsoever. We are unable to read that passage in the judgment with the meaning given to it by Mr. Desai. The two questions formulated were these. One was the right claimed by certain persons to use certain streets exclusively. The Court held that such a right had been consistently, and rightly, refused. The other question, contrasted with the first, was, when such an exclusive right was not claimed, whether a civil suit lay for establishing a right to take out a religious procession with its observances. As has been repeatedly pointed out, the observations in a case must be read along with the facts of the case, and should not be, unless expressly so pronounced, read as laying down general propositions of law. In the case in question Lord Dunedin has not laid down any general proposition of law, but had formulated the two questions which arose in the case before the Judicial Committee.

Mr. Desai further relied on the recent judgment of the Privy Council in 47 Bom. L. R. 575.<sup>2</sup> In that case, the Shia community of Amroha claimed the right to take out *tazias* of a height greater than what could pass under the electric wires laid out by the local electric company. The company had put up its poles and fixed the wires 'according to the licence granted to it by the appropriate authority. In considering the right of the public to pass and repass along the street, the Board observed as follows (p. 577):

"The plaintiffs have the right as members of the public to take part in religious processions in the streets ; subject of course to the rights of other

members of the public to pass and repass along the same streets and subject to the powers of the appropriate authorities of controlling traffic and preventing disturbance. This right as a normal user of the highway does not originate in custom. Whether a highway could be dedicated subject to such a custom need not be considered . . . The rights of the plaintiffs therefore are no more and no less than the rights of any member of the public, and subject to questions of danger or disorder there seems no reason why a member of the public should not convey along an open street as part of a normal use of the street articles of any height."

The Board then held that the Shia community had not the right claimed by it because the legislative authority had power to curtail the public right, and by the issue of the licence the public right, in fact, to that limited extent, had been curtailed. Later on in the same judgment it was observed as follows (p. 577):

"Their Lordships in leaving the case wish to emphasize that no question arises of ignoring or depreciating the respect due to the well established religious beliefs and observances of the plaintiffs. Like any other religious or secular body or any other member of the public their rights over the streets are subject to the present law which may abridge them."

From these observations we are unable to accept the argument of Mr. Desai that the Board recognised the general right of public to take out a procession which was not religious. We should point out that such a larger claim has not been found in the plaint. The plaint is limited to the right to take out the procession as a religious procession. That aspect of the claim is made clear by the prayer itself. We, therefore, think that the larger right claimed by the plaintiffs is not pleaded and is not supported by law. The second aspect urged by Mr. Desai was that the carrying of the *vyasantol* in procession was the right to take out a religious procession. The question whether this particular procession was a religious procession, within the accepted description recognised by law, is a question of fact. The lower appellate Court has considered in detail the evidence given before the trial Court. It has considered the various texts which were cited before the Court and considered the expert opinion of witnesses who had been called on the point. In para. 15 of its judgment the lower appellate Court has stated as follows:

"Nor is the parading of *vyasantol* done, as a matter of fact, out of any respect for Vyas. There is nothing in plaintiff 1's deposition to show that *vyasantol* is paraded as an object of worship. . . . Plaintiff 1 has stated that he seeks to parade it as a *birudavali* of his *math*, in honour of himself as the Swami and of the *puran*, which are both seated in the *palaki*."

2. ('44) 31 A.I.R. 1944 P. C. 33 : I.L.R. (1944) All. 191 : I.L.R. (1944) Kar. P. C. 181 : 71 I. A. 25 : 213 I. C. 144 : 47 Bom. L. R. 575 (P.C.), *Martin & Co. v. Faiyaz Husain*.



In para. 16 of his judgment, the learned Judge has recorded his conclusion in these words:

"The parading of *vyasantol* is thus not a religious observance, in the sense that it has been enjoined or even recommended by any *shastra* or work containing the tenets of the Lingayats or the Veershaiva faith. Nor can it be considered to be an appropriate observance, having regard to the purpose and motive that has prompted the parading of it."

Later on, in para. 17 he observed that there is no evidence in the case, that *vyasantol* was paraded in any of the other villages in Bijapur District. In second appeal we are bound by the findings of fact of the lower appellate Court. The above mentioned conclusion of the learned District Judge, on this question, shows that the carrying of *vyasantol* in procession was not the taking out of a religious procession with "appropriate observances," as stated by the Privy Council in 27 Bom. L. R. 170.<sup>1</sup> Having regard to that conclusion the appeal must fail.

We do not consider it necessary to go into the question of limitation, particularly because the order made by the Sub-Divisional Magistrate of Bijapur in 1931 is not before the Court. In the evidence of plaintiff 1 its effect is generally described. It is not found under what section of what Act of the Legislature the order was made. We think it undesirable to come to a conclusion about the true effect of the order on such summary made by a layman. The order may have been passed under S. 147, Criminal P. C., or S. 145, Criminal P. C. or S. 44, District Police Act. The effect of the order passed under each of these sections is different and, therefore, we do not consider it necessary to decide the question of limitation. The appeal fails and is, therefore, dismissed with costs.

D.R./D.H. *Appeal dismissed.*

[Case No. 78.]

**A. I. R. (33) 1946 Bombay 356**

RAJADHYAKSHA J.

*Ahmedbhai Kadubhai — Applicant*

v.

*Badrudhin — Opponent.*

Civil Rev. Appln. No. 20 of 1944, Decided on 26th June 1945, from order of District Judge, Ahmedabad, in Appeal No. 241 of 1941.

(a) Bombay Civil Courts Act (14 [XIV] of 1869), Ss. 8 and 26 — Applicability — Subject matter of suit — Administration suit — Suit valued at Rs. 130 for court-fees under S. 7 (iv) (f), Court-fees Act (1870) and by mistake at Rs. 5500 for jurisdiction under S. 8, Suits Valuation Act — Value for jurisdiction is Rs. 130

— Decree passed for Rs. 25,000 odd — Appeal lies to District Court under S. 8.

An administration suit is a suit for accounts governed by S. 7 (iv) (f), Court-fees Act. Where an administration suit is valued for the purpose of court-fees at Rs. 130, but has been, by mistake, valued at Rs. 5500 for the purpose of jurisdiction, and a decree has been passed for Rs. 25,000 odd, the value of the subject-matter of the suit is the value which the plaintiff himself has put when filing the suit and is not affected by the fact that the decree for an amount exceeding Rs. 5000 is passed by the trial Judge and although the suit is valued for the purpose of jurisdiction at Rs. 5500. Under S. 8, Suits Valuation Act, the value for the purpose of jurisdiction must be taken to be the same as that for the purpose of court-fees i.e., Rs. 130 and that being the value of the subject-matter, S. 26 does not apply and under S. 8, the appeal must lie to the District Court: ('38) 25 A.I.R. 1938 Bom. 464; *Foll.*: 20 Bom. 265; 22 Bom. 963 and ('41) 28 A. I. R. 1941 Bom. 242, *Disting.*; *Case law discussed.* [P 359 C 2; P 361 C 1]

C. P. C. —

('44) Chitaley, S. 96, N. 18, Pts. 1, 10 and 11.  
(41) Mulla, Page 354, Pt. (o).

Court-fees Act —

('44) Chitaley, S. 7 (iv) (f), N. 3, Pt. 1 and S. 8, Suits Valuation Act, N. 33, Pt. 7.

('36) Aiyar, Page 110, Pt. 25; Page 752, Pt. 24.

(b) Bombay Civil Courts Act (14 [XIV] of 1869), S. 26 — Subject-matter of suit decides forum of appeal.

Under S. 26 it is the value of the subject-matter of the suit, and not the subject-matter of the appeal that must decide the Court to which an appeal will lie. [P 358 C 2]

(c) Suits Valuation Act (1887)—Act does not apply to appeals.

The Suits Valuation Act does not apply to appeals but only to suits. [P358 C 2]

Court-fees Act —

('44) Chitaley, S. 8, Suits Valuation Act, N. 33.  
(36) Aiyar, Page 741 Note "Forum of appeal."

*J. C. Shah and A. G. Kotwal — for Applicant.*

*N. C. Shah — for Opponent.*

**Order.** — The short point that arises for decision in this civil revision application is this. When an administration suit is filed and valued for the purpose of court-fees at Rs. 130 but has been by mistake valued at Rs. 5500 for the purpose of jurisdiction, and a decree has been passed for Rs. 25,000 odd, does the appeal from such a decree lie to the District Court or to the High Court? The facts leading to the filing of this application are somewhat complicated, but it is necessary to refer to them, as there have been decisions of this very Court at some stage of the proceedings to which I shall have to refer in deciding the point that arises for decision in this case. One Kadubhai Gulabbhai died on 10th February 1894, leaving behind him his widow Ilahi-



begum, his son Dr. Ahmed and his two daughters Amirbibi and Fejbibi. Fejbibi was married to one Chandmiya from whom she had a son named Ahmedmiya. Kadubhai Gulabbhai left some immovable property, and in the year 1894 his widow Ilahibegum filed a suit, No. 38 of 1894, claiming her share in the property according to the Muhammadan law. The claim was compromised for Rs. 108. Fejbibi died in the year 1924. In 1925 Amirbegum filed a suit, No. 1300 of 1925, for administration of her father's share in the First Class Court at Ahmedabad. The claim was valued at Rs. 130 for the purpose of court-fees and at Rs. 5500 for the purpose of jurisdiction. The suit was filed against Dr. Ahmed and Chandmiya. Dr. Ahmed contended that the claim had been satisfied on payment of Rs. 2000 to the two sisters, and further alleged that in any case the claim was barred by limitation. The trial Court upheld this defence and dismissed the suit. Against that order an appeal was filed by Amirbibi in the District Court, being Appeal No. 318 of 1927, challenging the view taken by the lower Court both as regards satisfaction and the bar of limitation. It was further contended that the District Court had no jurisdiction to hear the appeal, but this view was also rejected by the District Judge who proceeded to hear the appeal on merits. On 11th August 1928, the District Court held that the claim of the plaintiff had not been satisfied and that the suit was not barred by limitation. Accordingly the decree of the trial Court was set aside and the suit was sent down for trial on other issues. Against that decree of the District Court Dr. Ahmed filed an appeal to the High Court being Appeal No. 52 of 1929. In this appeal he contended that the District Court had no jurisdiction to hear the appeal, that the claim of the plaintiff was satisfied and that in any case the claim was barred by limitation. On 12th September 1930, the High Court upheld the decision of the District Court on all the points and dismissed the appeal. Thereupon the matter went back to the trial Court for decision on the remaining points at issue. While the suit was pending before the trial Court, the plaintiff and Dr. Ahmed arrived at a compromise, and on 15th September 1931, a *purshis* was filed in the Court to the effect that the claim of the plaintiff had been satisfied by the payment of Rs. 2500. Chandmiya died on 30th September 1931, and his son Ahmedmiya applied to be brought on record as the legal representative

of his father Chandmiya. On 5th November 1931, the compromise between the plaintiff and Dr. Ahmed was ordered to be recorded, and on 20th April 1932, the Court directed that Ahmedmiya's name should be transposed as plaintiff. The revision application filed in this Court against the order of transposing Ahmed's name as plaintiff was rejected. Thereafter Ahmed assigned his right, title and interest in favour of one Badruddin Ziauddin, and on 7th November 1933 the Court substituted Badruddin's name as the plaintiff in the suit. Ultimately an account was taken and eventually the learned trial Judge passed a decree in favour of the plaintiff for a sum of Rs. 25,493-14-6. Against this decree Dr. Ahmed filed an appeal in the District Court of Ahmedabad being Appeal No. 241 of 1941. After the appeal had been heard for some days it was contended before the learned District Judge that the appeal should properly have been filed not in the District Court but in the High Court, inasmuch as the decree in the administration suit had been passed for a sum of over Rs. 25,000. The learned District Judge upheld this objection and being of opinion that the appeal should have been filed in the High Court returned it for presentation to this Court. It is against that order that this application has been filed in revision.

Under S. 8, Bombay Civil Courts Act of 1869 "except as provided in ss. 16, 17 and 26, the District Court shall be the Court of appeal from all decrees and orders passed by the subordinate Courts from which an appeal lies under any law for the time being in force." Under this section, therefore, an appeal from a decision of the First Class Subordinate Judge would lie to the District Court unless the case falls under S. 26, Bombay Civil Courts Act. Under S. 26, as it now stands, in all suits decided by a Subordinate Judge of which the amount or value of the subject-matter exceeds five thousand rupees, the appeal from his decision shall be direct to the High Court. Therefore, the real point to be decided in this application is whether in the suit which the learned First Class Subordinate Judge of Ahmedabad decided the value of the subject-matter exceeded Rs. 5000 or not. Mr. J. C. Shah for the applicant referred me to the case in 22 Bom. 963,<sup>1</sup> which was a case similar to the one with which I am dealing. In that case an administration suit was filed in the Court of the Second Class Subordinate Judge valuing the relief claimed at

1. ('98) 22 Bom. 963, *Shet Kavasji v. Dinshaji*.



Rs. 130. The Subordinate Judge found that the property in suit was worth over a lakh of rupees, that the liabilities came to Rs. 5729 and that the defendant was indebted to the estate in the sum of Rs. 15,199. He drew up a preliminary decree, directing (*inter alia*) that the defendant should pay this amount into Court within two weeks. Against this order the defendant appealed to the District Court. The District Judge returned the appeal for presentation to the High Court, on the ground that the subject-matter exceeded Rs. 5000. It was held by the High Court reversing the order of the District Judge that the appeal lay to the District Court. But that case does not really support the contention taken up by Mr. J. C. Shah. Section 26 as it then stood provided that "in all suits decided by a Subordinate Judge of the first class in the exercise of his ordinary and special original jurisdiction of which the amount or value of the subject-matter exceeds five thousand rupees, the appeal from his decision shall be direct to the High Court." As that suit was decided by a Second Class Subordinate Judge, s. 26, Bombay Civil Courts Act, did not come into play, and therefore under s. 8, Bombay Civil Courts Act, the appeal obviously lay to the District Court. It was on that point that the case was decided. Now, by the amendment effected in the year 1930 the words "of the first class in the exercise of his ordinary and special original jurisdiction" occurring in s. 26, Bombay Civil Courts Act, have been repealed. The result therefore is that the forum of appeal depends not upon the 'class' of the Subordinate Judge who tries the suit, but solely on whether in the suit tried by him the amount or the value of the subject-matter exceeds Rs. 5000 or not. If it exceeds Rs. 5000, then the appeal lies to the High Court. If it does not, the appeal lies to the District Court. The learned District Judge was therefore, in my opinion, right in distinguishing the case in 22 Bom. 963<sup>1</sup> on the ground that it was decided prior to the amendment of s. 26, Bombay Civil Courts Act. The learned District Judge, however, has laid considerable emphasis on the recent decision of this Court in 43 Bom. L. R. 475.<sup>2</sup> In that case it was held that :

"Where a suit for account, in which the claim is valued at an arbitrary figure, results in a decree for a sum of money, the party appealing from the decree should value the claim in appeal at the

amount of the decree, and not at the arbitrary figure, for purposes of paying the court-fees."

And the learned District Judge goes on to observe: "By an analogy this decision would apply to the valuation of an appeal for jurisdiction also." In my opinion the learned Judge was in error in drawing this analogy. The case in 43 Bom. L. R. 475<sup>2</sup> only decides the question about the payment of court-fees in an appeal from the decree in an accounts suit where a specified sum is directed to be paid. It has no reference to the Court in which such an appeal has got to be filed. There are two objections to the analogy which the learned District Judge draws from this decision. In the first place it has to be assumed if the view of the District Judge is correct that the Suits Valuation Act applies also to appeals; and on this assumption the argument is that as the court-fee is to be paid on the valuation of the suit as determined by the decree in the trial Court, the jurisdiction for the purpose of appeal is also determined by the same valuation under s. 8, Suits Valuation Act. But the Suits Valuation Act does not apply to appeals but only to suits. In this connexion I need only refer to the observations of Jardine J. in 20 Bom. 265<sup>3</sup> at p. 268. Further, the decision in 43 Bom. L. R. 475<sup>2</sup> is primarily based on a construction of s. 7 (iv) (f), Court-fees Act, which applies both to suits and to appeals. It is with reference to that section that the court-fees have got to be determined and it was that section that was construed by this Court in 43 Bom. L. R. 475.<sup>2</sup> In the present case the forum of appeal must be decided by a reference to s. 26, Bombay Civil Courts Act of 1869, under which the deciding factor is what is the valuation or the subject-matter of the suit. The learned District Judge has at three or four places referred to "the subject-matter of appeal" and has held that because an appeal is filed from a decree where Rs. 25,000 odd have been directed to be paid the subject-matter of the appeal is that sum and that, therefore, the appeal must lie to the High Court. The learned Judge has in my opinion ignored the words of s. 26, Bombay Civil Courts Act, which in terms refers to the value of "the subject-matter of the suit" and not to "the value of the subject-matter of the appeal." It is the value of the subject-matter of the suit that must decide the Court to which an appeal will lie. The next point then for considera-

2. ('41) 28 A.I.R. 1941 Bom. 242 : I. L. R. (1941) Bom. 477 : 195 I. C. 894 : 43 Bom. L. R. 475, Kashiram Senu v. Ranglal Motilalshet.

3. ('96) 20 Bom. 265, Ibrahimji Issaji v. Bejanji Jamshedji.



tion is what is the value of the subject-matter of the suit. It was contended by Mr. N. C. Shah for the opponent that a suit of this kind could not be regarded as a suit for accounts and, therefore, a suit falling under S. 7 (iv) (f), Court-fees Act. For this purpose he referred me to a decision of a single Judge of the Madras High Court in I. L. R. (1942) Mad. 455.<sup>4</sup> It was held in that case that

"a suit for the administration of the estate of a deceased person is not merely a suit for accounts. It should be valued for purposes of court-fee under Art. 17B of Sch. 2, Court-fees Act, and not under S. 7 (iv) (f). The jurisdiction of the Court which can try such a suit is determined by the market value of the suit property."

As against this decision of a single Judge of the Madras High Court there are two decisions of the Division Bench of this Court which take the contrary view. In 39 Bom. 545<sup>5</sup> it was held that an administration suit of this kind properly fell under S. 7 (iv) (f), Court-fees Act. At p. 551 the learned Chief Justice observes as follows:

"That being so, there does not appear to be any reason why this should not be treated as a suit for account and for the share which may be found due to the plaintiff upon taking of such account, and if it is a suit for an account falling under S. 7, cl. (iv) (f), Court-fees Act, the plaintiff is at liberty to value it at Rs. 130 or any other sum she pleases."

In a more recent decision of this Court in 38 Bom. L. R. 754<sup>6</sup> an argument was advanced that the effect of the declaration asked for in that suit would be that the plaintiff would get possession of the immovable properties admittedly exceeding Rs. 5000 in value, and that, therefore, the suit should properly be regarded as a suit coming under cl. (iv) of S. 7, Court-fees Act. In dealing with that contention Broomfield J. observed (p. 758):

"We are not prepared to say that this case can really be distinguished from such cases as 39 Bom. 545<sup>5</sup> and 19 Bom. 198<sup>7</sup> where suits claiming reliefs similar to the reliefs claimed here were held to be administration suits coming under S. 7, cl. (iv) (f), Court-fees Act, in spite of the fact that the final decree to be passed might award possession of immovable properties."

Further this Court held at an earlier stage of the present case that the suit was governed by S. 7 (iv) (f), Court-fees Act. The learned District Judge had on 11th August

1926, taken the view that the suit was an administration suit and that the plaintiff was, therefore, at liberty to value it at his will for the purpose of court-fees under S. 7 (iv) (f), Court-fees Act. In Appeal No. 52 of 1929 this Court confirmed the decree of the District Judge and Patkar J. observed as follows:

"The present suit for administration of the estate of Kadubhai is substantially a suit for accounts governed by S. 7 (iv) (f), Court-fees Act. We, therefore, think that under S. 7 (iv) (f) and S. 8, Suits Valuation Act, the valuation for purposes of court-fees and jurisdiction is the same, and the appeal in the present case lay to the District Court. The learned District Judge held that the suit was tried as an ordinary suit and not as a special jurisdiction suit. If there was any mistake in assessing the pleaders' fees and the suit was treated as special jurisdiction suit that was a matter for the amendment of the decree, and would not invest the Court with special jurisdiction when the suit was really brought in its ordinary jurisdiction." I must, therefore, in view of these decisions, particularly the decision of this Court in this very matter, hold that the present suit for administration is a suit for accounts governed by S. 7 (iv) (f), Court-fees Act, and normally an appeal would lie to the District Court. The question then arises whether the fact that in this administration suit a decree had been passed for a sum of more than Rupees 5000 makes any difference in deciding the forum for filing the appeal. The learned advocate, Mr. N. C. Shah, contended that S. 26, Bombay Civil Courts Act, merely refers to the value of the subject-matter exceeding Rs. 5000, and he argued that although the suit may have been filed upon a notional valuation, the decree of the Court made it clear that the value of the subject-matter was above Rs. 5000 and that therefore the appeal should lie to the High Court. The question therefore arises whether the fact that the decree has been passed for a sum exceeding Rs. 5000 does make any difference in deciding the forum to which the appeal lies. *Prima facie* if the Court to which an appeal lies was to be decided by the amount for which a decree has been passed, numerous complications are likely to arise. For instance, if in a suit for accounts filed on notional valuation of Rs. 130 a decree is passed for Rs. 3000 and if the plaintiff is dissatisfied with the decree and claims a sum of Rupees 10,000 then according to the view taken by the learned District Judge the appeal would lie to the High Court. If on the other hand, the defendant was dissatisfied with the decree for Rs. 3000 and wanted to get rid of it, then again according to the view of the learned District Judge the appeal would lie

4. ('42) 29 A. I. R. 1942 Mad. 247 : I.L.R. (1942) Mad. 455 : 201 I. C. 261, Khaja Moideen v. Abdul Gaffoor.

5. ('15) 2 A.I.R. 1915 Bom. 59 : 39 Bom. 545 : 29 I. C. 949, Khatija v. Adam Husenally.

6. ('36) 23 A.I.R. 1936 Bom. 353 : 165 I. C. 954 : 38 Bom. L. R. 754, Maganlal v. Kanchanlal.

7. ('95) 19 Bom. 198, Bai Amba v. Pranjivandas Dullabhram.



to the District Court. These difficulties do not arise in determining the question of court-fees. As has been held by this Court in 34 Bom. L. R. 44,<sup>8</sup> the notional valuation on which the original suit was filed must give place to the actual valuation found as a result of the suit in deciding the court-fees to be paid on a memorandum of appeal. Taking the instance which I have just quoted, if a decree is passed for Rs. 3000 and if the plaintiff claims more than Rs. 3000, he would have to pay the court-fees on the difference between the amount claimed by him and the sum of Rs. 3000. On the other hand, if the defendant wants to get rid of the liability of payment of Rs. 3000, he would have to pay court-fees on that sum for filing the appeal. But these questions do not touch the forum where an appeal has to be filed, and it was held by this Court in 40 Bom. L. R. 1040<sup>9</sup> that in such a case the appeal must lie to the District Court. In that case a suit had been filed for accounts in the Court of the Subordinate Judge of Second Class and the claim was valued at Rs. 200. The decree passed in that suit was for Rs. 12,000 odd, and an appeal from that decree was filed to the High Court when an objection was taken that the appeal lay to the District Court.

In view of the fact that S. 26, Bombay Civil Courts Act, as amended made it immaterial by which Court the decree was passed, the point at issue was what was the value of the subject-matter of the suit. It was held that the case was governed by S. 8, Bombay Civil Courts Act, and that the appeal lay to the District Court and not to the High Court. On behalf of the opponent a reference is made to the ruling in 20 Bom. 265.<sup>3</sup> That was a suit for an account of partnership dealings, and the plaintiff valued the claim at Rs. 600. The Subordinate Judge passed a decree awarding to the plaintiff a sum of Rs. 30,000 odd. The defendants appealed to the High Court from the decree of the Subordinate Judge. The plaintiff objected that the appeal lay to the District Court and not to the High Court; and it was held that the value of the subject-matter of the suit exceeded Rs. 5000 and that therefore the appeal lay to the High Court under S. 26, Bombay Civil Courts Act. The correctness of that decision

however has been doubted in 22 Bom. 963<sup>1</sup> where Parsons J. observes as follows (p. 965):

"I have some doubt of its correctness, and would point out what seems to me an anomaly, viz., that though a plaintiff is allowed to place any value he pleases on his claim in order to select the forum in which he may file his suit, the permission does not extend beyond decree, the forum of appeal being governed not by that value but by the value decreed."

And although an attempt seems to have been made to distinguish 20 Bom. 265<sup>3</sup> in 40 Bom. L. R. 1040,<sup>9</sup> it seems to me that the latter decision in effect dissents from the view taken in that case. The view taken in 40 Bom. L. R. 1040<sup>9</sup> is in consonance with the view taken by the other High Courts in India. In a Full Bench decision of the Madras High Court in 40 Mad. 1<sup>10</sup> it was held that :

"Where a District Munsif passed a decree for more than Rs. 5000 in a suit for accounts wherein the plaintiff valued the subject-matter of the suit at an amount within the pecuniary jurisdiction of the Munsif, [then] the appeal from the Munsif's decree lay to the District Court and not to the High Court."

In the order of the reference to the Full Bench which is adopted by the Full Bench itself numerous anomalies have been pointed out which would result by taking any view other than the one taken by the Full Bench. The Allahabad High Court has also taken the same view in 47 ALL. 534.<sup>11</sup> The head-note to that decision reads as follows :

"In order to determine the proper appellate Court what is to be looked at is the value of the original suit, that is to say, the amount or value of the subject-matter of the suit and that must be taken to be the value assigned by the plaintiff in his plaint, and not the value as found by the Court unless it appears that either through carelessness or gross negligence, the true value has been altogether misrepresented by the plaintiff. It is the plaintiff's valuation in his plaint which controls the jurisdiction not only of the first Court but of the appellate Court."

And lastly, there is the decision of the Calcutta High Court in 53 Cal. 14.<sup>12</sup> At p. 30 the following observations occur in the judgment of Ghose J., who delivered the leading judgment in the case :

"The only difficulty suggested in accepting the view I stated is with regard to the forum of appeal if the Munsif passes a decree exceeding Rs. 5000. An appeal from the decree of a Munsif lies in all cases under S. 21 (2) of Act 12 [XII] of 1887 to the District Judge. But where the value of the

8. ('32) 19 A. I. R. 1932 Bom. 111 : 56 Bom. 23 : 137 I. C. 702 : 34 Bom. L. R. 44, *Ishwarappa v. Dhanji*.

9. ('38) 25 A. I. R. 1938 Bom. 464 : I. L. R. (1938) Bom. 833 : 178 I. C. 116 : 40 Bom. L. R. 1040, *Gopal v. Chimabai*.

10. ('18) 5 A. I. R. 1918 Mad. 998 : 40 Mad. 1 : 39 I. C. 439 (F.B.), *Kannayya Chetty v. Venkata Narasayya*.

11. ('25) 12 A. I. R. 1925 All. 376 : 47 All. 534 : 87 I. C. 1055, *Muhammad Abdul Majid v. Ala Bakhsh*.

12. ('25) 12 A. I. R. 1925 Cal. 1076 : 53 Cal. 14 : 89 I. C. 726 (F.B.), *Bidyadhar Bachar v. Manindra Nath Das*.



original suit exceeds Rs. 5000, the appeal from a decree of the Sub-Judge lies to the High Court. The forum of appeal is determined with reference to the value of the suit, and not the amount decreed."

In view of these decisions and particularly of our own High Court in 40 Bom. L. R. 1040<sup>9</sup> to which the attention of the learned District Judge does not appear to have been drawn, I must hold that the value of the subject-matter of the suit in this case was the value which the plaintiff himself put when filing the suit and is not affected by the fact that the decree for an amount exceeding Rs. 5000 is passed by the trial Judge. Although the suit was valued for the purpose of jurisdiction at Rs. 5500 it has been held by this Court in an earlier appeal in these very proceedings that under S. 8, Suits Valuation Act, the value for the purpose of jurisdiction must be taken to be the same as that for the purpose of court-fees, i. e., Rs. 130. That being the value of the subject-matter, S. 26, Bombay Civil Courts Act, does not apply, and under S. 8 of the Act, the appeal must lie to the District Court. I must, therefore, make this rule absolute with costs. The memorandum of appeal, along with the papers of the case, will be sent back to the District Court with a direction that the learned District Judge will proceed with the hearing of the appeal on merits and dispose of it according to law.

V.R./D.H.

*Rule made absolute.*

[Case No. 79.]

**A. I. R. (33) 1946 Bombay 361**

**KANIA AG. C. J. AND CHAGLA J.**

*Sheshgiridas Shanbhag — Appellant*

*v.*

*Sunderrao — Respondent.*

O. C. J. Appeal No. 41 of 1945, Decided on 27th September 1945, from order of Coyajee J.

(a) Letters Patent (Bom.), Cl. 15— Judgment—Suit in ejectment on ground of breaches of lease conditions—Amendment of plaint by inserting claim for termination of lease on ground of breaches subsequent to suit allowed—Order is not judgment.

Where in a suit to eject the defendant on the ground that he has committed breaches of the conditions of the lease, the trial Court grants leave to the plaintiff to amend the plaint by inserting the claim of termination of the lease on the ground that after the filing of the suit the defendant has committed further breaches of the terms of the lease the order is only an order in respect of the procedure of the suit and does not determine the rights of the parties on any question between them. The order is, therefore, not a judgment within the meaning of Cl. 15 of the Letters Patent and no appeal lies therefrom : 8 Beng. L. R. 433 and 13 Beng. L. R. 91, *Rel. on*; 9 Cal. 482 (P. C.), *Ref.*

[P 362 C 2]

**C. P. C. —**

('44) Chitaley, O. 6, R. 17, N. 20, L. P. Cl. 15— N. 2, Pt. 18 and N. 3, Pt. 10.

('41) Mulla, Page 601, Note "Appeal"; Page 1402, Pt. (n); Page 1433 Note "Interlocutory order."

(b) Civil P. C. (1908), O. 6, R. 17 — Body of Code creates jurisdiction — Rules indicate mode of its exercise — O. 6, R. 17 has nothing to do with jurisdiction.

Per *Kania Ag. C. J.*—The Civil Procedure Code is divided into two parts. Part I contains the sections and Part II contains the orders. The body of the Code creates jurisdiction, while the Rules indicate the mode in which it is to be exercised. The body of the Code is, therefore, expressed in more general terms and is to be read in conjunction with the more particular provisions of the Rules. Where in a suit to eject the defendant on the ground that he has committed breaches of the conditions of the lease, the Court grants leave to amend the plaint by inserting the claim of the termination of the lease on the ground of further breaches of the terms of the lease committed after the filing of the suit, the order for amendment does not in any way deal with the jurisdiction of the Court or affect its jurisdiction and it is not a case of want of jurisdiction at all: ('17) 4 A.I.R. 1917 Cal. 657, *Rel. on.* [P 362 C 2; P 363 C 1]

Per *Chagla J.*—Order 6, R. 17 has nothing whatever to do with jurisdiction. It proceeds on the assumption that the Court has the jurisdiction in a suit pending before it to order amendment of pleadings. All that O. 6, R. 17 provides is the mode in which the Court should exercise that jurisdiction. [P 363 C 1]

**C. P. C. —**

('44) Chitaley, Pre. N. 7, Pt. 27, S. 2 (1), N. 1, Pts. 1, 2, 5; O. 6, R. 17, N. 1.

('41) Mulla, Page 4, Pt. (w).

*M. V. Desai and P. L. Thaker*—for Appellant.  
*D. N. Bahadurji and P. P. Khambatta* —

for Respondent.

**Kania Ag. C. J.** — This is an appeal from the order of Coyajee J. granting leave to the plaintiff to amend the plaint by inserting the claim of termination of the lease in suit on the ground of the alleged further breaches of two conditions of the lease after the filing of the suit, as set out in the rider filed in Court. The plaintiff who is a landlord filed this suit to eject the defendant on the ground that the defendant had committed breaches of its conditions as set out in the plaint. The defendant filed his written statement denying the breaches. The parties went to a hearing and the Court heard evidence, we are told, for two or three days. It is alleged on behalf of the appellant that finding that the case as set out in the plaint would not be established, the plaintiff sought to rely on further alleged breaches. It was vehemently argued before the trial Court that the plaintiff should not be allowed to amend the plaint at that stage but the argument was not accepted. The learned Judge made an order granting leave to



amend as asked by the plaintiff. The defendant has filed this appeal.

The first question is whether an appeal lies. Briefly put the plaintiff's case is that the defendant was a tenant, that he had committed breaches of the terms of the tenancy as set out in the plaint and therefore the plaintiff was entitled to possession. That is the cause of action set out in the plaint. By the amendment allowed by the Court the plaintiff will be permitted to contend at the hearing that the defendant should be ejected also on the ground that after the filing of the suit he had committed further breaches of the terms, as set out in red ink in the plaint. The effect of the amendment only is that the plaintiff will be allowed to raise that contention. The granting of leave to amend does not amount to admitting that those contentions are valid, or that the plaintiff will get the relief because of those contentions. They will be decided at the hearing on the merits of the disputes between the parties. At the present stage the question to be considered is whether an appeal lies from an order granting leave to amend, as made in the present case. The discussion should be considered as confined to the facts here.

On behalf of the appellant, Mr. Desai relied on two judgments of the Calcutta High Court, viz., 8 Beng. L. R. 433<sup>1</sup> and 13 Beng. L. R. 91.<sup>2</sup> In those cases the question, what is a 'judgment' within the meaning of Cl. 15 of the Letters Patent came to be considered by the Court. Under the Civil Procedure Code, an order made under O. 6, R. 17, is not appealable. Therefore, the appellant can succeed in his contention that an appeal lies only if the case is covered by the word "judgment" in Cl. 15 of the Letters Patent. According to those two decisions (which are accepted as classical pronouncements) a judgment must finally determine some right between the parties. That view is accepted by the Judicial Committee of the Privy Council in 10 I. A. 4.<sup>3</sup> In spite of counsel's industry, Mr. Desai has been unable to point out any precedent where this question was considered and decided by any Court. There is no reported decision in favour of the appellant.

In my opinion, no appeal lies in the present case. The only point decided by the learned trial Judge in giving leave to amend is that the plaintiff will be entitled to contend at the hearing that the defendant should be ejected on the grounds mentioned in the amendment. It is only an order in respect of the procedure of the suit and does not determine the rights of the parties on any question between them. It does not decide that the plaintiff is entitled to get any relief on those grounds, or in law is permitted to get those reliefs as claimed. The only permission granted is to urge the argument covered by the amendment. Mr. Desai strongly urged that under O. 6, R. 17, the Court's jurisdiction and power is to allow an amendment only in respect of a controversy between the parties in the suit. It is beyond the jurisdiction and beyond the power of the Court to allow an amendment which goes beyond the scope of the suit, and as by granting leave to amend the Court has permitted the plaintiff to raise a contention which is outside the scope of the suit as framed, it is an exercise of jurisdiction which is not vested in the Court at all. According to the appellant this is not a case of irregular or improper exercise of jurisdiction. It is a case of complete want of jurisdiction. It was further argued that the question involved in the appeal relates to the jurisdiction of this Court and was covered by the word 'judgment' as explained in the two Calcutta cases mentioned above. In my opinion, this line of reasoning is fallacious. So far as the Civil Procedure Code is concerned, it will be noticed that it is divided into two parts. Part I contains the sections and Part II contains the orders. As pointed out in 43 Cal. 148<sup>4</sup> the body of the Code creates jurisdiction, while the rules indicate the mode in which it is to be exercised. The body of the Code therefore is expressed in more general terms and is to be read in conjunction with the more particular provisions of the rules. These observations are applicable only to the extent the Code controls the jurisdiction of the High Court on its original side. It is, however, clear that the order for amendment as made in the present case does not in any way deal with the jurisdiction of the Court or affect its jurisdiction. The effect of the contention of the appellant only is that the learned trial Judge has tried to bring into

1. ('72) 8 Beng. L. R. 433, *Justices of the Peace for Calcutta v. Oriental Gas Co.*

2. ('74) 13 Beng. L. R. 91, *Hadjee Ismail Hadjee Hubbeeb v. Hadjee Mahomed Hadjee Joosub.*

3. ('84) 9 Cal. 482 : 10 I. A. 4 : 4 Sar. 407 (P.C.), *Hurrish Chunder Chowdhry v. Kali Sundari Debia.*

4. ('17) 4 A. I. R. 1917 Cal. 657 : 43 Cal. 148 : 33 I. C. 329, *Mani Mohan Mandal v. Ramtaran Mandal.*



the case a question for discussion which, it is contended, is improper to be discussed in the case. Thus put it is obvious that the Court having jurisdiction to make the order has made it improperly in a case where it should not have done so. It is a case of irregular or improper exercise of jurisdiction and not a case of want of jurisdiction at all. In my opinion, therefore, the appeal fails and is dismissed with costs.

**Chagla J.**— I agree. Mr. Desai for the appellant has strongly relied on the decision of the Privy Council in 48 I. A. 214.<sup>5</sup> In that case their Lordships of the Privy Council observed that no power had been given to the Courts under O. 6, R. 17, to enable one distinct cause of action to be substituted for another in order to change by means of amendment the subject-matter of the suit. Mr. Desai reads into these observations of the Privy Council something which is really not there, viz., that the effect of these observations of the Privy Council is that the Court has no jurisdiction to make an order for amendment of the plaint which substitutes a totally different, new and inconsistent case for the case with which the plaintiff originally and initially came to the Court. All that their Lordships of the Privy Council meant by those observations was that if a learned Judge in exercising the jurisdiction, which he undoubtedly had under O. 6, R. 17, to order an amendment of the plaint, ordered an amendment which had the effect of substituting an entirely different case for the case originally brought before the Court, then such an exercise of jurisdiction would be irregular or improper. Order 6, R. 17 has nothing whatever to do with jurisdiction. It proceeds on the assumption that the Court has the jurisdiction in a suit pending before it to order amendment of pleadings. All that O. 6, R. 17 provides is the mode in which the Court should exercise that jurisdiction, and it is clear both from the language of O. 6, R. 17, and from the various judicial decisions that have been given on that rule that there are various grounds on which the Court should allow amendment of the plaint and there are various grounds where leave to amend should be refused. The highest that Mr. Desai can put his case is that in this particular case Coyajee J. should have refused leave to the plaintiff to amend the plaint. In my opinion that does not amount to a decision on merits of the question. The

5. ('22) 9 A.I.R. 1922 P.C. 249 : 48 Cal. 832 : 48 I. A. 214 : 63 I.C. 914 (P. C.), *Ma Shwe Mya v. Maung Mo Haung*.

most that can be said is that the learned Judge exercised the jurisdiction vested in him under O. 6, R. 17, in a manner not warranted by the provisions of that rule. That does not make it a question of jurisdiction nor does that suggest that the learned Judge had no jurisdiction to make the order. Therefore, in my opinion, the order before us is not an order which affects the merits of the question nor does it determine any right or liability. Therefore it is not a judgment within the accepted definition of that expression as used in cl. 15, Letters Patent.

V.R./D.H.

*Appeal dismissed.*

[Case No. 80.]

**A. I. R. (33) 1946 Bombay 363**

SEN AND RAJADHYAKSHA JJ.

*Waman Vinayak—Applicant*

v.

*Narayan Hari — Opponent.*

Civil Revn. Appln. No. 674 of 1943, Decided on 15th August 1945, from order passed by Civil Judge (Junior Division) at Roha in Suit No. 148 of 1942.

Court-fees Act (1870), S. 7 (iv) (c) and (v)—Suit for possession of property alienated by Hindu widow with declaration that plaintiff was owner of property and that sale-deed in respect thereof was illegal—Held, relief of possession being principal relief and not consequential relief suit was governed by S. 7 (v) and not by S. 7 (iv) (c)—Market value at date of suit held should be considered.

The plaintiff alleging to be the sole surviving coparcener sued for possession of certain property which was alienated by his uncle's widow for Rs. 2000. In the alternative the plaintiff alleged that the sale-deed executed by the widow was in reality a mortgage and therefore he was entitled to redeem the property. The plaintiff, besides asking for possession and for redemption, asked for two declarations: (1) that the document was an illegal document and was not binding on the plaintiff and (2) that the properties were of the ownership of the plaintiff. He paid court-fee on the basis of the relief as regards redemption valued at Rs. 2000, which according to him was higher than the valuation regarding the two declarations as aforesaid, the claims for possession being, according to the plaintiff, consequential to the declarations sought by him:

*Held* that in determining whether the suit was governed by S. 7 (iv) (c) or not it was necessary for the Court to ascertain the real nature of the relief sought irrespective of the form in which the prayers for relief were framed; that in the present suit the claim for the declarations could not be treated as a claim really necessitated by the nature of the suit, the real or principal remedy sought by the plaintiff being a decree for possession. The suit was, therefore, governed by S. 7 (v) and not by S. 7 (iv) (c) with respect to the relief of possession: ('32) 19 A.I.R. 1932 All. 485 (F. B.) and ('38) 25 A.I.R. 1938 Pat. 22 (F. B.), *Applied*; ('28) 15 A.I.R. 1928 All. 248, *Dissented and held not good law in view of* ('32) 19 A.I.R. 1932 All. 485 (F.B.).

[P 365 C 2]

*Held further* that the market value of the property in suit must be determined by reference to the



rates prevailing in the market at the date of the suit and not with reference to the consideration stated in the sale-deed. [P 365 C 2]

**Court-fees Act —**

('44) Chitaley, S. 7 (iv) (c), N. 3, Pt. 3 and S. 7 (v), N. 25, Pt. 2.

('36) B. V. Vishwanath Iyer, S. 7 (iv) (c), P. 99 Note "Declaration and possession" and S. 7 (v) P. 139, Pt. 23.

*K. N. Dharap*—for Applicant.

*V. S. Desai*—for Opponent.

**Sen J.**—This is an application by one of the defendants in a suit filed in the Court of the Second Class Subordinate Judge (as he then was) at Roha. The plaintiff-opponent alleged that he was the son of Hari, the adopted son of Narayan, Narayan being one of the two sons of Ballal and the other son of Ballal being one Antaji, whose wife was Laxmibai, that Laxmibai, after Antaji's death had sold property purporting to be Antaji's property in 1912 for Rs. 2000 and that as the two brothers, Antaji and Narayan, had not separated, he was entitled, as the sole surviving coparcener, to the property which had been alienated by Laxmibai. Secondly, his case in the alternative seems to have been that even in case Antaji and Narayan had become separate, he was entitled to challenge the sale-deed, as not being based on legal necessity, after Laxmibai's death in 1930. His third alternative case was that the sale-deed which purported to have been effected by Laxmibai was in reality a mortgage and that, therefore, he was entitled to redeem the property. The plaintiff, besides asking for possession and for redemption, asked for two declarations: (1) that the document of 1912 was an illegal document and was not binding on the plaintiff and, (2) that the properties were of the ownership of the plaintiff. He paid court-fee on the basis of the relief as regards redemption valued at Rs. 2,000, which according to him was higher than the valuation regarding the two declarations as aforesaid, the claims for possession being, according to the plaintiff, consequential to the declarations sought by him.

The learned Judge held that the suit would, so far as the declarations and consequential reliefs sought by the plaintiff were concerned, fall under S. 7 (iv) (c), Court-fees Act, 1870, that the plaintiff would be entitled to put his own valuation thereon at not less than Rs. 5, and that, therefore, the last relief prayed for by him being valued under S. 7 (ix) of the Act at Rs. 2000, such valuation would govern the amount of court-fees payable. He also held that in case the market value of the property in question

had to be determined, it must be the market value at the date of the alienation, i. e., in 1912, the consideration stated in the document of sale being Rs. 2000. In the result he held that the valuation for purposes of jurisdiction could not be higher than Rs. 2,000, and, therefore, holding that he had jurisdiction to try the suit, he ordered the suit to be set down for further hearing.

Mr. Dharap of behalf on the applicant-defendant has contended that in this case the declarations sought by the plaintiff, viz., a declaration that the document in question was illegal and that the plaintiff was the owner of the property in question, were unnecessary, and that, therefore, the suit being substantially one for possession, it should be valued under S. 7 (v) of the Act. According to defendant 1, the valuation of the three houses in suit should be taken as between Rs. 10,000 and Rs. 12,000 and the valuation of the land in suit at Rs. 300, so that if this valuation be accepted, the suit must, according to Mr. Dharap's contention, be valued at a figure above the pecuniary jurisdiction of the Second Class Subordinate Judge. We think that this contention must be upheld. In 34 I.A. 87<sup>1</sup> there was a suit for a declaration that an *ijara* granted by a Hindu widow of her husband's estate had become inoperative as against the plaintiffs (heirs of her husband) since her death, and for *khas* possession of the properties in suit with mesne profits. It was held, *inter alia*, that there was no necessity for the declaration prayed, or to cancel or to set aside the *ijara*. In 54 ALL. 812<sup>2</sup> the reliefs claimed were : (1) that the mortgage deed be declared (or adjudged) void and be cancelled; and (2) that the compromise, the preliminary decree and the final decree be cancelled. It was held by a Full Bench that a relief for the cancellation of a decree, or to be more accurate, for the setting aside of a decree was not a declaratory relief only, and that the effect was not merely a declaration as to a person's character or status as contemplated by S. 42, Specific Relief Act, but that the effect would be to render the decree void and incapable of execution and would free the plaintiff from all further liability under it. The claim, therefore, was held not to be merely for a declaratory relief falling under Sch 2, Art. 17 (iii) or under S. 7 (iv) (c) of the Act. Their Lordships expressed

1. ('06) 34 Cal. 329 : : 34 I. A. 87 (P.C.), *Bijoy Gopal Mukerji v. Krishna Mahishi Debi*.

2. ('32) 19 A. I. R. 1932 All. 485 : 54 All. 812 : 139 I. C. 32 (F.B.), *Kalu Ram v. Babu Lal*.



the opinion that the expression "consequential relief" in S. 7 (iv) (c) meant some relief which would follow directly from the declaration given, the valuation of which was not capable of being definitely ascertained and which was not specifically provided for anywhere in the Act and could not be claimed independently of the declaration as a substantive relief. Their Lordships further observed that if a substantive relief was claimed, though clothed in the garb of a declaratory decree with a consequential relief, the Court was entitled to see what was the real nature of the relief, and that if satisfied that it was not a mere consequential relief but as substantive relief, it could demand the proper court-fee on that relief, irrespective of the arbitrary valuation put by the plaintiff in the plaint on the ostensible consequential relief. In 16 Pat. 766<sup>3</sup> it was held by a Full Bench that S. 7 (iv) (c) has application to declarations properly so called, such, for instance, as declarations of public status, or a declaration that the plaintiff holds a public office, or a declaration as to the meaning of a will or a trust-deed or other public document and that it has no reference to the kind of declaration in the sense of a finding of fact as to the plaintiff's title necessary for granting a decree for possession.

Mr. Desai on behalf of the opponent has admitted that he could have brought a suit for possession without asking for a declaration of any kind. But he has relied on the case in 50 ALL. 610<sup>4</sup> which was decided by a single Judge who held that where the plaintiff elected to ask for a declaration of his title as well as for possession of certain property, when he need only have sued for possession *simpliciter*, he would have to pay court fees as on a suit for a declaration with consequential relief. We are unable to agree with that decision, which cannot be said to be good law in view of the later decision of the same Court in 54 ALL. 812.<sup>2</sup> In 16 Pat. 766<sup>3</sup> it was observed (p. 784) :

"In every suit for possession the plaintiff cannot succeed unless he proves the facts necessary to establish his title, but the real remedy which he seeks is a decree for delivery of possession. The distinction between the remedy sought and the finding of fact necessary to justify the granting of that remedy may be simply tested by considering whether the plaintiff obtaining an order for possession but having been refused a formal 'declaration' in the decree could come to the appellate

Court with a complaint that he had not received the whole of the remedy for which he had asked . . . The plaintiff should only allege the facts necessary to establish his title and that the defendant is wrongfully in possession. If he goes on to claim, in the manner so beloved of pleaders, a declaration of title in addition to an order for possession, the Court may and should treat the case as a claim for possession pure and simple, and ignore entirely the claim for a 'declaration of title.' "

With respect we think that the principle enunciated in the two Full Bench cases should govern the facts of the present case. Both those cases emphasise the necessity for the Court to ascertain the real nature of the relief sought, irrespective of the form in which the prayer or prayers for relief are framed ; for instance, in every case, it would perhaps be possible to ask for some kind of declaration, but it is obvious that every one of such cases is not intended to be covered by the words used in cl. (c) of S. 7 (iv), Court-fees Act, and that in the present suit the claim for the declarations in question cannot be treated as a claim really necessitated by the nature of the suit, the real or principal remedy sought by the plaintiff being a decree for possession. The provisions of the Court-fees Act applicable, therefore, so far as that remedy is concerned, are those of S. 7 (v). We do not also agree with the view of the trial Court that the market value of the houses in suit should be determined by the consideration for the transaction of 1912. That value must obviously be determined by reference to the rates prevailing in the market at the date of the suit.

Accordingly, we must make the rule absolute with costs, set aside the order of the trial Court and direct that Court to determine the valuation both for the purpose of court-fees and for the purposes of jurisdiction ; and if it be found that the valuation for the purposes of jurisdiction is beyond the limits of its jurisdiction, the plaint should be returned to the plaintiff for being presented to the proper Court.

K.S./D.H. *Rule made absolute.*

[Case No. 81.]

**A. I. R. (33) 1946 Bombay 365**

KANIA AG. C. J., AND GAJENDRA-GADKAR J.

*Nagappa Balappa Bastwad and others*  
— Appellants

v.

*Ramchandra Gundo and others*

— Respondents.

Letters Patent Appeal No. 23 of 1944, Decided on 28th August 1945, from decision of Sen J., in S. A. No. 33 of 1941.

3. ('38) 25 A. I. R. 1938 Pat. 22 : 16 Pat. 766 : 172 I. C. 840 (F.B.), Ramkhelawan Sahu v. Bir Surendra Sahi.

4. ('28) 15 A. I. R. 1928 All. 248 : 50 All. 610 : 115 I. C. 655, Tula Ram v. Dwarka Das.



(a) Bombay Land Revenue Code (5 [V] of 1879), S. 83 — Presumption of permanent tenancy in favour of tenant — Proof by landlord as to commencement of tenancy—Nature of.

*Prima facie*, the object of S. 83 is to protect the possession of tenants who show the antiquity of their tenancy and who are able to claim by reason of such antiquity that the commencement of their tenancy cannot be proved. Therefore, if the tenant proves the antiquity of his tenancy the landlord is expected to prove by satisfactory evidence the commencement of the tenancy which as the word "commencement" indicates must have reference to the year—if not the date and month—in which the tenancy commenced. Merely showing that the tenancy may have commenced within a margin of any five or ten years is not such satisfactory evidence of the commencement of the tenancy: ('22) 9 A. I. R. 1922 Bom. 402; ('26) 13 A. I. R. 1926 Bom. 55; ('27) 14 A. I. R. 1927 Bom. 270; ('31) 18 A.I.R. 1931 Bom. 302 and ('35) 22 A.I.R. 1935 Bom. 247, held no longer good law after the Privy Council decision in ('40) 27 A.I.R. 1940 P. C. 192; ('43) 30 A.I.R. 1943 Bom. 95 and S. A. No. 566 of 1940, *Rel. on.* [P 369 C 2 ; P 370 C 1]

(b) Bombay Land Revenue Code (5 [V] of 1879), S. 83—To claim presumption of permanent tenancy, tenant of watan lands need not trace back his possession to a time when land was alienable.

In order to claim the presumption of permanent tenancy under S. 83, a tenant of watan lands is not required to trace back his possession of those lands as such tenant to a time when the land was alienable. On the contrary if the tenant establishes the antiquity of his tenancy the landlord can rebut the presumption arising from such possession only by showing that the tenancy commenced at a time when the watan property had ceased to be alienable: *Case law discussed.* [P 373 C 1; P 374 C 1, 2]

(c) Maxims — Presumitur retro — Doctrine of, applies to watan property.

The doctrine of *presumitur retro* is one of general application and there is no justification for excluding watan property from its operation.

[P 374 C 2]

(d) Appeal — Letters Patent appeal — New point.

A point which has not been taken in any of the Courts below cannot be allowed to be argued for the first time in a Letters Patent appeal: ('36) 23 A. I. R. 1936 Bom. 227, *Rel. on.* [P 372 C 2]

(e) Precedents — Obiter dicta in Privy Council decision are binding on Indian Courts.

The *obiter dicta* of their Lordships of the Privy Council are binding on all Courts in India if the said dicta contain a definite expression of their Lordships' opinion: 37 Bom. 513, *Rel. on.*

[P 372 C 1]

**C. P. C.—**

('44) Chitaley, Pre. N. 15, Pts. 17, 18.

*A. G. Desai & B. M. Kalagate*— for Appellants.

*H. C. Coyajee and S. H. Belavadi* —

for Respondents.

**Gajendragadkar J.**—The plaintiffs in this case sued (Civil Suit No. 87 of 1935) to recover possession of the suit lands situated in Mouje Jabapur, their respective revision survey numbers being 58, 59/1, 59/2 and 59A. The plaintiffs allege that these lands are all

pargana watan lands and were owned by Gundo, the adoptive father of plaintiff 1. Gundo had mortgaged the lands in suit to Ningappa, the ancestor of the contesting defendants, appellants before us, in the year 1873. Gundo died in 1880; his widow Tungawa borrowed some more money from the said Ningappa and passed a document in his favour in 1886. The plaintiffs allege that by this document Tungawa, the adoptive mother of plaintiff 1, sought to create rights of permanent tenancy in favour of Ningappa and their case was that this document was the result of undue influence practised on her. Plaintiff 1 was adopted by Tungawa in 1922 and the present suit has been filed within twelve years from the date of his adoption.

Shortly stated, the case for the plaintiffs is that the document executed by Tungawa is not binding on them and that the defendants who claim to be permanent tenants of the lands are trespassers or, at best, annual tenants. On that footing the plaintiffs claim possession of the suit lands and past mesne profits for three years. Plaintiff 2 has been joined to the suit "as he is to get half share in the suit property if plaintiff 1 gets possession." The defendants pleaded that they were in possession of the lands not as annual tenants, nor as trespassers, but that they were permanent tenants of the lands, and in support of their plea of permanent tenancy they relied upon their long possession of the lands as tenants and they invoked the provisions of S. 83, Bombay Land Revenue Code, 1879. The learned trial Judge held that the plaintiffs had no title to the land, Revision Survey No. 59/2. He also held that defendants 1 to 12 were entitled to the presumption of permanent tenancy in regard to the lands bearing Revision Survey Nos. 58 and 59A and that the plaintiffs were not entitled to take possession thereof. With regard to Revision Survey No. 59/1 it was held that defendants 1 to 12 had failed to prove their permanent tenancy and that the plaintiffs were entitled to its possession.

The plaintiffs went in appeal to the Assistant Judge at Belgaum (Civil Appeal No. 87 of 1939). In appeal the findings of the learned trial Judge were accepted and the decree passed by him was confirmed. Against that decree the plaintiffs preferred a second appeal (No. 33 of 1941). Sen J. who heard the said second appeal came to the conclusion that the view accepted by both the Courts below that the defendants had proved their plea of permanent tenancy with regard to the two



lands, Revision Survey Nos. 58 and 59A, was erroneous in law. He held that on the documents produced in the case, the tenancy had been traced to 1860. He also held that the said documentary evidence "would make 1861 the year of its commencement at the earliest." Sen J. also held that even if the tenancy be deemed to have existed for 20 or 25 years prior to 1886, the period of five years within which its commencement could be deemed to have been proved was a fairly definite period within the meaning of S. 83, Land Revenue Code. Thus, the conclusion of Sen J. was that the tenancy in question had been shown to have commenced in 1861 or between 1860 to 1865. In either view, according to Sen J. the landlord must be deemed to have proved by satisfactory evidence the commencement of the tenancy. On this view of the matter, Sen J. set aside the decree passed by both the Courts below, allowed the appeal and decreed the plaintiffs' claim for possession even as regards the two Revision Survey Nos. 58 and 59A. Against this judgment of Sen J. defendants 3 to 5 and 8 and 9 have preferred the present Letters Patent appeal.

It may be pointed out that the oral evidence led by the defendants in support of their plea of permanent tenancy was not accepted by both the Courts below and the finding recorded by them in favour of the defendants on that point was based on the documentary evidence in the case. The documents in this case are very few. First, there is a document of 1849 (Ex. 181). The material entry in that document in regard to Revenue Survey No. 40, which include Revision Survey Nos. 58 and 59A, reads as follows :

"Revenue Survey No. 40.

Sarva Inam :— Yamaji Sadashiv Nadgouda, of Inam Village Nadihalli Vahiwardar personally : and Vahiwardar as regards 10 acres, Babaji Abaji Nadgouda Nadihalli: Khuski land (called) Mavingidat shet for this land were entered the following old paimashi Nos. 2. Numbers 33 and 34 entirely Karda are Sheshuubin Basanna Kagati and Appaya bin Avanna Bastwad."

It has been found that Yamaji was the ancestor of the plaintiffs and Appaya was the ancestor of the defendants. The view which both the Courts below had taken of this document was that Appaya was a tenant of Yamaji with regard to the land in suit and that Sheshu was a tenant of Babaji with regard to the ten acres which are not the subject-matter of the present appeal.

On this document Sen J.'s view was that it was more likely that Sheshu was Yamaji's

tenant rather than of Babaji and that Appaya may have been the tenant of Babaji. He, therefore, held that "both the Courts below seem to have fallen into an error in holding it proved that the defendants' predecessors-in-title were tenants of the plaintiffs' predecessors-in-title on the land in suit in 1849." It is true that the recitals in this document are not very specific or clear. And in the absence of any evidence as to the identity of Nos. 33 and 34 mentioned in the document, it is somewhat difficult to find which land they referred to. However, having regard to the area of the lands now in suit and the area of Revenue Survey No. 40 mentioned in Exs. 136 and 181 it would not be unreasonable to hold that the said Nos. 33 and 34 include the lands now in suit. The document refers to the two owners of Revenue Survey No. 40 and defines the land which had fallen to the share of Babaji by its acreage, and by its name. Thus, the rights of the two owners are distinctly and separately mentioned. The possession of both the tenants is shown as against Nos. 33 and 34 entirely. It seems to me that this document shows that Sheshu and Appaya were cultivating the land bearing Nos. 33 and 34 jointly. If the said Nos. 33 and 34 include the land now in suit, then it may not unreasonably be taken as established that the defendants' ancestor Appaya was in possession of the land in suit as a tenant, may be along with Sheshu. In construing this document, Sen J. has apparently failed to consider the effect of the word "entirely" used in reference to Nos. 33 and 34 and has overlooked the fact that the said two lands are shown to be in the joint cultivation of the two tenants Sheshu and Appaya. I, therefore, think that there is considerable force in the contention of the defendants that this document helps to trace back their possession of the land in suit to 1849. I am, therefore, not prepared to agree with Sen J. in holding that both the Courts below had erred in finding that the ancestor of the defendants was shown to be in possession of the land in 1849.

Then the next document is of 1853 (Ex. 123) It purports to be an entry from the Revenue Prat Book of that year. The extract shows Revenue Survey No. 40 as Sarva Inam, the Inamdar being "Yamaji Sadashiv Nadgouda Madihalli, Absent." This document does not refer to the persons in the actual cultivation of the land. It does not also show that Yamaji was personally cultivating the land. It is not suggested that in the ordinary course the Revenue Prat Book is expected to men-



tion the name of the tenant or cultivator. The absence of the name of any cultivator or tenant in this document is therefore inconclusive. The next document is an agreement passed in writing by Gundo to Ningappa on 3rd April 1873, (Ex. 136). Gundo had borrowed from Ningappa Rs. 300 and in order to secure the repayment of the said amount he agreed to mortgage to Ningappa Survey No. 40 measuring 27 acres, 11 gunthas, and assessed at Rs. 32. The document recited: "I have given this land to you for cultivation from the current year till such time as you like" and then it proceeded to provide for payment of Rs. 30 as rent out of which Rs. 15 were to be deducted every year towards repayment of the amount of Rs. 300 borrowed by Gundo. In this document Gundo admitted that "the aforesaid land is with you alone for *vahiwat* since formerly." This document shows that the land had been in possession with Ningappa from before 1873 and that under this document Ningappa was given the right to be in possession of the land as long as he liked.

The last document in the case is Ex. 189 which purports to be a permanent lease passed in writing by Tungawa in favour of Ningappa. In this document Tungawa refers to the amount borrowed by her husband from Ningappa and mentions that the balance still due thereunder was Rs. 105. She also refers to the amounts of Rs. 195 and Rs. 200 borrowed by her on two occasions and she admits to have received Rs. 100 on that day. The document thus purports to be for a consideration of Rs. 600. Under this document Tungawa purports to give Ningappa the land in question on a permanent lease on an agreement that Rs. 25 should be paid every year as rent to her and her successors from generation to generation. There is a recital in this document that for the last 20 to 25 years the land had been with Ningappa for cultivation on rent. It is common ground that Tungawa was not authorised to pass a permanent lease of the land in question since, as a Hindu widow, she was a limited owner of the property. Besides, the lands in question being Pargana Watan lands, any alienation made by a watandar would not be binding on his successor. The defendants do not seek to base their claim for permanent tenancy on this document. They rely upon this document for the admission made by Tungawa that Ningappa was in possession of the land for 20-25 years before 1886. On the other hand, for the landlord, it is contended that the reference to 20 to 25

years made in this document helps to fix the commencement of the tenancy between 1860 to 1865. It is also contended that reading the document literally it may be held that the tenancy commenced either in 1860 or in 1865. It must, however, be remembered that Ningappa as well as Tungawa were illiterate and the wording of the recitals in the document was probably settled by the scribe on some information given to him by Tungawa. The expression "20 to 25 years" used in the document is vague and loose. It denotes that the land was with Ningappa for some years past; it was not possible to say precisely how many. Taken literally, the recital that the land was with Ningappa for 20 to 25 years cannot be regarded as accurate because Appaya, who was Ningappa's ancestor, is shown to have been on the land in 1849. It is, therefore, impossible to hold that this document affords any reliable evidence for determining the commencement of the tenancy. In this connection it must be pointed out that though Tungawa was examined in the case, she was not asked any question about the period for which the defendants were in possession of the land and no attempt was made by the plaintiffs to prove the correctness of this recital in Ex. 189 by asking Tungawa any material or relevant questions about it. This being the position of the documentary evidence, I am unable to accept the conclusion of Sen J. that this document shows that the tenancy of the defendants commenced in 1861 or between 1860 to 1865. Sen J. has referred to the fact that "the plaintiff has admitted that the tenancy commenced in 1860." Plaintiff 1 has admitted that he had no personal knowledge in the matter and his evidence in regard to the commencement of the tenancy is based upon the documents produced in the case. These documents show that the defendants were in possession of the land as tenants of the plaintiffs' ancestor probably in 1849, and, in any event, between 1860 to 1865. It is not either alleged or proved that anybody else unconnected with the defendants' family was ever in possession of the land as a tenant. In fact, in the plaint no allegation is made as to when the tenancy of the defendants actually commenced according to the plaintiffs. Under these circumstances it seems to me that the defendants have established the antiquity of their tenancy and they are *prima facie* entitled to a declaration of their status as permanent tenants on the ground that the commencement of their tenancy cannot be proved because of its antiquity.



The next question which arises for decision is if the plaintiff shows that the defendants came on the land between 1860 to 1865, is that "satisfactory evidence of the commencement" of the defendants' tenancy? Sen J. took the view that even if it was held that the tenancy in question commenced some time between 1860 to 1865, the plaintiff can be deemed to have led satisfactory evidence about the commencement of the tenancy and that by reason of that evidence the presumption of permanent tenancy could not arise in favour of the tenants. Two views were pressed before Sen J. For the appellants it was contended that this Court has repeatedly held that under S. 83 if the landlord shows that the tenancy of a particular tenant may have commenced not in a particular year, but within a margin of a reasonably definite period, he could be said to have led satisfactory evidence about the commencement of that tenancy; and it was argued that five years was certainly a margin of a reasonably definite period. The appellant thus claimed to have rebutted the presumption of permanent tenancy arising in favour of the defendants by reason of the antiquity of their tenancy. On the other hand the respondents urged before Sen J. that whatever may have been the view of this Court before, since the decision of the Privy Council in 43 Bom. L. R. 1<sup>1</sup> it must now be taken to be settled that the only way in which a landlord can rebut the presumption of permanent tenancy arising in favour of the tenant by reason of the antiquity of his tenancy is to lead satisfactory evidence about the date of the commencement of that tenancy. It was urged that the earlier decisions of this Court which seemed to take a contrary view must be now treated as overruled. In this connection reliance was placed by the respondents on the decision of Divatia J. in 45 Bom. L. R. 186.<sup>2</sup> Sen J. apparently accepted the contention of the appellants and took the view that the tenancy in suit was shown to have existed for 20 or 25 years in 1886 and that the margin of 20 to 25 years was a fairly definite period. On that view he decided that there was no justification for drawing the presumption of permanent tenancy in favour of the defendants.

Mr. Desai for the appellants has contended before us that Sen J. has not properly appre-

ciated the effect of the decision of the Privy Council in 43 Bom. L. R. 1.<sup>1</sup> Under S. 83, Bombay Land Revenue Code—which deals with agricultural leases—the landlord starts with a presumption in his favour that the tenancy is annual since the person placed in possession of the land of another as tenant shall be regarded as holding the same at the rent, or for the services agreed upon; or in the absence of satisfactory evidence of such agreement, at the rent payable or services renderable by the usage of the locality, or, if there is no such agreement or usage, shall be presumed to hold at such rent as, having regard to all the circumstances of the case, shall be just and reasonable. If a tenant sets up a plea of permanent tenancy, he has got to rebut this initial presumption by showing the antiquity of his tenancy as a result of which satisfactory evidence about its commencement is not forthcoming. He has also got to show that there is no evidence of the period of the intended duration of his tenancy; if these facts are proved, the initial presumption in favour of the landlord is displaced by a presumption in favour of the tenant that the duration of his tenancy is co-extensive with the duration of the tenure of his landlord and of those who derive title under him. At this stage the onus shifts to the landlord, and if he resists the inference of permanent tenancy being raised in favour of the tenants, he has got to lead satisfactory evidence of the commencement of his tenancy.

Thus in the application of section 83, the onus of proof shifts from stage to stage and the question which often arises in such cases is : If the tenant proves the antiquity of his tenancy, is the landlord required to prove the commencement of the tenancy by date, month and year, or, would it be enough if he shows that the tenancy may have commenced within a reasonably short period? On a strict construction of the terms of the section itself, it seems to me that the landlord is expected to prove *the commencement* of the tenancy, and since such commencement must necessarily mean the year, if not the date and month, in which the tenancy commenced, he is not entitled to say that he has led satisfactory evidence of such commencement merely by showing that the tenancy may have commenced within a margin of any five, ten or twenty years. *Prima facie*, the object of the section seems to be to protect the possession of tenants who show the antiquity of their tenancy and who are able to claim that it is by reason of such

1. ('40) 27 A.I.R. 1940 P.C. 192 : I.L.R. (1941) Bom. 107 : I.L.R. (1940) Kar. P.C. 380 : 190 I.C. 342 : 43 Bom.L.R. 1 (P.C.), Shankarrao Dagadujirao v. Shambu Nathu Patil.

2. ('43) 30 A.I.R. 1943 Bom. 95 : 206 I.C. 487 : 45 Bom. L. R. 186, Rama Appa v. Tippaya Appaya.



antiquity that the commencement of their tenancy cannot be proved.

However, in several reported decisions this Court took the view that a tenancy cannot be presumed to be co-extensive with the duration of the tenure of the landlord, even though the commencement of such tenancy cannot be traced to a particular year, provided it can be traced to a definite period, say twenty years, as for instance between 1830 to 1850. In 24 Bom. L. R. 831<sup>3</sup> a Division Bench of this Court had to decide this question in the light of the finding that the tenancy in that particular case had been traced back to a period from between 1830 to 1850. The judgment of Fawcett J. in this case is treated as a leading authority on this subject. While dealing with this question, this is what Fawcett J. held (p. 833):

"The phraseology of para. 2 of S. 83 is no doubt somewhat vague and there are two opposite views that can be taken of the exact meaning to be put on the word 'commencement.' One that has been placed before us by the appellant is that it necessitates satisfactory evidence that the tenancy commenced at any rate in a particular year. The other view is that it suffices to show a particular period of time beyond which the tenancy certainly did not go. Dealing broadly with the first point of view, I do not think that logically there is ground for saying that a particular year is the real test contemplated by the Legislature. The primary point of commencement is of course the actual date on which the tenancy began and the fixing of the particular year really means no more than saying that the tenancy commenced at some point of time within 12 months. But why should one be limited to the particular division of time represented by a month? I can see no logical basis for saying that you are so justified in taking a number of months, but not justified in taking a number of years as sufficient."

Fawcett J. tested the argument by dealing with a hypothetical case in which the landlord may be taken to have established that the tenancy commenced after the year 1868 and before the year 1871, but was not able to show that it commenced in particular in 1869 or 1870. "Can it be reasonably said" asked Fawcett J. (p. 834):

"that this defect prevents there being satisfactory evidence of the commencement of the tenancy? I do not think that this can have been intended by the Legislature. In my opinion the presumption operates when owing to the antiquity of the tenancy, you cannot fix on any particular point or period of time as that at or within which the tenancy commenced."

Fawcett J. then proceeded to hold that if you get the commencement of the tenancy within a period of twenty years

"there is a commencement within a certain period shown which bars the presumption arising. At the same time this treatment of a 'period' as sufficient

3. ('22) 9 A.I.R. 1922 Bom. 402 : 47 Bom. 4 : 76 I.C. 71; 24 Bom L.R. 831, Narayan v. Pandurang.

to satisfy the requirements of S. 83 must of course be applied with reasonable limits. I do not for instance mean to say that it would suffice to show that a tenancy had commenced *after the flood*. It is not, I think, necessary to define what are 'reasonable limits': it is enough for the purposes of this case to say that the period, 1830 to 1850, is clearly a reasonable one."

In 27 Bom. L. R. 1258<sup>4</sup> it appeared on evidence that certain land was waste land belonging to the landlord's ancestor in or about the year 1851, and the ancestor of the defendant probably first cultivated it some years later. It was held that the tenant was not entitled to the presumption mentioned in S. 83, Land Revenue Code. In this case Fawcett J. delivered the judgment of the Bench and dealt with the criticism made against his judgment in 24 Bom. L. R. 831<sup>3</sup> in these words (p. 1260):

"In both the judgments of Pratt J. and myself, the main reason for holding that the presumption could not be drawn was that a certain period was proved within which the tenancy must have commenced, and that there was no good ground for saying that a particular year was the outside limit contemplated by the Legislature in S.83, in regard to proof of the commencement of a tenancy. As I have said in that case, I can see no logical basis for saying that you are justified in taking a number of months but not justified in taking a number of years as sufficient."

It was urged before the Court that the fact that the ordinary tenancy contemplated by the Land Revenue Code is an annual tenancy supplies a reason for taking a year as the extreme period contemplated by the Legislature. Fawcett J. rejected that contention on the ground that "there is nothing in S. 83 to confine it to the case of annual tenancies, and if the Legislature had intended such a construction we think it would have been more clearly expressed."

The same question arose before Fawcett and Patkar JJ. in 29 Bom. L. R. 274.<sup>5</sup> In that case the tenancy was shown to have originated at some time between 1758 and 1857. It was held that "the period of a century is too long and indefinite a period to constitute satisfactory evidence of the commencement of a tenancy within the meaning of S. 83." Reliance was placed by the appellant in that case on the judgment of Fawcett J. in 24 Bom. L. R. 831<sup>3</sup> and in regard to the submission made on that judgment Fawcett J. said (p. 280):

"I quite agree that logically Mr. Desai for the appellants can contend that a period of a hundred years falls within the view taken in 24 Bom. L.R. 831<sup>3</sup> but as there mentioned, some reasonable

4. ('26) 13 A. I. R. 1926 Bom. 55 : 91 I. C. 347 : 27 Bom. L.R. 1258, Ramchandra v. Dattu.

5. ('27) 14 A. I. R. 1927 Bom. 270 : 101 I.C. 340 : 29 Bom. L. R. 274, Shripadbbhat v. Rama.



limits must be applied, and I think that, at any rate, a period of 100 years is too long to satisfy that condition."

A similar view was taken in 33 Bom. L.R. 551.<sup>6</sup> In that case the defendants showed that they were in possession as tenants from 1860 and that there was nothing to show how long they were in possession before that date. The plaintiffs adduced evidence to show that in the year 1758, another person was in possession of the land as a tenant. It was held

"that the presumption could be raised in favour of defendants, inasmuch as there was neither any evidence of the period of the intended duration of the tenancy, if any, agreed upon between the landlord and the tenant nor was there any evidence of any usage of the locality as to the duration of such tenancy."

Dealing with the provisions of S. 83, Land Revenue Code, Patkar J. observed that :

"ordinarily the landlord must prove the commencement of the tenancy by proving that particular day, month and year, on which the tenancy commenced by production of the lease or a rent note. It was, however, held in 24 Bom. L. R. 831<sup>3</sup> that in the absence of proof of the commencement of the tenancy in a particular year a definite period from 1830 to 1850 might be considered to be sufficient to show the commencement of the tenancy in order to counteract the presumption under S. 83, Bombay Land Revenue Code."

Patkar J. also referred to the decision in 29 Bom. L. R. 274<sup>5</sup> where a period of one hundred years was regarded as being too long and indefinite to satisfy the condition laid down by S. 83 to denote the commencement of the tenancy. It may be noticed that apart from the authorities by which Patkar J. thought he was bound, on the section itself the view which he took was that the landlord had to prove the commencement of the tenancy by proving the particular day, month and year on which the tenancy commenced. In 37 Bom. L. R. 376<sup>7</sup> Beaumont C. J. and Divatia J. had to consider a similar question under S. 83, Land Revenue Code. Dealing with it, Beaumont C. J. referred to the earlier decisions of this Court under S. 83 in these words (p. 380) :

"It has been held by this Court in a good many cases that S. 83, Bombay Land Revenue Code, in referring to the absence of satisfactory evidence of the commencement of a tenancy, does not mean that there must be satisfactory evidence as to the exact date of commencement, that is, the day on which the tenancy commenced, but that it is sufficient if the evidence shows that the tenancy must have commenced in a particular period; and the degree of elasticity permissible in relation to the period has been the subject-matter of a good many

decisions. Here it is suggested by the defendant that as the period is fixed between 1844 and 1851, there is sufficient evidence as to the commencement. I doubt that proposition. . . "

Then the learned Chief Justice pointed out that on the evidence in that case, even that assumption had not been established. In the view which I take about the effect of the provisions of S. 83, Land Revenue Code, I respectfully share the doubt expressed by Beaumont C. J. On the authorities, however, it is clear that this Court somewhat liberally construed S. 83, Land Revenue Code, in favour of the landlord and held that the landlord may successfully resist the claim of the defendant to be regarded as a permanent tenant even if he shows that the tenancy commenced not in a particular year, but within a reasonably short period of years. In 43 Bom. L. R. 1,<sup>1</sup> the question as to the tenant's rights of permanent tenancy arose before the Privy Council. This Court had held that the tenancies in all the six cases involved in that appeal attracted the provisions of para. 2 of S. 83, Land Revenue Code. While dealing with this question their Lordships referred to the decisions of this Court which I have mentioned above, and they said (p. 15) :

"Some cases have been cited to their Lordships to show the interpretation put upon this provision of S. 83 by the High Court of Bombay [45 Bom. 350,<sup>8</sup> 23 Bom. L. R. 533,<sup>9</sup> 47 Bom. 4,<sup>3</sup> 27 Bom. L.R. 1258<sup>4</sup>, and 29 Bom. L. R. 274,<sup>5</sup>] Their lordships think that for the purposes of the present case it is sufficient to note that the particular presumption mentioned in the clause is not directed, to be made save upon these two conditions (among others) : first, that there is no satisfactory evidence of the date of the commencement of the tenancy and secondly, that this lack is due to the antiquity of the tenancy. They cannot agree that the first condition is excluded by showing that the tenancy had its origin at some date within a period of 20 years which cannot be more precisely ascertained. This is not satisfactory evidence of the date of its commencement, and the view taken in 24 Bom. L. R. 831,<sup>3</sup> fails in their Lordships' opinion to give effect to the ordinary meaning of the language of the clause. Again, by a tenancy's antiquity the section does not, in their Lordships' opinion intend any reference to remote ages in the past or to 'time immemorial' in the sense of the English law. It is to be given the practical meaning appropriate to its context and afforded by the limits within which living testimony to past facts is necessarily restricted."

It may be pointed out that as regards the tenancies with which their Lordships were dealing, their Lordships took the view that they were not proved to have been in exist-

8. (21) 8 A.I.R. 1921 Bom. 224 : 45 Bom. 350 : 59 I.C. 751, *Maneklal Vamanrao v. Bai Ainba*.

9. (21) 8 A.I.R. 1921 Bom. 454 : 63 I. C. 935 : 23 Bom. L. R. 533 on appeal (22) 9 A.I.R. 1922 Bom. 25 : 46 Bom. 687 : 66 I.C. 315 : 24 Bom. L.R. 226, *Sidhanath v. Chiko*.

6. (31) 18 A. I. R. 1931 Bom. 302 : 133 I. C. 826 : 33 Bom. L. R. 551, *Janardan v. Lakshman*.

7. (35) 22 A. I. R. 1935 Bom. 247 : 156 I. C. 1020 : 37 Bom. L. R. 376, *Vaman v. Khanderao*.



ence before 1892 and that the presumption could not, therefore, be properly applied to them, "notwithstanding that the evidence by no means excludes the possibility of an earlier origin." Their Lordships did not, therefore, proceed as regards any of the said tenancies upon the presumption authorised by S. 83. They held that the tenancies in question were permanent tenancies on the other evidence in the case, particularly the entries in the Record of Rights which described the possession of the tenants as that of permanent tenants.

The question which thus arises for decision is whether having regard to the observations of their Lordships of the Privy Council to which I have just referred the view taken by this Court in the earlier decisions is still good law. It is true that the actual decision of the Privy Council was based upon independent evidence in favour of the tenants and that in terms the Privy Council refused to proceed as regards the tenants who had pleaded permanent tenancy upon the presumption authorised by S. 83. In that sense the observations in question are *obiter*. But it is well established that the *obiter dicta* of their Lordships of the Privy Council are binding on all Courts in India if the said *dicta* contain a definite expression of their Lordships' opinion : *vide* 37 Bom. 513.<sup>10</sup> Now there is no doubt that the observations made by the Privy Council in 47 Bom. L. R. 1<sup>1</sup> as to the scope and proper effect of the provisions of S. 83, Land Revenue Code, contain their Lordships' well-considered opinion on that section. The point was obviously argued before their Lordships and the decisions of this Court which took a liberal view of S. 83 were cited before them. The judgment of Fawcett J. in 24 Bom. L. R. 831<sup>2</sup> which was, in this Court, regarded as a leading judgment on this point was considered by their Lordships in some detail and its reasoning was subjected to a close examination. Under these circumstances, it would, I think, be impossible to accede to the contention of the plaintiff-respondent before us that in spite of this clear expression of their Lordships' view it would be permissible for us to rely upon the earlier decisions of this Court as good law. Their Lordships have clearly indicated that the satisfactory evidence which the landlord is expected to lead to rebut the presumption of permanent tenancy arising in favour of the tenant must relate to the commencement of the tenancy, and as the word "commence-

ment" clearly indicates the said evidence must have reference to the year, if not the month and date, of such commencement. I think, therefore, that even on the alternative finding recorded by Sen J. that the tenancy in this case may have commenced between 1860 to 1865, it cannot be held that that is satisfactory evidence of the commencement of the tenancy within the meaning of S. 83, Land Revenue Code. That being so, the Court is entitled to draw the presumption of permanent tenancy in favour of the tenants in this case. In 45 Bom. L. R. 186<sup>2</sup> Divatia J. took the same view about the effect of the Privy Council decision in 43 Bom. L. R. 1<sup>1</sup> and Lokur J., while dealing with a similar question in S.A. No. 566 of 1940<sup>11</sup> has accepted the view expressed by Divatia J.

For the plaintiff-respondent Mr. Coyajee has, however, contended that S. 83, Land Revenue Code, cannot apply to the lands in suit since these lands are pargana watan lands. The argument is that S. 83 deals with ordinary rayatava lands and the nature of the presumption which arises under para. 2 of that section shows that the section was not intended to apply to watan lands. Under para. 2 of the said section "the period of the tenancy is presumed to be co-extensive with the duration of the tenure of such landlord and of those who derive title under him." Mr. Coyajee contends that in the case of watan lands the successor of the immediate landlord cannot be said to derive his title under him and so the presumption arising under that paragraph cannot enure to the benefit of the tenant as against such successor. This point, however, has not been taken in any of the Courts below and Mr. Desai for the appellants objects to permission being granted to Mr. Coyajee to argue this point for the first time in Letters Patent appeal. Having regard to the consistent practice of this Court in this matter, Mr. Desai's objection must be upheld : *vide* 38 Bom. L. R. 221.<sup>12</sup>

I will, therefore, assume that S. 83, Land Revenue Code, applies to watan lands. Before Regn. 16 [XVI] of 1827, these watan lands were alienable like all other property. By the provisions of the said regulation watan property became inalienable. This regulation was applied to the Belgaum District in 1830. For the plaintiff-respondent Mr. Coyajee's

11. Second Appeal No. 566 of 1940, decided by Lokur J. on 13th July 1943, Kantilal Bokordas v. Kuberdas Hargovandas.

12 (36) 23 A.I.R. 1936 Bom. 227 : 60 Bom. 516 : 163 I. C. 305: 38 Bom. L. R. 221, Sattappa v. Mahomedshah.

10. (13) 37 Bom. 513 : 20 I. C. 162, Shrinivas Sarjerao v. Balwant Venkatesh.



contention is that in applying S. 83, Land Revenue Code, to watan lands, the tenant must be called upon to show not merely that he has been in possession of the land as tenant for a very long number of years, but that his possession as such tenant is traced back to a time when the land was alienable. It has been held by the Privy Council in 25 Bom. L. R. 1005<sup>13</sup> that:

"Persons who and whose predecessors-in-title have claimed to be and were tenants of service Vatan lands cannot acquire title to a permanent tenancy in the lands by adverse possession as against the Vatandars from whom they hold the lands."

In the light of this decision of the Privy Council, it has also been held in 27 Bom. L. R. 449<sup>14</sup> that:

"A person who is in possession of watan lands as a tenant of the vatandar cannot acquire a right by adverse possession to fixity of rent."

"Even if a permanent tenant can acquire a right of fixity of rent as against the immediate holder of the watan by adverse possession, it will not prevail against the next holder."

The question as to the effect of these two decisions on the application of S. 83, Land Revenue Code, to watan lands arose incidentally in 33 Bom. L. R. 210.<sup>15</sup> It was held:

"that the defendants were entitled to rely on the presumption raised under S. 83, Land Revenue Code, and that they could not be ejected from the land."

Having regard to the facts found in that particular case, Patkar J. took the view that (p. 212):

"It is not necessary in the present case to go into the general question as to whether the presumption under S. 83 does or does not apply to watan lands..."

Dealing with the decision of the Privy Council in 25 Bom. L. R. 1005<sup>13</sup> Patkar J. pointed out that the permanent lease in that case was granted on 15th March 1853, after the enactment of the Bombay Regn. 16 [XVI] of 1827, and held that the decision in the said case does not prevent the raising of the presumption under S. 83, Bombay Land Revenue Code, in regard to the tenancy with which he was dealing. In 34 Bom. L. R. 1131<sup>16</sup> the tenancy of the defendant had commenced somewhere within a period of 150 years between 1700 and 1850. The lands were watan lands, which first became inalien-

able on the passing of Regn. 16 [XVI] of 1827. A question having arisen whether the tenancy became permanent by virtue of the presumption contained in S. 83, Bombay Land Revenue Code, it was held

"that having regard to the fact that S. 83, Bombay Land Revenue Code, did not exclude watan lands from its operation and to the fact that the onus was on the landlord to show the commencement of the tenancy, the Court should presume that the tenancy of the defendant was in existence even prior to 1827."

It was also held

"that the tenancy of the defendant having commenced somewhere between the years 1700 and 1850, it should be presumed, in the absence of any evidence to the contrary that the tenancy commenced at a time when the watan lands were alienable under the law prevailing before Regn. 16 [XVI] of 1827 came into force;" and that, therefore, the statutory presumption of permanent tenancy arose under S. 83, Bombay Land Revenue Code, 1879."

Mr. Desai contends that Patkar J. held in this case that in case the tenant showed that he was in possession as a tenant in 1850, a presumption must be drawn that he was in possession even before 1827. He argues that under this decision it is the landlord who must resist the inference arising from the defendants' antiquity of tenancy by showing that the tenancy in question commenced at a time when the prohibition against alienation of watan property came to be enacted. It may be pointed out that when Patkar J. held that the tenancy of the defendant commenced somewhere between the years 1700 and 1850 it was in reference to the evidence in the case which showed that the tenant had traced back his possession to 1850 whereas the landlord had shown that in 1700 the village in which the land was situated was waste. Even so, this Court held that the tenancy must be deemed to have been in existence even prior to 1827.

Broomfield J. dealt with this question in 37 Bom. L. R. 209.<sup>17</sup> He referred to the Privy Council decision in 25 Bom. L. R. 1005<sup>13</sup> and to the decisions of this Court in 33 Bom. L. R. 210<sup>15</sup> and 34 Bom. L. R. 1131.<sup>16</sup> "If," says Broomfield J. (p. 212),

"as appears to me to be the case, there is no satisfactory evidence as to the time when the tenancy in this case commenced, then on the authority of 33 Bom. L. R. 210<sup>15</sup> the defendants would be entitled to rely on the presumption under S. 83. In 34 Bom. L. R. 1131<sup>16</sup> this Court considered both the Privy Council ruling and the decision in 49 Bom. 526<sup>14</sup> and it was held that having regard to the fact that S. 83, Bombay Land Revenue Code, did not exclude watan lands from its operation and to the fact that the onus was

13. ('23) 10 A.I.R. 1923 P.C. 205 : 47 Bom. 798 : 50 I. A. 255 : 25 Bom. L. R. 1005 : 74 I. C. 362 (P.C.), *Madhavrao v. Raghunath*.

14. ('25) 12 A.I.R. 1925 Bom 375 : 49 Bom. 526 : 87 I. C. 779 : 27 Bom. L. R. 449, *Vishnu v. Tukaram*.

15. ('31) 18 A. I. R. 1931 Bom. 191 : 131 I. C. 466 : 33 Bom L. R. 210, *Govind v. Vithal*.

16. ('32) 19 A. I. R. 1932 Bom. 577 : 140 I. C. 557 : 34 Bom. L. R. 1131, *Ramchandra v. Adivappa*.

17 ('35) 22 A.I.R. 1935 Bom. 191 : 156 I.C. 760 : 37 Bom. L. R. 209, *Dhondur v. Damodar*.



on the landlord to show the commencement of the tenancy, the Court should presume that the tenancy of the defendant there was in existence even prior to 1827. It is true, as the learned counsel for the respondents pointed out, that in that particular case the earlier limit for the commencement of the tenancy went back as far as 1700, but the later limit was 1850, that is to say, after watan lands had become inalienable, and the principle laid down will apply to the present case, where also possession *presumitur retro*. I hold, therefore, that the fact that these lands are watan lands does not constitute a legal bar to the operation of S. 83, Bombay Land Revenue Code."

In the case with which Broomfield J. was dealing, the tenant was able to trace back possession to 1878. It is true that in that particular case the plaintiff landlord had not produced documents with regard to the property prior to 1878 and Broomfield J. held that an inference would be justifiable that if the said records which were admittedly in the possession of the plaintiff had been produced they would have supported the defendants' case that their ancestors were in occupation of the land even prior to 1878. But the application of the principle of *presumitur retro* to the facts of that particular case does not seem to have been influenced by the finding as to the non-production of the documents by the plaintiffs in that case. In 40 Bom. L. R. 439<sup>18</sup> it was held that the evidence in the case justified the finding of the trial Court as to the time at which the defendants' tenancy of the watan lands in dispute commenced, and since the commencement of the tenancy had been ascertained with reasonable definiteness, S. 83, Land Revenue Code, could not in terms apply to assist the defendants. On that view of the matter, it was not necessary to consider the other question as to whether in the case of watan lands it is for the tenant to show that he was in possession of the said lands as a tenant at a time when the watan property was alienable. Broomfield J. incidentally referred to the decisions bearing on this point and observed (p. 441) :

"What was held in those cases was that S. 83 will apply in the case of watan lands if the tenancy has been shown to have commenced before watan lands were rendered inalienable by the operation of Regn. 16 [XVI] of 1827."

As I have already pointed out, the decisions in question including the judgment of Broomfield J., to which I have already referred, do not seem to put the onus on the tenant to carry his possession back to a period when the watan property was alienable. On the contrary they seem to lay down that

if the tenant establishes the antiquity of his tenancy, the doctrine of *presumitur retro* comes to his help and the landlord can rebut the presumption arising from such possession only by showing that the tenancy commenced at a time when the watan property had ceased to be alienable.

The doctrine of *presumitur retro* is one of general application and there is no justification for excluding from its operation watan property. As held by the Privy Council in 14 I.A. 101<sup>19</sup> at p. 110 "when the state of possession for a long period of years has been satisfactorily proved, in the absence of evidence to the contrary, *presumitur retro*." Under S. 83 when the defendant seeks to rebut the initial presumption of annual tenancy arising in favour of the landlord, he leads evidence to show that he has been in possession of the land as a tenant of the plaintiff or his predecessor for a very long time. If and when he proves the antiquity of his tenancy, he invites the Court to draw an inference in his favour that it is because of that antiquity that the commencement of his tenancy cannot be proved and that the period of his tenancy should, therefore, be regarded as co-extensive with that of the landlord. At this stage the landlord has got to meet that evidence by showing that the tenancy had commenced in a particular year. Now, while dealing with the question of the long possession, it is difficult to see why this doctrine of *presumitur retro* should not apply merely because the property of which the tenant had been in possession happens to be watan property. That being so, in the present case the defendants must be deemed to be entitled to the presumption under S. 83, Land Revenue Code. As I have already said above, there is evidence to show that they were in possession of the land in 1849. Even according to the finding of Sen J. they were on the land sometime between 1860 and 1865. Under these circumstances, they must be presumed to have been in possession prior to 1890 when the watan lands became inalienable in this district. The result is that the appeal is allowed and the decree passed by the learned Assistant Judge, Belgaum, in Civil Appeal No. 87 of 1939 is restored. The respondents to pay the appellant's costs of this Letters Patent appeal as well in Second Appeal No. 33 of 1941.

**Kania Ag. C. J.** — I agree. The question before the Court is whether the defendants

18. ('38) 25 A. I. R. 1938 Bom. 316 : I. L. R. (1938) Bom. 465 : 176 I. C. 398 : 40 Bom. L. R. 439, Krishna v. Laxmibai.

19. ('87) 14 Cal. 740 : 14 I. A. 101 : 5 Sar. 45 (P. C.), Anangamanjari v. Tripura Soondari Chowdhrani.



have established that they were permanent tenants and as such entitled to retain possession against the plaintiffs. In the trial Court oral evidence was led but that was regarded as unsatisfactory. Therefore, a conclusion has to be drawn from the documentary evidence in the case. That consists of four documents. The first set came into existence in 1849 and consists of entries in the Revenue Pucca Book. The second is a document of 1853 which is an entry in the Revenue Prat Book of that year. The third is a document of 1873 (Ex. 136) and the fourth is described as a permanent lease (Ex. 189). Sen J. considered the first two sets and came to the conclusion that they did not show that the defendants' predecessors-in-title were tenants of the plaintiffs' predecessors-in-title of the lands in suit. In the later part of his judgment, he stated that it was not shown that they were such tenants "of the plaintiffs' family." I do not think the learned Judge attached any particular significance to the words "plaintiffs' predecessor" or "plaintiffs' family." In my opinion, that point is not material. The point to be proved is whether the defendants' predecessors-in-title were in possession of the land in suit as tenants. Approaching these two documents from that point it appears that the learned Judge overlooked the fact that the total area of survey No. 40 in 1849 (excluding the ten acres mentioned in Ex. 190) was 27 acres and 11 gunthas. That conclusion is supported by the statement of the area of survey No. 40 in the documents of 1873 and 1886. The learned Judge has further overlooked the fact that in Exs. 181 and 190 (which are two copies of the same document) the word 'entire' is used in connection with the names of the cultivators. Bearing in mind these two important facts it seems to me that the two cultivators, one of whom was the defendants' ancestor, were tenants of survey No. 40 in 1849. It is not clear what particular area was held by them as such tenants. The original book which may throw some light on it was produced in the trial Court but is not here at present. The copy, which is put in as exhibit, shows that Nos. 33 and 34 were the original numbers before survey No. 40 was given to this area, and in connection with these two numbers the word "entire" or "entirely" is used. Bearing in mind the fact that the total area of the four plots of land in respect of which the plaintiffs filed this suit is 27 acres and 11 gunthas (about) and also the fact that the plaintiffs have claimed these as successors-in-title of Yamaji, it ap-

pears that the ten acres which were referred to in Exs. 181 and 190 as under the management of Babaji Abaji were not under the tenancy of the two tenants. I think that if the learned Judge had these two facts before him he would have come to the conclusion that the defendants' predecessor Appaya was one of the tenants of survey No. 40 in 1849.

The relevant clauses and terms used in the documents of 1873 and 1886 have been set out in the judgment of my learned brother. The document of 1873 clearly shows that the lands in question were under the 'vahivat' of the defendants' predecessors before that year. That document in terms says that after the period of mortgage was over the tenant could continue to be in possession and enjoy the lands 'as long as he liked' on payment of Rs. 30 a year. That document, therefore, clearly establishes the right of the defendants' predecessor to hold the lands in perpetuity after the period of the mortgage. It equally shows that the tenant was in occupation as such for some time before that date. That document further shows that the tenant's right of possession and tenancy had commenced before 1873. The document of 1886, although described as permanent lease, is in effect a mortgage. It is difficult to see how the document of 1873 can be limited by a later document, merely because it is described as a permanent lease. In my opinion, that document only makes a slight variation of the rent to be paid by the tenant, after the mortgage loan was paid off by appropriating the rent towards payment of the capital amount. I do not think that document shows that the commencement of the tenancy was in 1861 or 1866 as contended by the respondents. I apprehend that the learned Judge did not correctly appreciate the effect of that document in the light of the recitals found in the document of 1873. The statement that the land was for vahivat for the last 20 or 25 years for cultivation with the tenants, is only a loose way of expressing that the land was in the possession of the tenant for several years before the document was passed. It does not fix even an approximate time during which the land was previously in the tenant's possession. That is made clear on reading the original. The statement of the plaintiffs on which the learned Judge relied to show that the tenancy commenced in 1860 does not help the respondents, because that statement is not made on personal knowledge but only as a result of his own conclusion on the construction of the documents produced in the



case. I, therefore, agree with my learned brother that the commencement of this tenancy is not shown to be in the year 1861 or 1866. I am unable to agree with the conclusion of Sen J. that the tenancy has been traced up to 1860.

The effect of the last two documents even if we ignore the two documents of 1849 and 1853 is that the tenants as such were in possession in 1873 and they were in possession of the land as tenants for some years before that. The question under the circumstances is what is the effect of S. 83, Land Revenue Code. That section contemplates the tenant contending that by reason of antiquity of tenancy he is unable to produce definite evidence of his possession as a tenant beyond a certain period. The section is interpreted to mean that if the tenant proves that, the landlord has to enter upon his defence and establish that the tenant's contention that the original tenancy is lost in antiquity is not correct because by affirmative evidence he is able to establish that the tenancy had commenced at a particular time. That appears to be the result of the decisions on the construction of S. 83. A controversy then arose as to what was the meaning of the words "commencement of the tenancy." Was it sufficient if it was shown that it commenced within a span of 20 or 30 years? In 24 Bom. L. R. 831<sup>9</sup> it was held that a period of 20 years was not unreasonable under the circumstances of the case. An attempt was made to extend that period to 36 years, but that failed. The question whether proof of such kind is satisfactory proof of the commencement of the tenancy came to be considered by the Judicial Committee of the Privy Council in 43 Bom. L. R. 1.<sup>1</sup> Their Lordships definitely negatived the contention that proof of commencement of tenancy by the landlord within a period of a few years (in that case twenty years) was not the proof required under S. 83, Land Revenue Code. It is true that this expression of opinion was not directly called for, but in the matter of interpretation of a section of the Act there is no question of the opinion being *obiter*. In my opinion, this interpretation is entitled to its full weight. It appears that their Lordships were pressed with the contention that if the argument about the commencement of the tenancy during the period of years was rejected, the Court must say that it must be proved that the commencement was on a particular date. Their Lordships appear to have accepted that argument. I venture to think, however, that their Lord-

ships did not literally mean that proof on the part of the landlord must be of the exact *date* of the commencement of the tenancy. It must be recognised that in the case of agricultural lands tenancy for a week or a month is out of question. The normal course of letting such lands is for a year. I should not be surprised if the matter were again brought before the Privy Council and their Lordships accepted the contention that if proof of the commencement of the tenancy to a certain specific year was given and accepted by the Court, it would meet the provisions of Section 83.

I do not propose to deal in detail with the various authorities cited before us. They have been fully dealt with in detail by my learned brother. I only desire to say that in 34 Bom. L. R. 1131<sup>16</sup> the assumption that the period of commencement was between 1700 and 1850 has to be considered along with the fact that the Court found that the village itself came in the possession of the plaintiff's predecessor in 1700. I think perhaps a better way of putting it might have been that the title of the plaintiff's predecessor in that case could only be from 1700 and it was proved that the defendants' tenancy was before 1850 and therefore a presumption was permitted to be drawn under S. 83, Land Revenue Code. The only question before the Court was that if possession and tenancy were established up to 1850, was the tenant entitled to the presumption permitted to be raised under S. 83? In that connection it may be noticed that in 43 Bom. L. R. 1<sup>1</sup> at page 15 their Lordships observed as follows:

"Again, by a tenancy's antiquity the section does not in their Lordships' opinion intend any reference to remote ages in the past or to 'times immemorial' in the sense of the English law. It is to be given the practical meaning appropriate to its context and afforded by the limits within which living testimony to past facts is necessarily restricted."

In the present case once it is held that the defendants' predecessors-in-title were in possession as tenants prior to 1873 or 1849, I think the defendants have discharged the burden which lay on them to prove antiquity within the meaning of the section. The suit was filed in 1935 and the judgment was given in 1939. The defendants had thus led evidence of the character of their possession of over 60 years. This is *prima facie* sufficient proof. In view of the Privy Council judgment the attempt to contend that the commencement of the tenancy may be between 1861 and 1866 does not help the plaintiffs, because such commencement is not considered sufficient



[Case No. 82.]

**A. I. R. (33) 1946 Bombay 377**KANIA AG. C. J. AND GAJENDRA-  
GADKAR J.*Madhavrao Raghavendra and others—*  
*Appellants*

v.

*Raghavendraro and others —**Respondents.*First Appeal No. 261 of 1942, Decided on 31st  
July 1945, from decision of Joint Civil Judge  
(Senior Division) Poona, in Suit No. 224 of 1931.(a) Hindu law—Sources—Custom — Custom  
overrides text—Custom must be ancient, certain  
and reasonable — Onus to prove custom is on  
person setting it up—Permissive custom—Test  
of invariability cannot be applied—Nature of  
evidence to prove custom, indicated—Custom  
as to *sagotra* marriage among Deccani Brah-  
mins held established.Under Hindu law custom is one of the three  
sources of law. Where there is a conflict between  
the custom and the text of the Smriti, custom over-  
rides the text. A custom must be proved to be  
ancient, certain and reasonable, and being in dero-  
gation of the general rules of law, it must be es-  
tablished by clear and unambiguous evidence. When  
a party sets up a custom it is obvious that the  
onus to prove that custom is on him. The test of  
invariability can be legitimately applied in the case  
of customs like primogeniture. But, in the case  
of permissive customs the test of invariability can-  
not be rigidly applied. [P 379 C 1; P 381 C 2;  
P 385 C 2; P 386 C 1; P 388 C 1]If in a particular case the party pleading a  
custom has produced general evidence of a respect-  
able and reliable character showing that the parti-  
cular custom prevails amongst the community to  
which the witnesses belong, and that the observ-  
ance of the custom is well known for a fairly  
long period of time, that evidence can be accepted  
in support of the custom pleaded. If instances are  
cited covering a period of nearly 30 years, it would  
not be unreasonable to presume that the evidence  
of those instances shows that the custom had been  
in existence even before the period covered by those  
instances : *Case law discussed.* [P 382 C 1;  
P 388 C 2]While dealing with a growing custom it would  
be unreasonable to exclude from consideration in-  
stances in support of that custom merely on the  
ground that those instances took place pending the  
suit : [P 389 C 1]*Held* on consideration of the evidence in the case  
that a custom applicable to the Deccani Brahmins  
by which a marriage can be validly performed be-  
tween persons belonging to the same *gotra* if, before  
the celebration, the daughter was given in adoption  
to a person of a different *gotra*, was established.

[P 389 C 2]

**Hindu Law—**('40) Mulla, Page 15, Pts. (k) and (l), Page 17,  
Pt. (s).('38) Mayne, Page 67, Pt. (u), Page 71, Pts. (e)  
and (h), Page 78, Pt. (t).(b) Hindu law —Text—Interpretation—Court  
has to look to interpretation put by recognised  
commentators.The Court has to look to the interpretation put on  
the text by recognised commentators only ; inter-

to displace the presumption raised on the evidence led by the defendants. Mr. Coya-  
jee raised the larger question whether  
S. 83 applied to pargana watan lands  
at all. He strongly relied on the concluding  
part of the paragraph in S. 83 dealing with  
this question and urged that as each succes-  
sive tenant did not claim from the preceding  
holder the words and expressions used in S. 83  
did not apply to watan lands. We are not  
concerned in the present case with this con-  
tention because it cannot be permitted to be  
raised in the Letters Patent appeal for the  
first time. The only contention urged before  
Sen J. as summarised by the learned Judge,  
was this :

" . . . . that with regard to watan lands, S. 83,  
Land Revenue Code, is subject to the qualification  
that if the tenancy could not have commenced be-  
fore 1830, when the Reg. 16 [XVI] of 1827 came  
into operation, no presumption under that section  
could arise."

The contention therefore was that even if  
the Court could raise a presumption under  
S. 83 in respect of watan lands, when there  
was a tenancy shrouded in antiquity, there  
can be no presumption that such tenancy  
came into existence prior to 1830. That argu-  
ment was considered and rejected by Broom-  
field J. in 37 Bom. L. R. 209.<sup>17</sup> I respectfully  
agree with that conclusion. Once it is held  
that the commencement of the tenancy was  
beyond the memory of persons who could  
depose to it when litigation started, there  
appears no reason to limit that to a particular  
period. In fact I think it will be a contra-  
diction in terms to say that it commenced be-  
fore 1839 but not in 1819. The only contention  
which can be urged is that the defendants must  
show that the tenancy commenced before 1830.  
In my opinion, there is no justification for  
holding that it was the duty of the defendants  
to show that the land in question was in their  
possession as tenants and that the tenancy  
commenced before 1830. The proof of anti-  
quity, once accepted by the Court, does not  
limit it to a particular period, and I see no  
reason why the Court should not presume  
that the tenancy commenced before any  
legislative disability against alienation was  
imposed in a particular year. I therefore  
agree that the appeal should be allowed and  
the decree of the first appellate Court  
restored. The respondents should pay the  
costs of this appeal and of the appeal before  
Sen J.

N.S./D.H.

*Appeal allowed.*



pretation of the text by the witnesses examined by the parties cannot help the Court. [P 378 C 2]

Hindu Law —

('40) Mulla, Page 10, Pt. (i).

('38) Mayne, Page 43, Pt. (h).

(c) Hindu law—Marriage—Sagotra marriage is invalid.

Apart from custom, marriage between *Sagotra* persons is invalid under Hindu law : 32 Bom. 619, *Expl.* [P 396 C 1]

Hindu Law—

('40) Mulla, Page 506, S. 436.

('38) Mayne, Page 170, Pt. (i)

*P. V. Kane*—for Appellants.

*R. A. Jahagirdar, S. Y. Abhyankar, N. M. Hungund; and R. N. Bhalerao*—for Respondents 1 to 6; and 7 and 8 respectively.

**Kania Ag. C. J.** — This is an appeal from the judgment of the Joint Civil Judge (Senior Division) at Poona in Civil Suit No. 224 of 1931. When this suit was filed, plaintiffs 1, 2 and 3 were minors. They are sons of defendant 1 by his predeceased wife. The suit was filed by the plaintiffs' next friend the grandfather, who is a Jahagirdar and a First Class Sardar in the Deccan. Defendant 1 lost his first wife in about 1927. Defendant 2, who is stated to be of *Bharadwaja gotra*, was taken in adoption by one Kale, who was of a different *gotra*, on 11th July 1929. On 12th July 1929, defendant 1 married defendant 2 according to Hindu rites. The next friend of the minor plaintiffs, who was aware of the intended marriage, had taken part in various ceremonies prior to the marriage. A couple of days before the marriage he received a letter from the Shankaracharya of Sankeshwar Pith, expressing the opinion that the intended marriage of defendants 1 and 2 would be against Hindu religion. The plaintiffs' next friend, thereupon, refrained from attending the marriage. Other persons attended the marriage. It was performed by the priest of the family. That was followed by a feast of about 200 or 300 people, when all friends and relations attended as usual. After the marriage was celebrated, defendants 1 and 2 and the minor plaintiffs lived with the next friend of the plaintiffs for several months. In 1931, the next friend filed this suit in the name of the three minor sons of defendant 1. The first prayer is that the marriage of defendants 1 and 2 be declared null and void. The second prayer is that as the marriage of defendants 1 and 2 was not permitted by law, and, as the *upanayan* (thread) ceremony of the plaintiffs was to be shortly performed, defendant 2 should be restrained from taking part in that ceremony. It was also claimed that defendant 1 may be restrained from performing the

ceremony without undergoing the *prayaschit* prescribed by the *shastras*. Defendants 1 and 2 filed one written statement. In para. 5 they contended that the marriage of defendant 1 with defendant 2 was legal, according to the custom and practice prevailing in the community of the Deccani Brahmins in this Presidency. The allegation that a *sagotra* marriage is null and void under Hindu law was not admitted. Various other minor contentions were raised in the pleadings, with which we are not now concerned. Defendants 3 to 6 are the sons of defendant 2 by defendant 1, born since the suit was filed. Since the thread ceremony of the plaintiffs has been performed, we are now concerned only with the first prayer. Before the trial Court several witnesses were examined on the question of custom. They also deposed to the meaning of the authoritative texts. It is clear that their interpretation of the texts cannot help the Court, as the Court has to look to the interpretation put on the texts by recognised commentators only. The learned trial Judge came to the conclusion that a marriage between *sagotras* was prohibited according to the Hindu Smriti writers and recognised commentators. He, however, held that the defendants had established the custom pleaded by them and therefore to that extent the law was modified. The suit was therefore dismissed. From that judgment, this appeal has been preferred. When the matter came before this Court, at first, only plaintiff 2, who had by then attained majority appeared as the appellant. In the course of discussion it was stated that all the plaintiffs were living with the defendants. At a later stage, plaintiffs 1 and 3 appeared through another advocate to support the appeal. It may be mentioned that all the three plaintiffs have now attained majority. It is not denied that they live with the defendants. It appears, therefore, clear that although they have attained majority, the appeal is still prosecuted under the directions, or, according to the wishes of the paternal grandfather, who was the original next friend of the plaintiffs.

On behalf of the appellant, it was contended that the evidence led before the trial Court on the question of custom was not sufficient. It was argued that the instances were few and the details of each instance were not sufficiently full to make it a perfect instance. The learned advocate for the appellant did not address us at length on the question of interpretation of the original texts as the finding of the trial Court was in



favour of the appellant. At a later stage, in reply, he however addressed us on that part of the dispute between the parties.

Mr. Kane relied on three cases in support of his contention that the evidence of custom should be clear and unambiguous, and the custom should be ancient. In 10 Bom. H.C.R. 241<sup>1</sup> the question was in respect of an adoption in the Jain community. In the course of the judgment it was pointed out that evidence of custom has to be scrutinised with care because it can be conveniently asserted by the party who wants to rely on the same. The observations of the Judicial Committee in 14 M.I.A. 570<sup>2</sup> were relied upon. The observations are as follows (p. 585) :

"Their Lordships are fully sensible of the importance and justice of giving effect to long established usages existing in particular Districts and families in *India*, but it is of the essence of special usages, modifying the ordinary law of succession that they should be ancient and invariable ; and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends."

Those observations are clearly binding on us. It should be noted that the Court was dealing with a custom modifying the law of succession. In that case the Court held that the custom was not proved, because there were only three instances, two of which were only four years old, and one 20 years old, but of which the details were not perfect. Mr. Kane further relied on 19 Bom. 428<sup>3</sup> in support of the same proposition. That was a case of an only son's adoption. The Court upheld the adoption. In that case evidence of 29 instances was led and was spread over a period of 60 to 70 years. Ranade J. in an elaborate judgment, examined each of the instances in detail and came to the conclusion that the custom propounded was established by the evidence on record. The next in order of date is 29 I. A. 270,<sup>4</sup> where it was alleged that there was a family custom that on the extinction of the line of one of several brothers, the descendants of all the other brothers took equally, without reference to their nearness to the common ancestor. An examination of the judgment shows that evidence of only four instances was led in that case. In de-

livering judgment Lord Macnaghten observed as follows (p. 75) :

"The result is that in support of the alleged custom four instances at most can be adduced, and those of a comparatively modern date, and that there is no other evidence."

The Court considered that in that state of affairs the custom was not proved.

On behalf of the respondents, reliance was placed on several later decisions. It seems that without derogating from the general principle laid down by the Privy Council in 14 M. I. A. 570<sup>2</sup> the tendency has been not to strictly construe the word "antiquity" as was contended to mean by the appellant. Proceeding to consider the decisions in their order of date, the next is 40 I. A. 156.<sup>5</sup> In that case also the Court had to consider the question of adoption amongst Jains. After dealing with the evidence on record and bearing in mind that the parties had lived together after the adoption for several years, it was observed that instances 20 or 30 years old raised a presumption of antiquity, and although the evidence of instances was comparatively meagre, the Court gave the declaration of validity, but limited it to the parties to the suit, so that the question may be further considered if necessary, if fuller evidence was available in later litigation. In 45 Bom. 754<sup>6</sup> the question of adoption amongst Jains residing in the Belgaum District came to be considered. Evidence of instances was led. Some instances were of adoptions after the controversy arose. It was argued that these later instances should not be considered at all. That argument was disposed of by Sir Norman Macleod C. J. in these terms (p 759) :

"These remarks would appear to me most pertinent, but from the later cases which have come before the Courts on which it was sought to establish a custom, it seems to be no longer considered that the evidence of modern instances, which alone can be proved by oral evidence, cannot establish the custom, unless the Court is satisfied by the evidence of texts or experts that those instances have occurred in pursuance of a recognized custom, in order to link the present with the past."

It was observed that it was open to the plaintiffs to call the evidence of Pandits and elders of the Jain community, to show that the validity of an orphan adoption was not recognised by them. It was a significant fact that the evidence which they did call to negative the custom was, as pointed out by the learned Assistant Judge, not entitled to any

1. ('73) 10 Bom. H. C. R. 241, Bhagvandas Tejmal v. Rajmal.

2. ('70-72) 14 M. I. A. 570 : 12 Beng. L.R. 396 : I. A. Sup. Vol. 1 : 3 Sar 108 (P.C.), Ramalakshmi Ammal v. Sivanantha Perumal.

3. ('95) 19 Bom. 428, Basava v. Lingangauda.

4. ('02) 24 All. 273 : 29 I.A. 270 : 8 Sar. 233 (P.C.), Chandika Bakhsh v. Muna kuar.

5. ('13) 40 Cal. 879 : 40 I. A. 156 : 19 I. C. 669 (P. C.), Chiman Lal v. Hari Chand.

6. ('21) 8 A. I. R. 1921 Bom. 147 : 45 Bom. 754 : 61 I. C. 492, Parshottam Ganpat v. Venichand Ganpat.



credence whatever. Fawcett J. in the same case, pointed out that in Halsbury's Laws of England, Vol. X, Art. 442, p. 234, it was stated that as a general rule proof of the existence of the custom, as far back as living witnesses can remember, was treated, in the absence of any sufficient rebutting evidence as proving the existence of the custom from time immemorial, and that evidence of the existence of the alleged custom for a period of 20 years may be sufficient to warrant a Court in finding as a fact the existence of the custom from time immemorial. He relied on several text books and on a passage from the judgment in 45 Cal. 835.<sup>7</sup> The Calcutta High Court had held that a usage for 20 years may raise a presumption, in the absence of direct evidence of a usage, of its existence beyond the period of legal memory.

In 52 I.A. 379,<sup>8</sup> which was decided in 1925, the Judicial Committee of the Privy Council had occasion to consider the question of custom in respect of inheritance in a tribe. Their Lordships observed that the custom could properly be proved by general evidence given by members of the family or tribe without proof of special instances. In the course of the judgment it was stated as follows (p. 383) :

As regards the custom in respect of which the two Courts in India have differed, their Lordships think the Subordinate Judge was in error in putting aside the large body of evidence on the plaintiff's side merely on the ground that specific instances had not been proved. They are of opinion that the learned Judges of the High Court are right in holding that a custom of the kind alleged in this case may be proved by general evidence as to its existence by members of the tribe or family who would naturally be cognisant of its existence and its exercise without controversy.

There is a large body of oral evidence establishing the custom, wholly un rebutted by the defendants, who have relied exclusively on the district *riwaj-i-am*. The judges of the High Court have commented on these documents, and their Lordships see no reason to differ from them."

That case lays down a further land-mark in the consideration of evidence led on custom. It recognises that general opinion of members of the community or elders, who are likely to know the existence of the custom, is entitled to great weight even though they may not be able to give specific instances. It further decides that when there is clear evidence of such general statements, which is all one-sided, it is open to the Court to

rely on that and give a decision upholding the custom.

Next in order of date is the decision in 37 Bom. L. R. 584<sup>9</sup> where Rangnekar J. was dealing with the question of a custom of entry into a temple. Following the observations in 52 I. A. 379<sup>8</sup> quoted above, the Court upheld the custom in the absence of specific instances. In the course of his judgment the learned Judge stated as follows (p. 588) :

"In my opinion, it is open to a Court to hold a custom to be proved, even if there are no instances, if there is sufficient evidence on which the Court can rely and say that that evidence proves that a particular usage has been so long known and so well known in a particular district as to have been tacitly acknowledged as the law governing that particular district."

In considering the evidence of witnesses it was observed as follows (p. 590) :

"... it is clear that in all such questions as to proof of custom one material consideration for the Courts would be whether the witnesses are men who are likely to know the custom in dispute and we have special means of acquiring knowledge about it and whether they speak of their own personal knowledge in their lifetime, and if they do that, it is open to them to refer to information which they may have received from their elders or ancestors and which may be strictly speaking hearsay."

In the same volume another decision of the Privy Council, in 37 Bom. L. R. 805,<sup>10</sup> is reported. The relevant point decided was that a customary law, if found to exist in 1880 and 1910, must be taken to have the ordinary attribute of a custom that it is ancient, and that, unless the contrary is proved, it must be assumed to have existed prior to 1858. Those observations support the view that recent instances, if they could be linked up reasonably with past, could be used to support the argument that the custom was ancient.

The question came to be considered again by the Privy Council in 41 Bom. L. R. 700.<sup>11</sup> The custom in question was to exclude a daughter from inheritance in respect of an estate governed by male primogeniture. Their Lordships reiterated that in proving a custom it was not necessary to adduce proof of actual instances of the custom taking effect. Sir George Lowndes, in delivering the judgment, observed as follows (p. 705) :

"The opinions of responsible members of the family as to the existence of such a custom, and the grounds of their opinion, though generally in

7. ('19) 6 A. I. R. 1919 Cal. 681; 45 Cal. 835 : 47 I. C. 402, *Ambalika Dasi v. Arpana Dasi*.

8. ('25) 12 A. I. R. 1925 P. C. 267 : 6 Lah. 502 : 52 I. A. 379 : 91 I. C. 455 (P. C.), *Ahmad Khan v. Ohanni Bibi*.

9. ('35) 22 A. I. R. 1935 Bom. 371 : 158 I. C. 796 : 37 Bom. L. R. 584, *S. K. Wodeyar v. Ganapati*.

10. ('35) 22 A. I. R. 1935 P. C. 132 : 57 All. 494 : 62 I. A. 180 : 156 I. C. 864 : 37 Bom. L. R. 805 (P. C.), *Basant Singh v. Brijraj Saran Singh*.

11. ('39) 26 A. I. R. 1939 P. C. 22 : I. L. R. (1939) Kar. P. C. 98 : 179 I. C. 620 : 41 Bom. L. R. 700 (P. C.), *Ajai Verma v. Vijai Kumary*.



the nature of family tradition, are clearly admissible. . . . and their unanimity in the present case is remarkable."

In 43 Bom. L. R. 432<sup>12</sup> the Judicial Committee had occasion again to consider the question of antiquity in respect of custom. It was observed that the English rule that a "custom, in order that it may be legal and binding, must have been used so long that the memory of man runneth not to the contrary" does not apply to conditions in India. A custom observed in a particular district derives its force from the fact that it has, from long usage, obtained in that district the force of law. It must be ancient, but it is not of the essence of this rule that its antiquity must in every case be carried back to a period beyond the memory of man. It will depend upon the circumstances of each case what antiquity must be established before the custom can be accepted. What is necessary to be proved is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of the particular district. In that case the Court had before it instances which ranged over a period of nearly 30 years. These were held to be sufficient to establish the custom as binding on the parties. 44 Bom. L. R. 358<sup>13</sup> is the latest decision to which our attention has been drawn. After considering the evidence on record, Broomfield J. observed as follows (p. 363) :

"Witnesses have been examined on both sides who have made general assertions that the custom in Marwar and among the Jains in Thana is as alleged by the plaintiff or as alleged by the defendant respectively. In the evidence of this group of witnesses no particular instances have been referred to at all. Nor is any reference made to judicial decisions. That fact does not make the evidence inadmissible."

After quoting the passage from 52 I. A. 379<sup>8</sup> at p. 383 (quoted above), the learned Judge observed as follows (p. 363) :

"There is no doubt that if the evidence is all one way, or if there is a strong preponderance of evidence in favour of a particular custom, the Court cannot ignore it, although the witnesses do not cite specific cases in support of their statements."

It must be recognised that when general opinion is conflicting, it has of course little value, but when that evidence is all one-sided,

the Courts have accepted the evidence and acted on the same.

I have summarised above the relevant passages from the judgments of the different cases cited to us. They disclose, in my opinion, a clear manner of proof of custom. While the rule laid down by the Privy Council in 14 M. I. A. 570<sup>2</sup> still holds good, it is recognised that the meaning given to the word "ancient" in English law is not applicable to custom here. It is also recognised that the necessary proof in each case will depend on the nature of the custom alleged and the want of instances or paucity thereof does not prevent the Court from upholding the custom, if there is a general consensus of opinion of persons who are likely to know of its existence, particularly when the evidence is all in one direction. Moreover unlike cases of succession, the custom being permissive, the test of invariability will not apply.

Having regard to these observations we have to approach the evidence on record. Custom is a recognised source of Hindu law. I do not propose to deal in detail with the evidence, as my learned brother is going to do so. It is sufficient for me to say that the evidence in this case is all one-sided and is given by independent, orthodox and respectable members of the community, priest and an author. Their veracity is not challenged. The opinion is expressed by persons who are all likely to know of its existence. In addition to general opinion they have given instances also. The oldest is over 100 years old. It is true that an instance is not found at regular interval, but the instances, deposed to by witnesses with sufficient particulars, are of marriages, which took place, after passing through a form of adoption, 20, 30 or 60 years ago. In addition, there are instances of 1922, 1927, 1928 and 1929. The evidence shows several instances of such marriages after the suit was filed. In my opinion, these instances, under the circumstances of the case, are stronger proof of the ancient nature of this custom. The question before the parties is about their status. If the custom is held not proved, or not in existence, the relationships between the man and woman will not be of husband and wife. They will be living an immoral life. Knowing the danger of such a position being established, if a dispute arose, the parties have confidently passed through the ceremony of adoption and celebrated the marriage even after the existence of such custom was disputed in the present suit. In my opinion, that shows the strong

12. ('41) 28 A.I.R. 1941 P.C. 21 : I. L. R. (1941) Lab. 154 : I. L.R. (1941) Kar. P.C. 22 : 68 I.A. 1 : 193 I.C. 436 : 43 Bom. L. R. 432 (P.C.), Subhani v. Nawab.

13. ('42) 29 A.I.R. 1942 Bom. 185 : I.L.R. (1942) Bom. 467 : 201 I.C. 759 : 44 Bom. L. R. 358, Suganchand Bhikamchand v. Mangibai Gulabchand.



mental conviction of the community that such a custom exists. The evidence shows that in the later years, members of respectable families have been married on the footing that such a custom exists. The parties are recognised by the community as husband and wife and they have social relations with the rest of the community on the footing of their marriage being legal. In the present case the erstwhile next friend of the minors himself made the betrothal of defendants 1 and 2. When the Shankaracharya expressed his opinion a doubt was raised in his mind; but it was not sufficiently strong to make him stop the marriage. His conduct shows that out of respect for the Shankaracharya he refrained from attending the marriage; but he took no other objection to the same effectively. After the marriage was celebrated, the parties lived with him peacefully for several months. The suit was filed about two years after the marriage. All this, in my opinion, shows that the custom was recognised to exist, even by the next friend of the minors. Defendant 1 is still the president of the Rigvedi Deshastha Brahmin conference and defendant 2 is the president of the female branch of it. This shows that in spite of the unfortunate intervention of the Shankaracharya the community as such has recognised them as husband and wife and that is done in spite of the dispute raised by the next friend of the minors. I, therefore, agree with the trial Court that the custom is established and the general law, which is held to be against the marriage amongst *sagotras*, to that extent is departed from. On the question of interpretation of the ancient texts, the Court is bound by the judgment of the Privy Council in 62 I.A. 139.<sup>14</sup> In that case at page 143 their Lordships approved of the observation in 12 M.I.A. 397<sup>15</sup> at p. 436. It is the duty of a Judge

"not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities as to ascertain whether it has been received by the particular school which governs the district with which he has to deal, and has there been sanctioned by usage."

Their Lordships observed that the Mitakshara subordinates in more than one place the language of texts to custom and approved usage and it was, therefore, clear that in the event of a conflict between the ancient

text writers and the commentators, the opinion of the latter must be accepted. With all respect, I think that the observations, as worded, do not carry out the intention with which they were expressed. The Board considered that the ancient text writers had laid down a certain rule of law and the commentator in his commentary had recognised the growth of custom in the intermediate period and, therefore, the views of the commentator were more liberal. To give effect to this more liberal view, their Lordships stated that in the event of a conflict between the ancient text writers and the commentators, where they were not reconcilable, the opinion of the latter must be accepted. The question, however, may have to be seriously considered when the opinion of the commentator does not enlarge, but restricts the meaning of the original text.

In the present case the learned trial Judge, in the course of his judgment, has relied upon Manu Smriti, Chap. III, Verses 5, 8 and 9 which are as follows :

(Verse 5)

असपिण्डा च या मातुरसगोत्रा च या पितुः ।

सा प्रशस्ता द्विजातीनां दारकर्मणि मैथुने ॥

"She who is not a *sapinda* of the mother and she who is not a *sagotra* of the father is recommended to the twice-born for being selected for wife."

(Verse 8)

नेद्वहत्कपिलां कन्यां नाधिकार्द्धीं न रोगिणीम् ।

नालोमिकां नातिलोमां न वाचालां न पिंगलाम् ॥

"He should not marry girls of black complexion, she should not have additional limbs, she should be healthy, should not be hairy, should not be without hair, should not be talkative and should not be brown."

(Verse 9)

नर्क्षवृक्षनदीनाम्नीं नात्यपर्वतनामिकाम् ।

न पक्ष्यहिप्रेष्यनाम्नीं न च भीषणनामिकाम् ॥

"She should not have the name of a river and not of tree or mountain and she should not bear a furious name."

He has also relied on Yajnavalkya Smriti Chap. III, verses 52, 53 and 54, which are as follows .

(Verse 52)

अविप्लुतब्रह्मचर्यो लक्षण्यां स्त्रियमुद्रहेत् ।

अनन्यपूर्विकां कान्तामसपिण्डां यवीयसीम् ॥

"He with the celibacy not broken should marry a girl of good signs, not belonging to others, beautiful, not of a *sapinda* relationship and younger than himself."

(Verse 53)

अरोगिणीं भ्रातृमतीमसमानार्धगोत्रजाम् ।

पंचमात्सप्तमादूर्ध्वं मातृतः पितृतस्तथा ॥

"She should be healthy, should have brothers should not have the same *gotra* and *pravara* and should be five degrees removed from the mothers and seven degrees from the father."

14. ('35) 22 A. I. R. 1935 P. C. 57 : 31 N. L. R. 398 : 62 I.A. 139 : 155 I.C. 330 (P.C.), *Atmaram Abhimani v. Bajirao Janrao*.

15. ('68) 12 M. I. A. 397 : 1 Beng L. R. 1 : 2 Sar. 361 : 2 Suther 135 (P. C.), *Collector of Madura v. Moottoo Ramalinga Sathupathy*.



(Verse 54)

दशपुरुषविख्याताद्येन्रियाणां महाकुलात्

स्फीतादीप न संचारिरागेदाषे समन्वितात्॥

"A maiden should be taken from a highly respectable family of persons well-versed in the Vedas, and inheriting the virtue of ten generations, prosperous; not even from such a family if there be any hereditary disease."

I find that in the judgment of the trial Court the texts are not considered in their order, but the texts of the two law-givers are taken together and their combined effect is considered.

Proceeding on the footing that in the Bombay Presidency we are bound by Yajnyavalkya Smriti and the commentary of Vijnanesvara thereon, the argument urged by the respondents is that the various qualities of a prospective bride described in verses 52 to 54 can, in no event, be considered the irreducible minimum qualifications. They are recognised as qualities which would be preferable to have in a prospective bride. Proceeding with that line of reasoning, it is contended that just as a healthy girl and a girl with brothers is stated to be an eligible bride, the statement that she should not be of the same *gotra* and *arsha* should be considered recommendatory. It was argued that in the last line of verse 53, the limitation of five degrees on the mother's side and seven degrees on the father's side would be redundant if full effect and meaning is given to the prohibition not to marry a girl of the same *gotra* and *arsha*. It is further pointed out that verses 52, 53 and 54 are all to be read together. It is not disputed that except the restrictions that they should not be of the same *gotra* and *arsha* and should not be related within five degrees on the mother's side and seven degrees on the father's side, all the rest are only qualities for which a girl may be preferred, but are not enjoined as necessary qualities in a would-be bride. It was argued that it is against the ordinary rule of construction therefore to accept certain portions of one verse as mandatory, and the rest as only recommendatory. It was pointed out that while the Privy Council in 62 I. A. 139<sup>14</sup> had expressed the views mentioned above, in the case of adoption of an only son and eldest son, it considered the texts of Mitakshara recommendatory, although the appropriate translation was 'should be' in connection with both of them. The decision of the Privy Council in 22 Mad. 398<sup>15</sup> and

16. ('99) 22 Mad. 398: 26 I. A. 113: 21 All. 460: 7 Sar. 330 (P. C.), Sri Balusu Gurulingaswami v. Sri Balusu Ramakshamma.

the passages on pages 415-416 and 428-429 show the great hesitation and diffidence with which their Lordships approached the question of interpretation of ancient texts when the commentators differed in their opinion. The commentary of Vijnanesvara (Mitakshara) on the texts of Yajnyavalkya in that case was in these terms:

"Paragraph 11.—So an only son must not be given (nor accepted). For Vasistha ordains 'Let no man give or accept an only son.'"

Paragraph 12.—Nor, though a numerous progeny exist, should an eldest son be given, for he chiefly fulfils the office of a son, as is shown by the following text: . . . . ."

In spite of the use of the words 'must' and 'should' in Mitakshara, in view of the conflict of interpretation by the different commentators and High Courts of the original texts, their Lordships held that it was a recommendatory and not a mandatory text. Similarly, in respect of the different kinds of *stridhan*, their Lordships have not accepted the commentary of Vijnanesvara fully. That is clear from 11 M. I. A. 487<sup>17</sup> and 39 I. A. 121.<sup>18</sup> In the present case, in view of our conclusion on the question of custom, it is not necessary to decide the larger question. If the matter were to be decided there appears considerable force in the contention that Mitakshara's commentary on Yajnyavalkya, Chap. III, verse 53, in respect of the girl not being of the same *gotra* and *pravara* is open to considerable comment.

The text runs as follows:

सपिण्डासु समानगोत्रासु समानप्रवरासु भार्यात्वमेव  
नोत्पद्यते । रोगण्यादिषु तु भार्यात्वे उत्पन्नेऽपि दृष्ट  
विरोध एव ॥

"In the case of marriage with girls who are *sapinda*, *saman gotra* or *saman pravara*, the condition of wifehood does not come into being but in case of girls who are afflicted with diseases, etc., the condition of wifehood does come into being but there is a conflict in regard to worldly considerations only."

It is questioned on what basis a distinction is sought to be made in respect of the two qualifications mentioned in the first line of verse 53 of Yajnyavalkya. One ground suggested by Mr. Kane was that when there was a visible explanation for prescribing certain qualities, the text would be recommendatory; but if human mind cannot think of an explanation, the same should be considered as prescribed owing to some superhuman reason, and, therefore, the text would be mandatory. It is pointed out that this

17. ('67) 11 M.I.A. 487: 2 Sar 327: 2 Suther 124 (P. C.), Bhugwandeem Doobey v. Myns Baee.

18. ('12) 34 All. 234: 39 I. A. 121: 14 I. C. 1000 (P.C.), Debee Mangal Prasad v. Mahadeo Singh.



line of reasoning overlooks the conditions under which the texts came to be written. It is recognised that in ancient times, each of the *rishis* formed, as it were his own feudatory realm and was supreme within his boundaries. Persons living in his *ashram* or attached thereto as relations, were prohibited from looking upon members of the other sex with an eye to matrimony. To prevent such a contingency, these texts are clearly explicable. If this is considered a rational explanation for the command stated to be contained in the second part of the first line of verse 53, of Yajnavalkya, there appears no reason to treat it differently from the first part, namely, that the girl should be free from disease and should have a brother. The explanation for not applying these texts rigidly to Kshatriyas and Vaishyas is far from satisfactory. As already stated, the point does not require to be elaborately considered in this case, but as arguments were addressed to us at some length, I have thought fit to summarise them, so that those who may be in charge of legislation at the appropriate time may seek further elucidation of the ancient text and commentaries. In my view, the judgment of the trial Court is correct. The appeal fails and is dismissed. The appellant to pay the costs of respondents 1 to 6.

**Gajendragadkar J.** — Sadashivrao Madhavrao Purandare is a Jahagirdar and a First Class Sardar in the Deccan ; his only son Raghavendra has three sons by his first wife who died about 1927. In 1929 Raghavendra married Sonubai Mudholkar. The present suit has been filed on 29th January 1931, by the three minor sons of Raghavendra, by their next friend their paternal grandfather Sadashivrao Purandare, against their father Raghavendra, defendant 1, and his second wife Sonubai, defendant 2. In their plaint, as originally framed, the plaintiffs claimed two reliefs :

"(1) That it may be declared that the so-called marriage between defendants 1 and 2 is null and void and that it confers no rights whatever on defendant 2 as a lawfully wedded wife of defendant 1 and step-mother of the plaintiffs; (2) "Defendant 1 may be restrained by an injunction from performing the thread ceremonies of plaintiffs 1 and 2, unless and until he has discontinued cohabitation with defendant 2 and made her live separate from him and has further undergone the *prayaschitta* prescribed by the shastras, and defendant 2 be restrained by an injunction from participating in any such thread ceremonies of the plaintiffs, as the lawfully wedded wife of defendant 1 and step-mother of the plaintiffs."

At an early stage of the suit it was found

that the thread ceremony of the plaintiffs had already taken place and the injunction claimed with regard to it had become superfluous. Besides, it was also held that the question of defendant 1's competence to perform the plaintiffs' thread ceremony was a question of a purely religious nature and was outside the jurisdiction of civil Courts under S. 9, Civil P. C., and so the second prayer made by them in the plaint could not be entertained. Against this finding no complaint has been made. The Court, therefore, has now to consider only the first prayer and the allegations made in support of it. In support of their first prayer, the plaintiffs alleged that

"they, their next friend and defendant 1 are Rigvedi Deshasth Brahmins belonging to the Bharadwaja *gotra*. Defendant 2 is also a Rigvedi Deshasth Brahmin lady belonging to the same *gotra*. According to Hindu law, as recognised and administered by the Civil Courts in British India, and also according to the Hindu religious text books, a marriage between persons belonging to the same *gotra* is absolutely null and void."

They further alleged that

If the validity of this so-called marriage is left unchallenged by the plaintiffs, it may cause them very serious injury."

This claim of the plaintiffs was resisted by defendants 1 and 2 by their written statement, Ex. 186. The defendants contended that

"The allegation made in para. 1 that the marriage of defendant 1 with defendant 2 is illegal is denied. It is submitted that the marriage is legal as the *gotra* of the bride was altered by an adoption of the bride according to the custom and practice prevailing in the community of the Deccani Brahmins in this Presidency. Further that the plaintiff's allegation that a *sagotra* marriage is null and void under Hindu law is not admitted. The text prohibiting such marriage is merely recommendatory and does not make the marriage null and void."

There were some other allegations made in the plaint and the written statement with which it is not necessary to deal. On these pleadings the learned trial Judge framed these issues :

(5) Whether defendants proved that the bride's *gotra* was altered by her adoption before marriage.

(5A—12) Whether defendants proved that the rule against *sagotra* marriage was merely recommendatory ?

(5B) Do plaintiffs prove that defendants 1 and 2 were of the same *gotra* before marriage?

(6) Whether defendants proved that a marriage between *sagotra* bride and bridegroom was not absolutely void under the Hindu law but was in accordance with custom prevalent in the community to which parties belonged?

The learned trial Judge found that the *gotra* of defendants 1 and 2 was the same, namely Bharadwaja. He held that under Hindu law a daughter could not be validly adopted, and,



in support of that conclusion, he relied upon a decision of this Court in 13 Bom. 690.<sup>19</sup> He further held that even if a daughter were adopted for the purpose of marriage, she had to observe the *gotra* of her natural family, as well as that of her adoptive family, and in support of this conclusion the learned trial Judge relied upon a decision of this Court in 35 Bom. L. R. 75<sup>20</sup> at p. 80. The learned trial Judge also held that on the texts, as interpreted by Mitakshara, marriage between persons of the same *gotra* was invalid and in support of this conclusion he relied upon a decision of this Court in 32 Bom. 619.<sup>21</sup> Lastly, on the question of the custom set up by the defendants, the learned trial Judge found in their favour. He came to the conclusion that the custom pleaded had been proved by satisfactory evidence, and since the said custom was obviously not opposed to public policy and was not immoral, it can be judicially recognised and enforced. On that view of the matter, the learned trial Judge dismissed the plaintiffs' suit.

Unfortunately, this litigation had a prolonged and somewhat chequered career. Meanwhile, four sons have been born to Raghavendra by his second wife and they have been impleaded to this suit as defendants 3 to 6. The plaintiffs, who were minors when the proceedings were pending in the Court below, have now become major and appear on the record as such. Plaintiff 2 alone has preferred the present appeal, and plaintiffs 1 and 3 have been joined as respondents 7 and 8. It was during the pendency of the hearing of this appeal before us that plaintiffs 1 and 3 (respondents 7 and 8) have appeared by an advocate and have supported the appellant's contentions.

For the appellant Mr. Kane has urged that the finding of the learned trial Judge on the question of the custom set up by defendants 1 and 2 is wrong. His main argument has been that the evidence adduced by defendants 1 and 2 in support of the said custom is insufficient in law to justify the finding recorded by the learned trial Judge. Mr. Kane has supported the judgment of the trial Judge in regard to his finding as to the invalidity of the marriage under the strict provisions of Hindu law. This part of the judgment has been challenged by Mr. Jahagirdar for respondents 1 and 2. So, two main

points arise for decision in this appeal : (1) Is the marriage between defendants 1 and 2 invalid under Hindu law on the ground that defendants 1 and 2 belonged to the same *gotra* before their marriage? If yes, (2) Is it shown that by a custom applicable to the Deccani Brahmins to which community the parties in suit belong, such marriages are recognised as valid? It may be mentioned that the question of custom was more exhaustively argued before us and it is that question which I propose to discuss first.

Now, it is well known that under Hindu law custom is one of the three sources of law. Where there is a conflict between the custom and the text of the Smriti, custom overrides the text. As observed by the Privy Council in 12 M. I. A. 397<sup>15</sup> (p. 436) "... under the Hindu system of law, clear proof of usage will outweigh the written text of the law." A custom like the present must be proved to be ancient, certain and reasonable, and being in derogation of the general rules of law, it must be established by clear and unambiguous evidence. When a party sets up a custom, it is obvious that the onus to prove that custom is on him. Putting the onus of proving this custom upon defendants 1 and 2 in this case, the question to decide is what is the mode by which this custom can be permitted to be proved. Mr. Kane contends that while proving such a custom, it is necessary that it must be established by satisfactory evidence of instances where this custom was observed and the instances cited in support of this custom must be shown to be ancient and certain. The argument is that in a case of this kind it is not open to a party to ask the Court to hold a particular custom as proved unless in support of that custom the party has been able to adduce evidence of a large number of instances showing that the custom really prevailed from ancient times. In support of this contention, Mr. Kane relied upon a decision of this Court in 10 Bom. H.C.R. 241.<sup>1</sup> The passage on which Mr. Kane relies appears at page 260 where this Court respectfully accepted the principles laid down by their Lordships of the Privy Council in 14 M.I.A. 570.<sup>2</sup> This is what the Privy Council had stated (p. 585) :

"Their Lordships are fully sensible of the importance and justice of giving effect to long established usages existing in particular Districts and families in India, but it is of the essence of special usages, modifying the ordinary law of succession, that they should be ancient and invariable ; and it is further essential that they should be established to be so by clear and unambiguous

19. ('89) 13 Bom. 690, Gangabai v. Anant.

20. ('33) A. I. R. 1933 Bom. 137 : 57 Bom. 74 : 142 I. C. 634 : 35 Bom. L. R. 75, Basappa v. Gurulingawa.

21. ('08) 32 Bom. 619, Ramchandra v. Gopal.



evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends."

It may be pointed out that in regard to a custom like the present it is difficult to expect evidence of invariability. The custom in terms purports to be permissive. It is not the case of defendants 1 and 2 that amongst the members of the community to which they belong, marriages between persons of the same *gotra* take place invariably. The test of invariability can be legitimately applied in the case of customs like primogeniture. But, in the case of permissive customs the test of invariability cannot be rigidly applied. Mr. Kane also relied on a decision in 16 ALL. 221.<sup>22</sup> In that case the Court was dealing with a custom as regards the step-mother's right to succeed to her step-son. It was held there that (p. 223) :

"A custom where it is disputed and where it goes to limit or vary well-known rules of law must be clearly proved by evidence. . . Evidence which is consistent with there being a custom as with there being no custom at all is not evidence of a custom modifying or varying the general law."

In this case the learned Subordinate Judge "Had apparently raised a case on his own motion for the defendant which was not suggested by the defendant in her written statement, and which, could not have been omitted from her written statement if she had been relying on a custom so much at variance with the ordinary rule of Hindu law.,, In fact, in this case it was found that there was no evidence of custom in the strict sense to be considered. To the same effect is a decision of the Madras High Court in 51 Mad. 1<sup>23</sup> at p. 18. It was held that :

"In order to give effect to a custom which is set up and which is at variance with ordinary Hindu law, it should be ancient, invariable, continuous, notorious, not expressly forbidden by the legislature and not opposed to morality or public policy, and as regards instances in support of the custom they should be established by clear and unambiguous evidence and must be conclusive."

Under the custom with which the Court was dealing in that case, it was alleged that the widows of a deceased last owner dying without issue were excluded from inheriting to his estate, but that his nearest dayadhis inherited his estate to the exclusion of his widows. On evidence it was found that the custom pleaded had not been satisfactorily proved, and that even if it existed in old days, it had ceased to be uniform and invariable by reason of inroads made in it from time to time. The Court took the view

22. ('94) 16 All. 221, Rama Nand v. Surgiani.

23. ('28) 15 A.I.R. 1928 Mad. 299 : 51 Mad. 1 : 108 I. C. 760 (F. B.), Vannia Kone v. Vannichi Ammal.

that since the custom was obviously opposed to the present rules of equity and justice, it was too late in the day to revive it. In this connection Mr. Kane referred to a decision of this Court in 19 Bom 428.<sup>3</sup> It was held in this case that according to the custom of the Lingayats in the districts of Dharwar and Bijapur the adoption of an only son is valid. In his judgment Ranade J. has elaborately considered all the instances cited in support of the custom and concluded (p. 452) :

"That the custom of giving an only son in adoption has been satisfactorily proved in nineteen Lingayat instances, three Reddi, and three Dhangar cases, making in all twenty-five instances in favour of the alleged custom, while it has not been satisfactorily established in ten Lingayat, one Reddi, and one Shepherd case, making in all twelve cases."

Ranade J. further held that he was satisfied (p. 459) :

"That the evidence of the twenty-five proved instances in this case is sufficient to show that the custom of the adoption of an only son is an immemorial, invariable and recognized custom among the Lingayats in the southern districts of this Presidency."

It was also pointed out that (p. 459) :

"Not a single case was shown on defendants' behalf where an adoption of an only son by the Lingayats of these parts was disowned or repudiated by the people, or by their rulers, Native and British."

Mr. Kane contends that this decision emphasises the fact that any particular custom pleaded by a party must be proved by citing several instances in support of it. Lastly, Mr. Kane relied upon a decision of the Privy Council in 29 I. A. 70.<sup>4</sup> The family custom there pleaded was that on the extinction of the line of one of several brothers the descendants of all the other brothers take equally without reference to their nearness to the common ancestor. It was held that the said custom had not been proved. The judgment of Lord Macnaghten shows that though 18 instances had been cited, only four instances had been proved and the evidence with regard to those four instances was held to be slender and not enough to support the finding in favour of the custom pleaded. There was no evidence of a general character adduced in this case to show the belief of the community in the matter of the custom in question. Mr. Kane contends that the evidence produced in this case by defendants 1 and 2 in support of the custom pleaded by them must be appreciated in the light of the principles laid down in these cases.

On the other hand, Mr. Jahagirdar for defendants 1 and 2 has argued that there have



been many subsequent decisions as a result of which the rule as to proof of custom has been considerably modified and relaxed. It would, therefore, be convenient at this stage to refer to these decisions in their chronological order.

In 40 I. A. 156<sup>5</sup> while dealing with the adoption of a married orphan amongst Agarwal Banias of Zira in the Punjab, the Privy Council held that the evidence produced in support of the custom pleaded was sufficient to hold (p. 160) :

"That the Agarwal Banias of Zira do not in matters of adoption follow the general rules of Hindu law, and that by the custom applicable to them an unequivocal declaration of adoption followed by subsequent treatment of the person as an adopted son is sufficient to constitute a valid adoption."

Their Lordships, however, held that since the evidence was of a limited nature, the decision should be confined to the parties to the suit and to the appeal before them and those claiming through or under them. The evidence about the observance of the custom pleaded in this case covered a period of about 20 years before the suit. In 45 Bom. 754<sup>6</sup> while dealing with the custom amongst the Jains by which it was alleged that an orphan could be validly given in adoption, it was held that the evidence adduced in that case in support of that custom was sufficient as between the parties and those claiming under them. With regard to the argument advanced before this Court in that case that the instances cited in support of the custom were not sufficiently ancient, it was pointed out :

"That it is not surprising that the only evidence in support of the custom adduced in the present case consists of instances that have occurred within the present generation."

In this connection Fawcett J. referred to the decision in 10 Bom. H. C. R. 241<sup>1</sup> on which stress was laid on behalf of the appellants and pointed out that the test of invariability could have no application to the custom with which he was dealing. Fawcett J. took the view that the evidence of the existence of the alleged custom for a period of 20 years may be sufficient to warrant a Court in finding as a fact the existence of the custom from time immemorial. Fawcett J. says (p. 767) :

"A similar rule was applied to Hindu usages by Grey C. J. in a judgment delivered so long ago as 1831, a quotation from which is given in Roy's Customs and Customary Law in British India at pages 27 and 28, and which is referred to in 45 Cal. 835<sup>8</sup> at p. 858 [According to the said rule enunciated by Grey C. J.] 'a usage for twenty years may raise a presumption, in the absence of direct evidence of a usage, existing beyond the period of legal memory'."

In this case, this Court applied this rule in appreciating the evidence adduced by the parties in support of the custom pleaded. In 52 I.A. 379<sup>8</sup> the Privy Council were dealing with a dispute as to inheritance from a member of an agricultural tribe in the Punjab, called the Khattars. The plaintiff had there admitted that under the custom of the tribe a sister or daughter was excluded in favour of collateral in respect of ancestral property, but she denied that the custom was extended to self-acquired property. Both Courts in India found that part of the property claimed was self-acquired property. The Subordinate Judge dismissed the suit on the ground that the plaintiff "had failed for absence of specific instances to establish satisfactorily the custom under which she claimed her brother's inheritance." The High Court of Lahore allowed the plaintiff's appeal holding that the custom pleaded had been proved. Dealing with this question, their Lordships held that (p. 383) :

"The Subordinate Judge was in error in putting aside the large body of evidence on the plaintiff's side merely on the ground that specific instances had not been proved. They are of opinion that the learned Judges of the High Court are right in holding that a custom of the kind alleged in this case may be proved by general evidence as to its existence by members of the tribe or family who would naturally be cognisant of its existence and its exercise without controversy."

Thus, this decision lays down that in dealing with the question of custom, Courts should not treat the proof of specific instances as the only method in which the custom could be established. If there is general evidence as to the existence of the custom given by members of the family or the community, it would be open to the Courts to rely upon that evidence and to hold the particular custom as proved. In 37 Bom. L. R. 584<sup>9</sup> Rangnekar J. adopted the principles laid down in the decision of the Privy Council to which I have just referred and held that (p. 588) :

"That it is open to a Court to hold a custom to be proved, even if there are no instances, if there is sufficient evidence on which the Court can rely and say that that evidence proves that a particular usage has been so long known and so well known in a particular district as to have been tacitly acknowledged as the law governing that particular district."

In 37 Bom. L. R. 805<sup>10</sup> their Lordships of the Privy Council held that (p. 813):

"Customary law, if found to exist in 1880 and 1910, must be taken to have the ordinary attribute to a custom that it is ancient, and that, unless the contrary is proved, it must be assumed to have existed prior to 1858, . . ."

In 41 Bom. L. R. 700<sup>11</sup> the Privy Council were dealing with the existence of a custom according to which it was alleged a daughter



was excluded from inheritance. While dealing with that custom their Lordships observed that (p. 705) :

"The opinions of responsible members of the family as to the existence of such a custom, and the grounds of their opinion, though generally in the nature of family tradition, are clearly admissible: see 27 I. A. 238<sup>24</sup> at p. 351."

In this case their Lordships held that it was unnecessary to examine the evidence as to the instances cited in the case since (p. 704): "It is well established that proof of actual instances of such a custom taking effect is not necessary: see 2 I. A. 379<sup>8</sup> at p. 383 and other cases."

This decision, therefore, shows that while dealing with the general evidence in support of any alleged custom opinion of responsible members of the community is admissible; and if that evidence is not contradicted by any evidence to the contrary and is not otherwise shown to be unreliable, it should not be disregarded. In 43 Bom. L. R. 432<sup>12</sup> the Privy Council were dealing with a customary law applicable to the Mahomedan Tulla clan resident in the Shahpur district in the Punjab, under which it was alleged that collaterals of the tenth degree of a deceased landowner do not take precedence over his married daughters in succession to his non-ancestral estate. It was held, while dealing with that custom, that the English rule that

" 'a custom, in order that it may be legal and binding, must have been used so long that the memory of man runneth not to the contrary,' does not apply to conditions in India. A custom must be ancient but it is not of the essence of this rule that its antiquity must in every case be carried back to a period beyond the memory of man. It will depend upon the circumstances of each case what antiquity must be established before the custom can be accepted. What is necessary to be proved is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of the particular district."

It may be mentioned that the instances cited in this case commenced from 1905-06 and ranged over a period of thirty years. I have already said that the test of invariability which may be applied to a custom in regard to succession is hardly applicable to a permissive custom like the one with which we are dealing in this case. In 44 Bom. L. R. 358<sup>13</sup> this Court was dealing with the question of a custom amongst the Jains under which the widow of a coparcener in a joint family is competent to adopt a son without the authority of her husband and without

the consent of his coparceners. Broomfield J. observed that (p. 363) :

"If the evidence is all one way, or if there is a strong preponderance of evidence in favour of a particular custom, the Courts cannot ignore it although the witnesses do not cite specific cases in support of their statements."

On these authorities, then, it seems to be fairly well established that if in a particular case the party pleading a custom has produced general evidence of a respectable and reliable character showing that the particular custom prevails amongst the community to which the witnesses belong, and that the observance of the custom is well known for a fairly long period of time, that evidence can be accepted in support of the custom pleaded. The decisions also seem to lay down that if instances are cited covering a period of nearly 30 years, it would not be unreasonable to presume that the evidence of those instances shows that the custom had been in existence even before the period covered by those instances. It is in the light of these principles that the evidence of custom led in this case must now be examined.

Before dealing with the evidence, it is necessary to point out that defendant 1 is himself a graduate and defendant 2 has passed the first M. A. of the Nagpur University. Both the parties are highly educated and come from very respectable families. They swear that when they thought of their marriage, they consulted the leading members of the community, some lawyers and their own relations. It is their case that they were told that under the custom prevailing amongst the community, it was open to them to marry if defendant 2 was taken in adoption by a person of a different *gotra*. It is obvious that they accepted the advice given to them by their relations and friends and believed *bona fide* that under the custom of the community to which they belonged, if before their marriage defendant 2 went in adoption, their marriage would be perfectly valid.

In support of the custom pleaded by them, defendants 1 and 2 have produced before the Court the evidence of five witnesses, who speak about the prevalence of this custom amongst the community to which they belong. It may be mentioned at this stage that Mr. Kane, who appears for the appellant, did not suggest that any of the witnesses who have come before the Court are actuated by improper motives. It is admitted that all of them are men of status and occupy respectable positions in society. The evidence which they are giving is the result of their

24. (01) 23 All. 37 : 27 I. A. 238 : 7 Sar. 724 (P. C.), Gururudhwaja Prashad Singh v. Sapan-dhwaja Parshad Singh.



Own honest beliefs and convictions. They are thoroughly independent witnesses, and it is not suggested that they have any interest in either of the parties to the suit. Some of them are friends of the family of longstanding. These witnesses have come to the Court and have sworn to the fact that to their knowledge and belief the custom pleaded by the defendants prevails amongst the Deccani Brahmins from ancient times. (After examining instances cited in the case, the judgment went on :) These are the instances relied upon by the defendants in support of their plea that there prevails in the community to which they belong a custom by which a marriage can be validly performed between persons belonging to the same *gotra*, if, before the celebration of the marriage the daughter was given in adoption to a person of a different *gotra*. Subsequent to the marriage which gives rise to this suit, there is evidence to show that six or seven marriages of the same type have taken place in this community.

The learned trial Judge took the view that the defendants were not entitled to rely upon these instances because these marriages had taken place subsequent to the marriage in question. I am unable to agree. It seems to me that while dealing with a growing custom like the present it would be unreasonable to exclude from consideration instances in support of that custom merely on the ground that those instances took place pending the suit. It is not denied that these subsequent marriages have in fact taken place between persons of the same *gotra* and that in each one of them the difficulty arising from the same *gotra* was overcome by giving the girl in adoption before the marriage. Presumably, the parties to these marriages knew about this case where the question of validity of such marriages had been raised. Even so, their belief in the existence of the custom was apparently so strong that they did not feel any difficulty in following the custom. In that view, these instances lend very strong support to the plea made by the defendants. While dealing with this question it may also be pointed out that the priest who officiated at the marriage of the defendants has given evidence and he says that he was asked to do so by the next friend of the plaintiffs. It is well known that the outlook of the priestly class in such matters is always very orthodox. The conduct of the priest in officiating at the marriage of defendant 1 and defendant 2 therefore suggests that he did not think that there was anything objectionable or wrong in that

marriage. Thus, in addition to the general evidence to which I have already referred, the defendants have led evidence about several specific instances of marriages which supports the custom which they have pleaded.

In the case of most of these instances, the only criticism made is that better evidence should have been called to prove those instances. The cross-examination of the witnesses, however, shows that the fact of marriage in each case was not seriously disputed. The remarkable feature about all these instances is that in each case the girl was given in adoption before she was married. It has not been suggested that there were any protests against these marriages in the community to which the parties belonged or that when they were performed, members of the community did not attend or otherwise expressed their disapproval. Considering the evidence as a whole, I am satisfied that the learned trial Judge was right in holding that the custom pleaded by defendants 1 and 2 had been proved. Besides, there are other circumstances in this case which support the same conclusion. The marriage between defendant 1 and defendant 2 was not performed hastily, impulsively or secretly. Before it was settled both the parties consulted their relations and their friends. They also consulted some lawyers. It appears in evidence that the next friend of the plaintiffs himself suggested the girl should be given in adoption before the marriage was celebrated. Accordingly, defendant 2 was given in adoption on 11th July 1929, and the marriage was celebrated on 12th July 1929, about 4.30 P.M. Evidence clearly shows that at the celebration of this marriage and at the performance of the adoption which preceded it, members of the community attended. Evidence also shows that when after the celebration of this marriage a feast was arranged, it was attended by several members of the community. After the marriage was performed, the next friend of the plaintiffs and his wife stayed with the defendants at least for four months, if not longer. Besides, even after this marriage, defendant 1 continues to be one of the leaders of the community in social and educational matters. There is an institution of Deshastha Brahmins for education purposes which was opened about 16 years back. Defendant 1 has been the president of that institution for the last 16 years. In 1935 there was a gathering of all the Purandare families at Saswad. Of that meeting the next friend of the plaintiffs was the president and defendant 1 was the vice-president. Defendant 2 was the president of



the female section in that meeting. Defendant 1 and defendant 2 have taken part in the conferences of the community held subsequent to their marriage.

As I have already mentioned, the priest of the family officiated at the marriage, and though the next friend of the plaintiffs sought to suggest that as a result of this conduct they were excommunicated, it has been shown satisfactorily by the evidence on behalf of the defendants that they were never excommunicated. In this connection the conduct of the next friend of the plaintiffs is also significant. It appears in evidence that he attended the adoption of defendant 2 on 11th July and in fact made some customary presents to the girl in token of the settlement of marriage. It also appears in evidence that some of the ceremonies which preceded the actual celebration of marriage were attended to by the next friend or his wife. He allowed the *wada* of the family to be used for the purpose of this marriage. He sent his wife along with Chimanrao to issue personal invitations for the marriage of his son. He sent the family priest to officiate at the marriage and what is more important, he bore all the expenses of this marriage himself. In fact, in his cross-examination he has admitted "that as Shankaracharya told that the marriage was against religion I opposed this marriage." It would, therefore, be perfectly legitimate to assume that but for the unfortunate intervention of Shankaracharya, the belief of the next friend of the plaintiffs was in consonance with the plea taken up by the defendants in this case, namely, that a marriage between *sagotras* would be valid according to custom if the girl was given in adoption to a person of different *gotra* before the marriage is performed.

It appears that about 11th July 1929, Shankaracharya was camping near Poona. On some representations made to him, he was pleased to issue an *adnyapatra* addressed to defendant 1, as well as to the next friend of the plaintiffs. In this *adnyapatra* (Ex. 29 C) he said :

"I am purposely writing this letter. As the *sagotra* marriage is prohibited by religious scriptures, it is undesirable to do it. Therefore if you intend to perform it on any account whatever, the above difficulty (bar) will not be removed. It is absolutely undesirable that such a calamity should befall in your family."

As the next friend of the plaintiffs has himself admitted, it is because of this letter that he decided to oppose the marriage of

defendants 1 and 2. That being so, on the question of custom and his belief about it, the Court is entitled to consider the conduct of the next friend of the plaintiffs before he received the said letter. That conduct, as I have already indicated, considerably supports the plea set up by defendants 1 and 2. Thus the conduct of the parties as evidenced by these circumstances lends support to the conclusion of the learned trial Judge that the custom pleaded has been proved. It may be mentioned that while dealing with this question, the learned trial Judge has said :

"All this must be due to the simple fact that the Deshastha Brahmin community does recognise such a custom and it is prevalent in this community since a long time."

Reading the judgment as a whole, it seems to me that the learned trial Judge has referred to the Deshastha Brahmin community through oversight and that he really intended to refer to the Deccani Brahmin community instead. The custom pleaded was one applicable to all Deccani Brahmins, and the issue referred to the community to which the parties belonged, meaning the general community of the Deccani Brahmins. The evidence both general and as to specific instances refers to the three major sub-communities amongst the Brahmins namely : Konkanastha, Deshastha and Karhada. That being so, the finding of the learned trial Judge, in substance, was that the custom pleaded with regard to the whole of the Deccani Brahmin community had been proved. On a consideration of the evidence in this case, I feel satisfied that this finding is correct and must be accepted. In this view of the matter, it may not, strictly, be necessary to consider whether, apart from custom, marriages between *sagotra* persons are valid under Hindu law. However, since this question has been argued before us, I think it is necessary for me to deal with it.

The learned trial Judge held that under the provisions of Hindu law, the marriage between defendant 1 and defendant 2 must be held to be invalid because the *gotra* of defendant 1 was the same as that of defendant 2 in her father's family. In support of his conclusion the learned trial Judge has referred to the commentary of Mitakshara relevant on the point and has relied upon a decision of this Court in 32 Bom 619.<sup>31</sup> Shortly stated the argument is that under Hindu law no valid marriage can be contracted if the *gotra* and *pravara* of the bride and the bridegroom are the same. Before dealing with the texts bearing on this question it would be necessary to consider briefly



the history of the origin and development of *gotra* and *pravara* in ancient Hindu literature. Max Muller, in his "History of Ancient Sanskrit Literature," observes (p. 199) :

" . . . . *Gotra* or *kula* means a family, and the number of families that had a right to figure in the Brahmanic Peerage of India was very considerable. The Brahmans were proud of their ancestors, and preserved their memory with the most scrupulous care, as may be seen by the numerous treatises on the subject which are preserved to the present day."

He further says (p. 199) :

" . . . The names of the *gotras* were liable to confusion, particularly in later times, when their number had become very considerable. But the respect which the Brahmans, from the very earliest time paid to their ancestors, and the strictness with which they prohibited marriages between members of the same family, lead us to suppose that the genealogical lists, such as we find in the Brahmanas, in the Sutras, in the Mahabharata, in the Puranas, and even at the present day, present in their general outlines a correct account of the priestly families of India. All Brahmanic families who keep the sacred fires are supposed to descend from the Seven Rishis. These are : Bhrigu, Angiras, Visvamitra Vasishtha, Kasyapa, Atri, Agasti. The real ancestors, however, are eight in number : — Jamadagni, Gautama and Bharadvaja, Visvamitra, Vasishtha, Kasyapa, Atri, Agastya. The eight *gotras*, which descend from these Rishis, are again subdivided into 49 *gotras*, and these 49 branch off into a still larger number of families. The names *gotras*, *vansa*, *varga*, *paksha*, and *gana* are all used in the same sense, to express the larger as well as the smaller families descended from the eight Rishis." (p. 199).

Then he points out (p. 200)

" that each of the 49 *gotra* claims one, or two, three or five ancestors, and the names of these ancestors constitute the distinctive character of each *gotra*."

Finally he concludes thus (p. 204) :

"It is clear from this that the science of genealogy being so intimately connected with the social and ecclesiastical system of the Brahmans, must have been studied with great care in India, and that the genealogical lists which have been preserved to us in ancient works represent something real and historical."

Mr. C. V. Vaidya, in his "History of Mediæval Hindu India," Vol. II, pp. 56-57, deal with this subject thus :

"According to the latest view the *gotra* Rishi is a son or rather a descendant of one of the Seven Rishis with the addition of the eighth Agastya who is outside the well known Seven Rishis of Baudhayana. According to Baudhayana's dictum the original Indo-Aryan families were considered to be eight, viz., 1. Visvamitra, 2. Jamadagni, 3. Bharadvaja, 4. Gautama, 5. Atri, 6. Vasishtha, 7. Kasyapa, and 8. Agastya. But an important Sloka in the Mahabharata takes us still further back, and states that originally there were four *gotras* only.

"Mula-gotrani chatvari samutpannani Bharata Angirah Kasyapaschaiva Vasistho Bhrigurevacha." —Santi. p. 296.

"These ancient four *gotras*, Angiras, Kasyapa, Vasishtha and Bhrigu are supported by the Pradaryhayayas also in several Sutras which always

begin with Bhrigu Pravara. Now this shows that, when the first or Solar Race Indo-Aryan invaders came to India, there were four family stocks, 1. Bhrigu, 2. Angiras, 3. Kasyapa, and 4. Vasishtha. They were the patriarchs—so to say the mind-born sons of the Creator and they were progenitors of all the three Aryan classes. They in fact were not Brahmin Rishis but Aryan-Rishis."

"Now Bhrigu's name does not appear in the Saptarshis; but that of his descendant Jamadagni does. So also Angiras is substituted by his two grandsons, Bharadvaja and Gautama. Therefore, in order to constitute the later eight stocks, we have to add Atri, Visvamitra and Agastya. It is clear that Atri stock represents the second horde of Aryan invaders, i.e. the Lunar Race Aryans, as the moon is looked upon as the son of Atri and Lunar Race Aryans have generally the Atri *gotra*. Agastya is entirely a new addition; but it took place in Vedic times; for Agastya is a Vedic Rishi, while Visvamitra, an Indo-Aryan Kshatriya, became a Brahmin and a Pravara Rishi, by his austerities. Visvamitra was, therefore, a Solar Race Kshatriya stock, which became priest by his intelligence and his religious merits."

Thus, it would appear that both Max Muller and Mr. Vaidya believe that the *gotra* and *pravara* system shows a regular and trustworthy descent. On the other hand, in the chapter on "Gotra" in his thesis on "Hindu Exogamy" Mr. Karandikar points out that in the Rigveda, the word *gotra* occurs about six times; but nowhere does it mean a family or a family name. In four places it means either a cloud, or a mountain, while, in two other places, it means a herd. Roth interprets the word as cow's stall, while Geldner thinks that *gotra* means a herd. This word *gotra* in the Rigvedic times was slowly gathering around it the idea of a group. According to Mr. Karandikar

"That *gotras* and *pravaras* are not very ancient may be seen from the fact that in the very comprehensive rituals of the Vedic sacrifices very little importance is attached to *gotras* and *pravaras*" (p. 61). Mr. Karandikar has examined this question in great detail and his conclusions can thus be summarised. In early Vedic times sept exogamy must have been absent, though marriage was generally contracted outside the family. In the days of the Samhitas other than the Rigveda and the Brahmana works, *gotras* had made their appearance and the Brahmin community was being organised on the basis of *pravaras*. The rule of sept exogamy, as given in Manu-Smriti, is rather loose and no penalty is provided for the breach of that rule. In Manu's rule of exogamy, *pravara* is not mentioned, nor is it implied, although commentators on Manu-Smriti, who came several hundred years after Manu, have interpreted the word *sagotra* as *sapravara*. It was during the Sutra period that the scope of the rule was extended and some penances were prescribed



for the sin of *sagotra* marriage. Baudhayana in his Dharma-Sutra declares that a *sagotra* wife should be abandoned as far as sexual life is concerned, but should be protected like mother. When *sagotra* marriage results in an issue, the issue would belong to Kasyapa *gotra* and the father would be purified by a Krichchhra penance of three months. The views of Gautama on this subject were extremely strong. However, during the Sutra-period, the prohibition against *sagotra* marriage on the whole was rather half-hearted. It was at the beginning of the Christian era that sept exogamy grew more and more rigid. Medhatithi, the first great commentator on Manu, deals with the subject at great length, while Mitakshara adopts the same rigid view about *sagotra* marriages and holds that those marriages are absolutely void.

In his "History of Dharmasastra", vol. II, Part 1 (1941), while dealing with the subject of marriage in Chap. 9, Mr. Kane has considered the history and growth of *gotra* and *pravara* exhaustively. In despair he points out that:

"The mass of material on *gotra* and *pravara* in the sutras, the puranas and digests is so vast and so full of contradictions that it is almost an impossible task to reduce it to order and coherence." (P. 483).

According to Mr. Kane, the general conception about *gotra* is that it denotes all persons who trace in an unbroken male line from a common ancestor. The conception of *pravara* is closely interwoven with that of *gotra* from very ancient times. The word *pravara* literally means "choosing" or "invoking." As *agni* was invoked to carry the offerings of a sacrificer to the gods by taking the names of the illustrious *rsis* (his remote ancestors) who in former times had invoked *agni*, the word *pravara* came to denote one or more illustrious *rsis*, ancestors of a sacrificer. The words *arseya* and *arsa* are the synonyms of *pravara*. The word *pravara* is not to be found in the Rigveda, though its synonyms *arsa* and *arseya* occur in a few places. Mr. Kane states the connection of *gotra* and *pravara* thus:

"*Gotra* is the latest ancestor or one of the latest ancestors of a person by whose name his family has been known for generations; while *pravara* is constituted by the sage or sages who lived in the remotest past, who were most illustrious and who are generally the ancestors of the *gotra* sages or in some cases the remotest ancestor alone." (P. 497).

According to the commentators, however, the word 'gotra' has a peculiar technical meaning. The relevant discussion in Medhatithi's commentary on Manu has been thus aptly summarised by Mr. Kane:

"... just as, though all persons are men, some are called *brahmanas*, so among *brahmanas* certain persons are known by immemorial usage (or convention) as belonging to certain *gotras* like Vasistha and the *sutra-karas* lay down that a certain *gotra* has certain *pravaras*; so the word *gotra* is applied to Vasistha and other sages by *rudhi* (by convention or long-standing usage). It cannot be supposed that a person called Parasara was born at a certain time and then his descendants came to be called Parasaras. In that case the Veda would not be *anadi* (beginningless), as it is supposed to be, since it mentions Parasara, Vasistha, etc. So *gotra* is *anadi* like the *brahmana* caste and the Veda. The word is also secondarily used to denote a person, who is very illustrious on account of his learning, wealth, valour or generosity, who thereby gives a name to his descendants and then becomes the founder of the family. This is *laukika gotra*. But this is not the meaning of *gotras* which *brahmanas* have. The secondary meaning may apply to the word *gotra* when used in the case of *ksatriyas*." (pp. 485-486).

At present the number of *gotras* is literally legion; while majority of these *gotras* have three *pravara* sages, a few have one, two or five. According to the commentators, the *ksatriyas* and the *vaisyas* have no '*gotras*' and *pravaras* of their own and they have, for the purposes of their marriage, to adopt the *gotras* and *pravaras* of their *purohitas*. Mr. Kane justly quarrels with this doctrine of the *nibandha* writers and says: "This is carrying the doctrine of *atidesa* (extension) too far or with a vengeance." Mr. Kane also points out that as a fact it is wrong to assume that *ksatriyas* have no *gotra* or *pravara* of their own.

It will thus be seen that scholars of ancient Sanskrit literature have expressed somewhat conflicting opinions as to origin and development of *gotra* and *pravara*. I think it is impossible to accept the suggestion that in reference to the Brahman families of today their *gotras* and *pravaras* represent anything like an unbroken line of descent from the common ancestors indicated by the names of their respective *gotras* and *pravaras*. Besides if this fanciful theory is accepted, its logical extension may well lead us to the conclusion that in the last analysis all Hindus are descended from their mythological ancestor Manu himself and in that sense all of them belong to the same *pravara*. It seems *pravara* and *gotra* had a purely ritualistic origin and in ancient times when several rites and sacrifices were frequently performed, *pravara* and *gotra* had some significance. In course of time, the performance of these rituals gradually decreased, until eventually it ceased altogether. During this period, the genesis and real significance of *pravara* and *gotra* was misappreciated. In the writings of subsequent



authors these words came to be invested with a mystical and metaphysical importance; apparently, prohibitions against marriage of *sagotra* and *sapravara* persons were vehemently discussed and rigidly sought to be enforced about this time. I will now proceed to consider the texts of Manu and Yajnyavalkya bearing on this question to see whether under those texts marriages between *sagotra* persons should be treated as absolutely void. The material verses in Manu-Smriti bearing on this subject are:

Chapter III, verse 5 :

असपिण्डा च या मातुरसगोत्रा च या पितुः ।

सा प्रशस्ता द्विजातीनां दारकर्मणि मैथुने ॥

"She who is not a *sapinda* of the mother and she who is not a *sagotra* of the father is recommended to the twice-born for being selected for wife."

Chapter III, verse 8 :

नोद्वहेत्कपिलां कन्यां नाधिकाङ्गीं न रोगिणीम् ।

नालोमिकां नातिलोमां न वाचालां न पिङ्गलाम् ॥

"He should not marry a girl of black complexion; she should not have additional limbs; she should be healthy, should not be hairy, should not be without hair, should not be talkative and should not be brown."

Chapter III, verse 9 :

नक्षत्रक्षनदीनाम्नीं नान्यपर्वतनामिकाम् ।

न पक्ष्यहिप्रेष्यनाम्नीं न च भीषणनामिकाम् ॥

"She should not have the name of a river and not of tree or mountain and she should not bear a furious name."

Yajnyavalkya in his *Smriti* deals with this topic thus :

Chapter III, verse 52 :

अविप्लुतब्रह्मचर्यो लक्षण्यां स्त्रियमुद्वहेत् ।

अनन्यपूर्विकां कान्तामसपिण्डां यवीयसीम् ॥

"He with the celibacy not broken should marry a girl of good signs, not belonging to others, beautiful, not of a *sapinda* relationship and younger than himself."

Chapter III, verse 53 :

अरोगिणीं भ्रातृमतीमसमानार्षगोत्रजाम् ।

पञ्चमात्सप्तमादूर्ध्वं मातृतः पितृतस्तथा ॥

"She should be healthy, should have brothers, should not have the same *gotra* and *pravara* and should be five degrees removed from the mother and seven degrees from the father."

Chapter III, verse 54 :

दशपुरुषविख्याताच्छ्रोत्रियाणां महाकुलात् ।

स्फीतादपि न संचारिरोगदोषसमन्वितात् ॥

"A maiden should be taken from a highly respectable family of persons well-versed in the Vedas, and inheriting the virtue of ten generations, prosperous; but not even from such a family if there be any hereditary disease."

On these texts the question to be decided is whether the requirement that the girl should belong to a different *gotra* as laid down by Manu, or that she should have a different *gotra* and different *pravara* as laid down by Yajnyavalkya is obligatory. It is admitted that most of the attributes mentioned by Manu and Yajnyavalkya with regard to the boy, as well as the girl, are recommendatory. The only provision which is admitted to be obligatory is the requirement that the girl should be five degrees removed from the mother and seven degrees from the father. Mr. Jahagirdar contends that if the verses from Manu and Yajnavalkya are read as a whole, it should not be difficult for the Court to hold that the requirements as to *gotra* and *pravara* mentioned therein are recommendatory, rather than mandatory. I think there is considerable force in Mr. Jahagirdar's contention. Mr. Kane, however, argues that while interpreting these verses, it is necessary to adopt the rule of construction laid down by Jaimini in his *Purva Mimamsa*,

"that if there is a seen (*drsta*) or easily perceptible reason for a rule stated in the sacred texts, it is only recommendatory and the breach of such a rule does not nullify the principal act. But if there is an unseen (*adrsta*) reason for a rule and there is a breach of such rule, the principal act itself is rendered invalid and nugatory thereby." (Kane's History of Dharmasastra, Vol. II, Part I, p. 437.)

Speaking for myself I feel no hesitation in rejecting this argument. As Mayne, in his "Hindu Law and Usage" points out, "some of the Mimamsa rules of interpretation are of very doubtful utility in the present day administration of Hindu Law." The rule of *adrsta* on which Mr. Kane relies is, I think, obviously one of such rules. The next contention urged by Mr. Kane is that whatever may be the view which the Court may take about the interpretation of the texts of Manu and Yajnyavalkya, the Court is bound to accept the interpretation which Mitakshara has put on the text of Yajnyavalkya. Mitakshara, while commenting on verse 53, Chap. III reads thus :

सपिण्डासु समानगोत्रासु समानप्रवरासु भार्यात्वमेव नोत्पद्यते । रोगण्यादिषु तु भार्यात्वे उत्पन्नेऽपि दृष्ट विरोध एव ॥

"In the case of marriage with girls who are *sapinda*, *samangotra* or *samanpravara*, the condition of wifehood does not come into being, but in case of girls who are afflicted with diseases, etc., the condition of wifehood does come into being but there is a conflict in regard to worldly consideration only."

It is quite clear that according to Vijnanesvara, a marriage between persons of the



same *gotra* is absolutely void, since in such a case, according to him, the condition of wifehood does not come into being. Vijnanesvara's interpretation is based on the *mimansa* rule of interpretation to which I have referred above. That rule is both artificial and irrational; and as I have already indicated, I would certainly not be prepared to adopt it as a safe guide in interpreting Sanskrit texts for the purpose of administering Hindu law. Besides, the said interpretation is open to other serious objections in so far as it deals with the question of *ksatriyas* and *vaisyas*. Vijnanesvara says that since *ksatriyas* and *vaisyas* have no *gotra* of their own, for the purposes of marriage they should adopt the *gotra* of their priests. Now, the assumption made by Vijnanesvara that *ksatriyas* have no *gotras* of their own is historically inaccurate: and the solution offered by him in regard to marriages amongst the *ksatriyas* and *vaisyas* is clearly meaningless and unsatisfactory. The difficulties in applying this prohibition to the *ksatriyas* and *vaisyas* are obvious. In several cases, many *ksatriya* families which may not be related even remotely to each other may have the same priest, while near relations may engage different priests. Besides, the literal requirements of the prohibition can be easily met by the parties changing their priest just at the time of the marriage.

Further, amongst all the regenerate classes the more serious prohibition based upon sapinda or consanguinity has, even according to Mitakshara, been relaxed according to usage. Marriages between first cousins, such as that of a man with a daughter of his mother's brother or of his father's sister, are referred to with approval on the ground that they are supported by custom. It seems very unreasonable that relaxation should be permitted in regard to the requirement of *sapinda*, while the rule as to *gotra* and *pravara* should be rigidly enforced. It may be conceded that on the whole,

"Vijnaneswar was a farseeing jurist and statesman, and by his commentary on Yajnyavalkya, he practically freed Hindu law from its religious fetters, and made it readily acceptable to all communities in all parts of India, establishing it on new foundations." Mayne's Hindu Law and Usage, 10th Edn., (p. 47.)

Unfortunately, however, while dealing with the provisions of Hindu Law of marriage, he was not able to rise above the conventional beliefs of his age.

The question then is whether the Court is bound to accept the interpretation put by

Vijnanesvara on the verses of Yajnyavalkya in question. Mr. Jahagirdar for the defendants contends that though the opinions expressed by Vijnanesvara in his commentary are entitled to great weight, they are in no sense binding upon the Court. He argued that on some questions the Privy Council had refused to accept the interpretation put by Mitakshara upon the texts and in that connection he referred to a decision in 22 Mad. 398.<sup>16</sup> The question which the Privy Council had to decide in that case was whether the adoption of an only son was valid under Hindu law. That question had given rise to a conflict of judicial decisions in India and the views expressed by the different commentators on that point could not easily be reconciled. Adoption of an only son *prima facie* appeared to be discountenanced if not actually prohibited, by the text of Yajnyavalkya as interpreted by Mitakshara. Their Lordships dealt with the several decisions of the Indian Courts on that point and the opinions expressed by the different commentators, and they concluded thus. (pp. 428-29):

"But what says authority? Private commentators are at variance with one another; judicial tribunals are at variance with one another; and it has come to this, that in one of the five great divisions of India the practice is established as a legal custom, and of the four High Courts which preside over the other four great divisions, two adopt one of the constructions and two the other. So far as more official authority goes there is as much in favour of the law of free choice as of the law of restriction. The final judicial authority rests with the Queen in Council. In advising Her Majesty their Lordships have to weigh the several judicial utterances. Upon their own examination of the *smritis* their Lordships find them by no means equally balanced between the two constructions but with a decided preponderance in favour of that which treats the disputed injunctions as only monitory and as leaving individual freedom of choice. They find themselves able to say with as much confidence as is consistent with the consciousness that able and learned men think otherwise, that the High Courts of Allahabad and Madras have rightly interpreted the law and rightly decided the cases under appeal."

While dealing with the works of commentators on Hindu Law, their Lordships said:

"They now add that the further study of the subject necessary for the decision of these appeals has still more impressed them with the necessity of great caution in interpreting books of mixed religion, morality and law, lest foreign lawyers accustomed to treat as law what they find in authoritative books, and to administer a fixed legal system, should too hastily take for strict law precepts which are meant to appeal to the moral sense, and should thus fetter individual judgments in private affairs, should introduce restrictions into Hindu Society, and impart to it an inflexible rigidity, never contemplated by the original lawgivers."



This decision shows that in the matter with which the Privy Council were dealing, the commentators took different views and those views gave rise to conflicting judicial decisions while on the point with which we are dealing all the commentators take the same view. Besides, the text of Mitakshara came in for discussion in that case only incidentally.

Mr. Jahagirdar also referred to the decision of the Privy Council in 39 I. A. 121,<sup>18</sup> where somewhat contrary to the views of Mitakshara, the Privy Council have held that a share obtained by a widow on partition of the joint family property is not her *stridhan* even under the Mitakshara law.

On the contrary it has been repeatedly pointed out by the Privy Council that while deciding questions of Hindu law, in regard to parties governed by the Mitakshara school, the views expressed by Vijnanesvara are of paramount importance. In 12 M. I. A. 397,<sup>15</sup> the Privy Council declared that it is the duty of a Judge (p. 436) :

"not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular School which governs the district with which he has to deal, and has there been sanctioned by usage."

The same view was expressed by the Privy Council in 62 I. A. 139.<sup>14</sup> In that case, dealing with the question of succession, the Privy Council held that :

"According to the Mitakshara School of Hindu law *samanodakas* including only those agnates who are within the eighth to the fourteenth degree of descent from (and including) the common ancestor : in the absence of an agnate within the fourteenth degree the estate devolves upon the deceased's *bandhus*."

Dealing with the commentary of Vijnanesvara on the material text of Yajnavalkya, Sir Shadi Lal pointed out that (p. 143) :

"Vijnanesvara, when writing his commentary Mitakshara on the Smriti of Yajnavalkya, probably found that a usage had grown up restricting the *samanodaka* relationship to the fourteenth degree. He accordingly refrained from endorsing the all-embracing rule of Yajnavalkya, and while mentioning it in the verse dealing with the subject, he gave prominence to the restricted scope of the word, and supported it by citing Vrihad Manu. It must be remembered that the commentators, while professing to interpret the law as laid down in the Smritis, introduced changes in order to bring it into harmony with the usage followed by the people governed by the law; and that it is the opinion of the commentators which prevails in the provinces where their authority is recognized."

Sir Shadi Lal also cited with approval the passage from the decision in 12 M. I. A. 397<sup>15</sup> to which I have just referred and thus concluded (p. 143) :

"Indeed, the Mitakshara 'subordinates in more than one place the language of texts to custom and

approved usage' : 13 M. I. A. 373<sup>25</sup> at p. 390. It is, therefore, clear that in the event of a conflict between the ancient text writers and the commentators, the opinion of the latter must be accepted." It is true that while dealing with questions like this, Courts have to construe the texts of Hindu law in the light of the explanations given by recognised commentators. But it must always be remembered that since the said commentaries were written, several centuries have passed by and during this long period the Hindu mode of life has not remained still or static. Notions of good social behaviour and the general ideology of the Hindu society have been changing; with the growth of modern sciences and as a result of the impact of new ideas based on a strictly rational outlook of life, Hindu customs and usages have changed. The custom as to marriages between persons of the same *gotra* which I have held proved in this case is an eloquent instance in point. Between the letter of the law and *sadachar* — good conduct, according to the consciousness of the community—there is obviously great variance. It follows, therefore, that the prohibitions which have been so emphatically enunciated by the *Nibandha* writers in this connection have not, for a considerable time past, conformed to the usage and custom recognised by the community. In such a case it is obviously the duty of the Legislature to intervene and to amend the material provisions of Hindu law so as to make them consistent with the custom and usage prevailing in society and thus help to place the Hindu law of marriage on a more rational basis.

While dealing with this question, the learned trial Judge has relied upon the decision of this Court in 32 Bom. 619<sup>21</sup> and Mr. Kane has argued that the Court is bound by that decision. The parties to that suit were Chitpavan Brahmins of the Thana District. The validity of the adoption was impugned on the ground that there could be no legal marriage between the adoptive father and the natural mother of the adopted son in her maiden stage. The adopting father and the natural mother belonged to different *gotras*, but two out of the three *pravaras* were common to both. It was argued that under Hindu law, no marriage could have validly taken place between the adoptive father and the natural mother of the adopted boy since two of their *pravaras* were the same. This objection was considered by this Court and

25. (70) 13 M. I. A. 373 : 5 Beng. L. R. 293 : 2 Suther 330 : 2 Sar. 566 (P. C.), *Bhyah Ram Singh v. Bhyah Ugur Singh*.



it was held that "the validity or invalidity of the marriage tie in cases of this kind must be determined under the original text of Yajnavalkya as authoritatively interpreted by Vijnyanesvara in the Mitakshara." It was also held that on the interpretation of Mitakshara no valid marriage could have taken place between the adopting father and the natural mother of the adopted boy. Notwithstanding these findings the Court was not prepared to accept the position, "that the invalidity of such a connection is necessarily a ground for holding the plaintiff's adoption to be invalid." Chaubal J. who delivered the judgment of the Court, considered the texts on which the argument as to the invalidity of the adoption was based and came to the conclusion that the restrictions sought to be imposed from the gloss of Nanda Pandita on the text "Putrachhaya-vaham" were only recommendatory, and that the gloss only contemplates the specific cases of Viruddha Sambandha mentioned therein. On that view, the adoption was held to be valid. That being the decision in the case, strictly speaking, the finding that if the adoptive father and the natural mother of the adopted boy had married, the marriage would have been invalid, could be regarded as obiter. It was not a decision that the marriage was invalid. In fact, the point about the invalidity of the marriage arose only incidentally. However, the judgment of Chaubal J. shows that he recorded that finding with some reluctance; because in connection with that finding he took the precaution of making an important additional observation. Chaubal J. said (p. 628) :

"I can conceive that deviations from any prescribed rule may obtain in practice and that the frequency of such deviations in any particular community may in course of time have established a recognised and binding usage or custom : and where such is established it would no doubt be the duty of our Courts to give effect to it, if otherwise legal and valid."

Indeed the facts in this case show that Chaubal J.'s anticipation that deviations from the prescribed rule on the ground of custom may be set up has come out true. On the whole I am not prepared to accept the argument that we are bound by the views expressed in 32 Bom. 619<sup>21</sup> as to the invalidity of marriage between persons of the same *gotra*.

However, as I have already pointed out, the Privy Council have consistently taken the view that under the Mitakshara School of Hindu law the gloss of Vijnyanesvara must be accepted as authoritative and bind-

ing. That being so, there is no alternative but to hold that marriages between *sagotra* persons like defendants 1 and 2 are invalid under Hindu law. This finding, however, does not affect the decision in the case, since I have already held that the custom under which such marriages are permitted and on which the defendants had relied has been proved.

The result is that the appeal fails and is dismissed. The appellant to pay the costs of respondents 1 to 6.

V.R./D.H.

*Appeal dismissed.*

[Case No. 83]

**A. I. R. (33) 1946 Bombay 396**

CHAGLA AND RAJADHYAKSHA JJ.

*Yeshavant Dattatraya — Appellant*

v.

*Shripad Sadashiv — Respondent.*

Second Appeal No. 947 of 1941, Decided on 13th September 1945, from decision of Dist. Judge, Ratnagiri, in Appeal No. 63 of 1940.

Hindu law — Joint family business — Personal liability of coparceners, test to determine, indicated.

It is only the manager or the managing member of the joint family business who is personally liable with regard to the debt contracted for that particular joint Hindu family business. The other coparceners are only liable when they are contracting parties along with the manager, or when their conduct is such from which it can be legitimately inferred that they can be regarded as contracting parties or by some act or conduct they have subsequently ratified the loan borrowed by the managing member for the purpose of the business. Where any coparcener of the family is sought to be made personally liable for such debts, the Court must consider the nature and the extent of the participation of the coparcener in the joint family business. Mere participation is not enough. If the Court comes to the conclusion that the nature and extent of the participation is such as to put him in the same position as a partner in a partnership firm or as a manager, then he would be personally liable to the creditor as much as the manager himself: ('40) 27 A. I. R. 1940 Mad. 580 and 22 Mad. 166, *Rel. on*; 5 Bom. 38, *Disting.*; Observation of Chandavarkar J. in 9 Bom. L. R. 1289, *held obiter*. [P 397 C 2; P 399 C 1, 2]

Hindu Law—

('40) Mulla, Page 259, Pt. (d) P.263, Pt. (j).

('38) Mayne, P. 393, Pt. (g); P. 401, Pt. (h).

V. S. Desai and A. A. Gajendragadkar—

for Appellant.

K. V. Joshi for R. D. Manerikar —

for Respondent.

**Chagla J.**— The suit from which this appeal arises was filed by the plaintiff on a promissory note for Rs. 1,391-12-0 passed by defendant 1. Defendants 2 to 7 were made party-defendants as members of a joint and undivided Hindu family along with defen-



dant 1, and on the allegation that the money was borrowed for the purpose of a joint family business. The trial Court held that a certain cloth shop was a joint family business, that the debt was incurred for that business and the shares of the defendants in that business were liable for the satisfaction of that debt; but in the case of defendants 1, 5 and 6, the trial Court held that as they were taking an active part in the conduct of the business, they were personally liable. From that decision defendant 6 preferred an appeal to the lower appellate Court. The lower appellate Court confirmed the decree of the trial Court. From that order an appeal was preferred to this Court. The appeal came up before Lokur J. and on 1st March 1943, that learned Judge sent down two issues to the trial Court for trial. These two issues were:

(1) Whether, though the promissory note in suit was passed by defendant 1 alone, defendant 6 also was in reality a contracting party or whether he can be treated as being a contracting party by reason of his conduct? or

(2) Whether he subsequently ratified it?

These issues were tried, and there was an appeal from the findings before the learned District Judge; and the learned District Judge answered both the issues in the negative; but with regard to the second part of issue 1, he made his finding subject to certain reservations and it is these reservations which have been the subject of controversy before us. The learned District Judge held that defendant 6 had taken part in the working of the cloth shop which was a joint family business and he considered a decision of our Court in 9 Bom. L.R. 1289,<sup>1</sup> and came to the conclusion that in view of that decision, if defendant 6 took part in the working of the cloth shop, then the second part of issue 1 framed by Lokur J. would be in the affirmative; or, in other words, according to the learned District Judge, the mere fact that defendant 6 had taken part in the working of the cloth shop was sufficient to warrant his being treated as being a contracting party by reason of that particular conduct of his, namely, taking part in the working of the cloth shop.

The principle of Hindu law on this particular question has been enunciated by Sir Dinshah Mulla in his well-known treatise on Hindu Law:

"The manager is liable not only to the extent of his share in the joint family property, but, being a party to the contract, he is liable personally, that is to say, his separate property is also liable.

1. ('07) 9 Bom. L.R. 1289, *Gokal Kastur v. Amarchand*.

But as regards the other coparceners, they are liable only to the extent of their interest in the family property, *unless*, in the case of adult coparceners, the contract sued upon, though purporting to have been entered into by the manager alone, is in reality one to which they are actual contracting parties, or one to which they can be treated as being contracting parties by reason of their conduct, or one which they have subsequently ratified."

Therefore the ordinary rule of Hindu law is that it is only the manager or the managing member of the joint family business who is personally liable with regard to the debt contracted for that particular joint Hindu family business. The other coparceners are only liable when they are contracting parties along with the manager, or when their conduct is such from which it can be legitimately inferred that they can be regarded as contracting parties or by some act or conduct they have subsequently ratified the loan borrowed by the managing member for the purpose of the business.

The distinction between a partnership firm and a joint family business is too well-known and too fundamental to need any repetition or emphasis; whereas one arises from contract, the other is the result of status. Whereas in the case of a contractual partnership each partner is the agent of the other and each partner is personally liable, in the case of a joint family business, as I have just said, ordinarily only the managing member is personally liable. Further it has got to be remembered that in the case of a joint Hindu family business, the karta has the right without consulting the other coparceners to contract debts on behalf of the business and to be in complete control of the business and the other coparceners are bound by these acts on the part of the karta. Therefore it can be well understood why Hindu law has restricted the liability of the coparceners other than that of the manager only to their interest in the joint family assets and has not foisted upon them a personal liability. The manager is personally liable because it is his contract and he is in charge of the business and is in control of it. This principle has been very well enunciated in a recent decision of the Madras High Court in I. L. R. (1940) Mad. 1012.<sup>2</sup> In that case Wadsworth J. and Patanjali Sastri J. came to the conclusion that a coparcener could not be made personally liable except on the ground of implied partnership or estoppel by holding out or ratification;

2. ('40) 27 A.I.R. 1940 Mad. 580 : I.L.R. (1940) Mad. 1012 : 194 I.C. 514, *Alagami Achi v. Palaniappa*.



and whether an inference can be drawn as to implied partnership or estoppel must depend upon the nature and extent of the participation of the coparcener in the business. The learned Judges rightly point out that every coparcener has an interest in the joint family business, and if his participation in that business is only such as can reasonably be attributed to his interest in the joint family, then no legitimate inference can be drawn that he intended to undertake a greater liability as a partner in the business. But if a coparcener takes such part in the management of the business as goes beyond what can be sufficiently explained by his interest in an asset of the family, then a conclusion may be drawn that his relations with the managing member of the firm are similar to those of a partner *quae* the creditor and that he would be personally liable for the debts incurred. But the learned Judges sound a note of warning and point out that mere participation, however active in the business, is not sufficient to warrant an inference either of partnership or of holding out. The Court must find some definite and unequivocal consensual acts before such an inference can be drawn. The learned Judges further point out that even with regard to the principle of repudiation it has got to be remembered that a Hindu coparcener is not entitled to disown any acts of the manager. Therefore ratification cannot be inferred by the mere fact that the coparcener has not disowned the debt or has not objected to it or protested against it. There must be some positive act from which the Court can say that the coparcener has ratified the transaction. Mere acquiescence would not be sufficient, and the Madras High Court points out that it would be wholly subversive of established principles of Hindu law to hold that a coparcener is personally liable on the ground of ratification by acquiescence for the dealings of the manager in the ordinary course of family businesses.

Turning now to the decision of our Court in 9 Bom. L. R. 1289<sup>1</sup> which seems to have caused some difficulty in the mind of the learned District Judge, it is important to note that as the facts set out at p. 1289 clearly show, the firm in that case, in respect of which the decision was given, was a partnership firm; and even in the judgment itself Chandavarkar J. at p. 1291 begins his judgment by saying that the debts in dispute were contracted by Kastur as the manager of a joint Hindu family of which he and the defendants were coparceners for the purposes

of a partnership business of that family. Later on, Chandavarkar J. considers the judgment of the Madras High Court in 22 Mad. 166<sup>3</sup> which laid down that a creditor of a joint Hindu family was not entitled to a personal decree against any coparcener other than the manager who contracted the debt on behalf of the family, and considers that proposition as not sound; then he proceeds to hold that the coparceners other than Kastur, the manager, were personally liable inasmuch as they must be treated as having acquiesced in the course of the dealings of the joint family concern. Now with great respect to the learned Judge, once he found as a fact that the business was a partnership business, it was unnecessary to consider the question of Hindu law. If the firm was a partnership business, undoubtedly all the members of that partnership were personally liable to the creditor. The question could only arise for determination if it was a joint family firm. In our opinion, therefore, this particular observation of Chandavarkar J. is an *obiter* and not binding on us, but even assuming that this statement of the law is binding on us, it must be read in its own context. Chandavarkar J. first cites with approval a dictum from the same decision of the Madras High Court to which I have just referred, 22 Mad. 166,<sup>3</sup> which lays down that the acquiescence on the part of a coparcener in the business must be such as to warrant his being treated in the matter as a contracting party. Having expressed his approval of this statement of the law, the learned Judge then proceeds to enunciate the proposition to which I have just referred. Therefore it is clear in our opinion that the acquiescence referred to by Chandavarkar J. is not any acquiescence by a coparcener in the joint family business but such an acquiescence as would warrant his being treated as a contracting party; or, in other words, his conduct *quae* the joint family business must be such as to entitle the Court to draw a legitimate inference that he could be regarded or considered as a contracting party along with the manager.

Mr. K. V. Joshi for the respondent has strongly relied on a decision in 5 Bom. 38.<sup>4</sup> In that case the plaintiff sued on a balance of account, signed by defendant 1, Someshvar, in the name of the firm of "Jivram Haribhai." That firm was established by Jivram, the father of Someshvar and his two

3. ('98) 22 Mad. 166, Chalamayya v. Varadappa.

4. ('80) 5 Bom. 38, Samalshai Nathubhai v. Someshvar.



brothers, defendants 2 and 3. Someshvar at that time was 23 years old; Mangal, defendant 2, was 17 and Harikisan, defendant 3, was a minor. Someshvar admitted the claim but urged that the liability lay upon the firm and not upon himself personally. Defendants 2 and 3 set up a plea of limitation and contended that they were not the owners of the firm of "Jivram Haribhai" solely managed by Someshvar. On all these points the Subordinate Judge decided in favour of the plaintiff and passed a decree accordingly. Mangal alone appealed to the District Judge, and the District Judge held that Mangal was not a partner and dismissed the suit as against Mangal. From that decision an appeal was preferred to the High Court, and Melvill J. in his judgment only considered the question whether Mangal was liable as a member of the joint Hindu family; and in the judgment he has discussed the distinction between a partnership firm and a joint family firm. It is to be noted that the question whether Mangal was personally liable or only liable to the extent of the joint family assets is nowhere discussed. It was only Someshvar who raised the point as to whether he was personally liable or his liability was confined to the assets of the joint family. As far as Mangal was concerned, he disputed his liability altogether. Therefore the observation of Melvill J. that a coparcener, even though he may not attend to the family business, is liable to the creditor only applies to the liability of such a coparcener to the extent of the assets of the joint family firm and not to the personal liability of such a coparcener. Melvill J. was only concerned to decide that mere absence from participating in the joint family business does not absolve the coparcener from his liability to the creditor to the extent of the joint family assets. Mayne in his Hindu Law has enunciated the principle in this way :

"Where several persons take an active part in the conduct of the business, they may well be regarded as managing members or as persons entrusted with the conduct of the business and they cannot only bind each other but also members of the family including minor coparceners."

Therefore it is not sufficient that a coparcener should take a part or even an active part in the conduct of the business. It must be further established that the part he takes in the conduct of the business is such as to entitle the Court to regard him as the managing member of the firm in the same way as the manager himself.

In this case the finding of fact of the learned District Judge which we accept is

that defendant 6 took part in the working of the cloth shop at the time when the promissory note was executed. He has found that defendant 6 could not be treated as being a contracting party by reason of his conduct. In our opinion the mere fact that defendant 6 took part in the working of the cloth shop was not sufficient to make him personally liable for the debts of the business. There is no evidence that his participation in the business was such as to make him liable to be regarded as a manager of the business.

In our opinion in each case the Court must consider the nature and extent of the participation of the coparcener who is sought to be held liable for the debts of the firm. Mere participation is not enough. If the Court comes to the conclusion that the nature and extent of the participation is such as to put him in the same position as a partner in a partnership firm or as a manager, then he would be personally liable to the creditor as much as the manager himself.

Under the circumstances we are of the opinion that defendant is not personally liable and the decree passed against him to the extent that he is made personally liable must be modified and the decree against him must be restricted to the extent of defendant 6's share in the joint family assets. We, therefore, allow the appeal with costs in this Court as well as costs in the lower appellate Court.

V.W./D.H.

*Appeal allowed.*

[Case No. 84.]

**A. I. R. (33) 1946 Bombay 399**

SEN AND RAJADHYAKSHA JJ.

*Babu Ningappa — Applicant*

v.

*Paragouda Parsappa — Opponent.*

Civil Revn. Appln. No. 771 of 1944, Decided on 10th August 1945, from order of Civil Judge, (Junior Division) at Athni, in suit No. 35 of 1943.

Bombay Increase of Court-fees Act (15 [XV] of 1943), S. 2—Surcharge under, applies only to fees leviable under Court-fees Act—Process fees leviable under rules framed under S. 42, Bombay Civil Courts Act, 1869, are not affected.

The word "leviable" in S. 2, Bombay Increase of Court-fees Act, 1943, means 'such as can (under the rules at present in force) be levied' and not 'capable (on appropriate rules being made) of being levied.'

[P 400 C 2]

The process fees leviable by the civil Courts subordinate to the High Court which are at present in force in Bombay Presidency are fees leviable, not under the Court-fees Act 1870, but under the



rules made under S. 42, Bombay Civil Courts Act, 1869. Therefore, the surcharge which has been brought into existence by the Bombay Increase of Court-fees Act, 1943, is not applicable to such process-fees. [P 400 C 2]

*R. A. Jahagirdar* — for Applicant.

*S. G. Patwardhan*, Government Pleader, and  
*K. L. Agaskar*, Special Counsel to Government — for the Government of Bombay.

**Sen J.**—This application raises a simple question, namely, whether the fees chargeable for serving and executing processes issued by the civil Courts subordinate to the High Court are affected by the surcharge to which process-fees leviable under the Court-fees Act, 1870, are subject, under Bombay Act 15 [XV] of 1943. The applicant filed suit No. 35 of 1943 in the Court of the Second Class Subordinate Judge, Athni. He paid a sum as process-fees calculated according to the rules which are to be found in the Civil Manual issued by the High Court, Vol. I, (1940), at pp. 137 to 143. According to the office of the learned Judge, the applicant was liable under Bombay Act 15 [XV] of 1943 to pay the surcharge prescribed thereby on the process-fee and the process-fee paid was, therefore, insufficient. The plaintiff contended that he was not liable to pay the surcharge, but the trial Court overruled that contention and, holding that Bombay Act 15 [XV] of 1943 applied to such process-fees, gave him three days' time to make up the deficit. As the applicant did not make any further payment, his suit was dismissed.

There are two Acts, namely, the Court-fees Act of 1870 and the Bombay Civil Courts Act of 1869, under which the fees chargeable for serving and executing processes issued by civil Courts established within the local limits of the appellate jurisdiction of the High Court may be prescribed and levied. Section 20, Court-fees Act, lays down that the High Court shall make rules, *inter alia*, regarding such fees, which, after being confirmed by the Provincial Government and published in the official Gazette, "shall thereupon have the force of law." That section appears in Chap. IV of the Act which is headed "Process-fees." There can be no doubt, therefore, that process-fees come within the meaning of the expression "court-fees." It appears that the original rules prescribing the process-fees leviable by the civil Courts subordinate to the High Court were made under S. 20, Court fees Act. Those rules can be found in Chap. XI of the 1925 edition of the Manual of Civil Circulars issued by this Court for the guidance of the civil Courts. Those rules have now been replaced by the

rules made in 1930 by the High Court under S. 42, Bombay Civil Courts Act, 1869, which empowers the High Court, with the sanction of the Provincial Government, to "prescribe and regulate the fees to be taken for any process issued by any Court the constitution of which is declared" by the said Act, and the new rules, after being duly sanctioned by the Governor of Bombay in Council, were published in the Bombay Government Gazette, 1930, Part I, at p. 1927. Bombay Act 15 [XV] of 1943 was made by the Governor of Bombay under the powers derived from a proclamation issued by him in 1939 under S. 93, Government of India Act, 1935, whereby all powers vested by or under the said Act in the Provincial Legislature were assumed by the Governor. The preamble to the said Act begins thus :

"Whereas it is expedient to provide for an increase in Court-fees leviable under the Court-fees Act, 1870, in its application to the Province of Bombay ;"

and S. 2 of the said Act reads :

"Notwithstanding anything contained in the Court-fees Act, 1870, in its application to the Province of Bombay (hereinafter called the principal Act), all fees leviable under the principal Act shall be increased by a surcharge at the rates specified in the Schedule annexed hereto."

It is quite clear that the fees that were increased by the surcharge in question were fees leviable under the Court-fees Act of 1870. But, as I have pointed out, the process-fees in force at present are fees leviable, not under the said Act but under the rules made under S. 42, Bombay Civil Courts Act. "Leviable" cannot, in our opinion, mean "capable (on appropriate rules being made) of being levied ;" we think that it means "such as can (under the rules at present in force) be levied." It cannot, therefore, be said that the surcharge which has been brought into existence by Bombay Act 15 [XV] of 1943 applies to the process-fees leviable by the civil Courts subordinate to the High Court. That being our view, the lower Court was clearly wrong in holding that the provisions of Bombay Act 15 [XV] of 1943 applied to the process-fee in question. The rule will, therefore, be made absolute with costs and the order of the trial Court set aside. We direct that suit No. 35 of 1943 shall be restored to the file of the learned Civil Judge at Athni for decision according to law.

K.S./D.H.

*Rule made absolute.*



[Case No. 85]

\* **A. I. R. (33) 1946 Bombay 401**

STONE C. J. AND CHAGLA J.

Commissioner of Income-tax —

Applicant

v.

Sir Purshottamdas Thakurdas—

Respondent.

Income-tax Ref. No. 18 of 1943, Decided on 14th November 1945.

\*Income-tax Act (1922), S. 12 (2) (as amended in 1939)—Deduction—Capital expenditure—Test to determine stated—Assessee elected as member of Local Board of Reserve Bank and entitled to fees as director of Bank—Assessee incurring legal expenditure in defending suit for declaration that his election was invalid—Legal expenditure held could be deducted.

The test to be applied in order to determine whether an expenditure is a capital expenditure is not merely that it should be non-recurring but it should be an expenditure to bring into existence an asset or an advantage for the enduring benefit of a trade. To maintain an existing asset or to preserve an existing asset is not enough. The expenditure must be to bring into existence an asset which did not already exist or a new advantage which must endure for the benefit of that particular trade. [P 405 C 2; P 406 C 1]

The assessee was elected a member of the Local Board for the Western Area of the Reserve Bank of India. As a director of the Bank, he was entitled to certain fees. In defending a suit brought against him for a declaration that the election was invalid the assessee incurred a legal expense of Rs. 7500 in the year of account. The question was whether this legal expense of Rs. 7500 incurred by the assessee in defending the suit could be allowed as a deduction under S. 12 (2):

*Held* that the expenditure was not a capital expenditure. It was not an expenditure incurred in creating or in originating the source of income or in bringing it into being, but in preserving it when it was already there. The expenditure was incurred in refuting the attack upon the directorship and might or might not be an expense which recurred at some future time. [P 401 C 2]

*Held further* that the expenditure was incurred by the assessee solely for the purpose of earning the income as a director of the Bank. There was no personal attack upon him which he was seeking to defend. What his own private motive, if any, in preserving his position as a director might have been was not relevant. So far as the Revenue Authorities were concerned, the directorship only sounded in fees and the only purpose of defending the action was to preserve the office and therefore the fees. Hence the legal expense of Rupees 7,500 could be allowed as a deduction under S. 12 (2); (1925) 10 Tax. Cas. 155, *Rel. on*; ('36) 23 A. I. R. 1936 Lah. 350, *Dissent*; *Case law discussed*.

[P 403 C 2 P 405 C 2]

M. C. Setalvad—for Applicant.

Sir Jamshedji Kanga, M. M. Jhaveri and M. R. Mody—for Respondent.

**Stone C. J.** — This is a reference under S. 66 (1), Income-tax Act. The short question which the Tribunal has framed is as follows:

"Whether, on the facts of the case, the legal expense of Rs. 7500 incurred by the assessee in defending a suit brought to unseat him was rightly allowed as a deduction in computing his total income for the charge year 1940-41, under S. 12 (2), Indian Income-tax (Amendment) Act, 1939?"

The facts can be shortly stated as set out in the case. Sir Purshottamdas Thakurdas, who is the assessee in this case, was a director of a number of limited companies in the year of account Samvat 1995. On 12th November 1935, he was elected a member of the Local Board for the Western Area of the Reserve Bank of India, which office is ordinarily held for five years. Sometime after his election one Mr. P. D. Shamdasani brought a suit against him for a declaration that the election was invalid and that he himself should be declared duly elected. The suit was dismissed both in the first Court and in the Appeal Court. In defending the suit the assessee incurred a legal expense of Rs. 7500 in the year of account. These facts are undisputed. The relevant section of the Income-tax Act under which head directors' fees come is S. 12 of the Act. Sub-section (2) provides:

"Such income, profits and gains shall be computed after making allowance for any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of making or earning such income, profits or gains, . . ."

And then there is a proviso with regard to certain excluded matters. Mr. Setalvad on behalf of the Crown has taken two points. The first is that the expenditure is a capital expenditure. In my opinion this is not so. It was not an expenditure incurred in creating or in originating the source of income or in bringing it into being, but in preserving it when it was already there. The expenditure was incurred in refuting the attack upon the directorship and might or might not be an expense which recurred at some future time. In my opinion the matter is really covered by the judgment of the Lord Chancellor, Lord Cave, in (1925) 10 Tax. Cas. 155.<sup>1</sup> In that case the respondent company claimed as a deduction in computing its profits for income-tax purposes a lump sum of £31,784 which it had contributed irrevocably as the nucleus of a pension fund established by trust deed for the benefit of its clerical and technical salaried staff, that being the sum actually ascertained to be necessary to

1. (1925) 10 Tax. Cas. 155, *Atherton v. British Insulated and Helsby Cables, Ltd.*



enable past years of service of the then existing staff to rank for pension, and it was held that the sum in question was not an admissible deduction in arriving at the company's profits for income-tax purposes. The Lord Chancellor said this (p. 192):

"But when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital."

There is a decision of the High Court of Lahore to a contrary effect and, as it is a decision on the Income-tax Act which we have to construe, it is a case to which this Court will give the very closest attention: 16 Lah. 479.<sup>2</sup> In that case the assessee carried on the business of manufacturing slates and for this purpose had obtained under a lease the exclusive right of quarrying slate in a particular village. The proprietors of the village instituted a suit to eject the assessee and to restrain them by injunction from quarrying and the assessee incurred expenses of Rs. 13,397 in defending this before the Courts, and then the question was raised whether that came within the provisions of S. 10 (2) (ix), Income-tax Act, and it was held that the expenditure incurred, being a non-recurring outlay required to retain a capital asset, was in the nature of capital expenditure.

I do not think it is essential to go into the judgments in that case, because the Court which decided it was made up of Addison and Sale JJ. and in a later case, (1945) 13 I. T. R. 340,<sup>3</sup> when sitting as a member of a Full Bench Sale J. said of his previous decision that it was not intended to be an authoritative exposition of the question of what is or what is not capital expenditure. To the effect that such an expenditure is an income expenditure and not a capital one is also the case in I. L. R. (1943) Nag. 307.<sup>4</sup> On this first question, therefore, in my opinion on the authorities, which draw a clear distinction between the bringing into being of an asset and its maintenance and preservation, this

case falls within the maintenance and preservation of an existing asset and, therefore, the appeal fails on this point.

The second question which arises is whether the costs of this litigation were incurred "*solely*" for the purpose of making and earning the income. Various English cases have been examined in this Court, but the wording of the Schedule to the English Income-tax Act is very different and I do not think that any use is to be derived from them. Mr. Setalvad on behalf of the Crown submits that what the assessee did in defending this litigation was not only to secure his fees as a director but was also to secure the privileges attributable to that office and he points out that under S. 9, Reserve Bank of India Act, 1934, the members of the Local Board are given certain rights of franchise and other rights and he says that there is attached to the office of the director a status carrying certain privileges, the right, for example, to influence and shape the policy of the Reserve Bank and therefore the monetary policy of India.

The case in (1943) 11 I. T. R. 142<sup>5</sup> is also relied upon. Now the circumstances in that case were rather special, for the assessee who was the promoter, managing director and principal shareholder of a company made a gift of Rs. 3 lacs to the company when it was in financial difficulties and he then claimed this sum as a deduction from his assessable income on the ground that if he had not made the gift the company would have failed and he would have lost his capital invested in the company, his salary, his business reputation and credit. The passage relied upon is at p. 148 in which the learned Sir John Beaumont C. J. says this:

"It seems to me quite impossible to say that this payment was made to the Company solely for the purpose of enabling the assessee to maintain his income derived from the Director's and Managing Director's fees and dividends on shares. The object of the expenditure must have been also to preserve the value of the other 75 per cent. of the shares in the Company which the assessee did not hold. If his sole purpose had been to preserve his income derived from that particular company, obviously a more business-like arrangement would have been to make to the Company a loan, which could have been repaid to the assessee as a debt. But the main object was to keep the Company going, to maintain his own reputation as the man who had promoted the Company."

Mr. Setalvad further submits that a man of the status of the assessee did not defend this action solely for the purpose of getting

2. ('36) 23 A. I. R. 1936 Lah. 350 : 16 Lah. 479: 161 I. C. 965, Kangra Valley Slate Co., Ltd. v. Commissioner of Income-tax.

3. ('45) 32 A. I. R. 1945 Lah. 217 : I. L. R. (1945) Lah. 457 : 221 I. C. 201 : (1945) 13 I. T. R. 340 (F.B), Mahabir Parshad and Sons v. Commr. of Income-tax.

4. ('43) 30 A. I. R. 1943 Nag. 219 : I. L. R. (1943) Nag. 307 : 208 I. C. 280 : Income-tax Appellate Tribunal, New Delhi v. Empress Mills, Nagpur.

5. ('43) 11 I. T. R. 142 (Bom.), Commr. of Income-tax v. Sir Homi M. Mehta.



his director's fees but also to maintain his status. On the other hand, the case for the assessee is put thus by Sir Jamshedji Kanga. He says that payment is not only for attending the directors' meetings but for services and duties performed and that what Mr. Setalvad points out as being privileges are in fact duties laid down by the Act which it is incumbent for the directors to carry out. The Income-tax Act has no regard to status and privileges and does not quantify them in moneys, therefore, says Sir Jamshedji Kanga, what it taxes is the director's fees and the costs of the litigation are in defending those fees. It is also pointed out that it is a pure matter of speculation what was the assessee's motive in defending the action and further that there is no evidence at all on the record as to what that motive was other than to defend his directorship. In this respect it should be observed that in the proceedings the personal reputation and honour of the assessee were not attacked. Sir Jamshedji Kanga also relies upon the case in 44 Bom. L. R. 778.<sup>6</sup> In that case the assessee was a money-lender and he had lent a large sum of money to a company and he sued the company and obtained a decree. After that some of the shareholders of the company sued him for damages and that suit was decided also in favour of the assessee. Subsequently in making his return for income-tax for the year 1931-32 the assessee claimed to deduct the expenses incurred by him in defending the second suit under S. 10 (2) (ix), Income-tax Act, 1922, and it was held by the Privy Council that the assessee's defence to the second suit was just as essential for the full protection of his rights as the creditor in the loan, as was his earlier suit for the recovery of the loan,\* and that therefore he was entitled to the deduction claimed, because the expenses were incurred by him solely for the purpose of earning the profits or gains of the money-lending business. Lord Thankerton in delivering the judgment of the Judicial Committee said (p. 781) :

"It has to be remembered that money is the stock-in-trade of a money-lender. The appellant might well have come to a different conclusion, if he had realised the close connection of this loan with the transactions alleged in the Agra suit. If it really added anything, their Lordships would agree with the High Court that at least three of the other transactions referred to in the appellant's further statement of case provide evidence that the

alleged transaction with the Agra United Mills was not foreign to the money-lending business of the respondent and his father.

Their Lordships are therefore of opinion that the facts stated by the Commissioner cannot justify the opinion expressed by him, but that the expenditure in question was incurred solely for the purpose of earning the profits or gains of the money-lending business, and that the High Court were right in holding the respondent entitled to the deduction claimed, and in answering the question of law asked by the Commissioner in favour of the respondent."

In my judgment the only purpose of incurring expenditure in this case was for the assessee to preserve his directorship. There was no personal attack upon him which he was seeking to defend. What his own private motive, if any, in preserving his position as a director may have been does not seem to me to be relevant. So far as the Revenue Authorities are concerned, the directorship only sounds in fees and the only purpose of defending the action was to preserve the office and therefore the fees. Accordingly in my opinion the Crown fails on this question also. The Commissioner to pay the costs of the assessee.

**Chagla J.**— I agree. Two questions arise on this reference. The first is whether the expense incurred by Sir Purshottamdas Thakurdas in defending the suit filed against him by Mr. Shamdasani was incurred solely for the purpose of making or earning an income which he derived from being a member of the Local Board of the Reserve Bank of India ; and the second question is whether such an expenditure was in the nature of capital expenditure.

Now in this case it cannot be disputed that Sir Purshottamdas Thakurdas incurred the expenditure for the purpose of earning the income as a member of the Local Board of the Reserve Bank. The question that we have got to determine is whether it was incurred solely for that purpose. Now whether it was solely incurred or not is essentially a question of fact, and we have to consider what are the findings of fact of the Tribunal as set out in the statement of the case. The first fact which has been found by the Tribunal is that Sir Purshottamdas defended this litigation in order that he should not be unseated as a member of the Local Board of the Reserve Bank; and the second finding of fact is that income was derived by Sir Purshottamdas as a member of the Local Board of the Reserve Bank and which is shown under S. 12, Income-tax Act, as having been derived from other sources. It is not disputed by Mr. Setalvad for the Department that the sole

<sup>6</sup> ('42) 29 A. I. R. 1942 P. C. 11 : I. L. R. (1942) Kar.P.C. 17 : 23 Pat. 491 : 69 I. A. 15 : 199 I.C. 314 : 44 Bom. L. R. 778 (P.C.), Commissioner of Income-tax, B. & O. v. Kameshwar Singh.



purpose of Sir Purshottamdas in fighting this litigation was to preserve his seat. It is not suggested that there were any personal allegations against him or that he was defending the suit for his personal honour or integrity. Once that is conceded and once it is found that the sole purpose of defending this litigation was to preserve his seat, and if it is also found that the seat yielded income, then it follows that the expenses of the litigation were incurred solely for the purpose of earning that income. It may be that Sir Purshottamdas's seat on the Board might not only have given him income but might have given him other rights and privileges. It might have given him a status and a position ; but to my mind those are irrelevant considerations. The source which is taxed is the directorship, and if the litigation is fought for the sole purpose of preserving that source, then in my judgment it is immaterial what other benefits the assessee may derive from that particular source. The purpose and the sole purpose for incurring this expenditure was to preserve and maintain the source which yielded the income which is shown as being derived from other sources under S. 12, Income-tax Act. Mr. Setalvad has also argued that, looking to the provisions of the Reserve Bank of India Act, a director or a member of the Local Board not merely gets fees but also gets certain rights and privileges and he has certain functions and obligations to discharge. Now it is patent that Sir Purshottamdas was paid his fees as a director or a member of the Local Board for discharging the functions and obligations which were made incumbent upon him by the provisions of the Reserve Bank of India Act, and as such director or member he also enjoyed certain rights and privileges. That, to my mind, would be true of any office to which a salary or an emolument is attached. Every office not only gives to its holder a monetary remuneration but also confers upon him certain rights and privileges and also casts upon him certain duties and obligations. Therefore there is nothing peculiar about the position of a director of the Reserve Bank.

Mr. Setalvad has relied on a decision of our Court in (1943) 11 I. T. R. 142.<sup>5</sup> In that case Sir Homi Mehta made a gift of rupees three lakhs to a company of which he was the promoter, managing director and principal shareholder when that company was in financial difficulties and Sir Homi Mehta claimed that sum as a deduction from his

assessable income on the ground that if he had not made the gift the company would have failed and he would have lost his capital invested in the company, his salary, and his business reputation and credit. Sir John Beaumont C. J. held that this sum of rupees three lakhs was not paid solely for the purpose of earning such income, profits or gains as required by S. 12, sub-s. (2), Income-tax Act. Now it is to be noted that both in the statement of the case and at the bar when that case was argued it was conceded on behalf of the assessee that his sole purpose in making that gift was not to earn income as a director or to earn dividends on his shares but one of his objects—and the main object was to save his business reputation. As was pointed out, Sir Homi Mehta felt that if the company failed, 75 per cent. of the shareholders would lose and he having promoted the company he was actuated to make a gift of rupees three lakhs in order to save the company. On those facts only one decision was possible at which the Court arrived, namely that the sum of rupees three lakhs paid by Sir Homi Mehta was not solely for the purpose required by S. 12, sub-s. (2), Income-tax Act. The difference between the case we have and the case which Sir John Beaumont, C. J. and Kania J. had before them is obvious and apparent. In this case the assessee has throughout maintained that his sole purpose in fighting the litigation was to earn the income as a member of the Local Board of the Reserve Bank of India, and as I have pointed out, the Tribunal in their statement of the case have not found that the assessee had any other purpose than the purpose of earning the income. It would be entirely irrelevant to enter into the motives of Sir Purshottamdas why he fought this litigation. Mr. Setalvad has invited us into the attractive region of speculation. He wants us to consider what might have moved the assessee in defending his seat on the Local Board of the Reserve Bank. He asks us to speculate and to hold that Sir Purshottamdas might have thought of his honour, reputation, position and status as a member of that important body. But after all, as has been pointed out over and over again, we are merely an advisory body and we must advise on the facts found by the Tribunal. There is not even a suggestion that there was any other purpose on the part of the assessee for defending the suit, brought by Mr. Shamdasani except the pure business and monetary purpose of earning his fees as



a member of the Local Board of the Reserve Bank. Sir Jamshedji Kanga at the bar has reiterated and re-emphasised this purpose of his client and, as no other purpose appears on the face of the record we must accept that and hold that in this case the object and purpose with which this expenditure was incurred was solely as required by S. 12 sub-s. (2), Income-tax Act for earning the income as member of the Local Board of the Reserve Bank of India.

The second question is whether this expenditure is in the nature of a capital expenditure, because if it is that, even though it was incurred solely for the purpose of earning the income, the assessee would not be entitled to claim the exemption. Mr. Setalvad strongly relied, as he was entitled to, on the case of the Lahore High Court in 16 Lah. 479<sup>2</sup> and I admit that it is very difficult to distinguish that case from the facts of the case before us. If the principle enunciated in that case be a sound one, then undoubtedly that principle applies to the facts of this case as well. In that case the assessees were carrying on a business of manufacturing slates and they had obtained a lease for the exclusive right of quarrying slate in that particular village. The proprietors of the village filed a suit to eject them, and the assessees resisted the suit and incurred an expense in doing so; and the question was whether they were entitled to claim the exemption with regard to that expense; and the Court held that the expenditure, being a non-recurring outlay required to retain a capital asset, was in the nature of a capital expenditure. In coming to that conclusion the Bench was largely influenced by an observation of Lord Dunedin in (1910) 5 Tax. Cas. 529<sup>7</sup> at p. 536. The particular observation of Lord Dunedin which is set out in the judgment of the Lahore High Court is as follows (p. 484) :

"... I think it is not a bad criterion of what is capital expenditure as against what is income expenditure to say that capital expenditure is a thing that is going to be spent once and for all, and income expenditure is a thing that is going to recur every year."

Now in this bald form this observation of Lord Dunedin seems to suggest that the only test to be applied in order to find out whether a particular expenditure is a capital or income expenditure is whether it is recurring or non-recurring in its character. Now, with respect to the learned Judges, it

was hardly fair to the learned Law Lord to have quoted him in this incomplete fashion, because, when you turn to the judgment itself, we find that Lord Dunedin qualifies his remark by saying (p. 536) :

"Now, I don't say that this consideration is absolutely final or determinative, but in a rough way I think it is not a bad criterion of what is capital expenditure as against what is income expenditure..."

Once this qualification and reservation is borne in mind, it would immediately be seen that what Lord Dunedin was laying down was one of the several tests which have got to be applied in order to determine what is capital expenditure and what is income expenditure. Fortunately it is not necessary for us to differ from a judgment of another High Court on an all-India statute because that very High Court seriously doubted the validity of that judgment when it came to be considered by a Full Bench of that High Court in (1945) 13 I. T. R. 340<sup>3</sup> and although Sale J. who was a party to both the judgments did not wholly repudiate his own judgment, he did say that his exposition of the question of what was and what was not capital expenditure was not an authoritative exposition as stated in 16 Lah. 479.<sup>2</sup> The most that one can say is that it remains an exposition but not an authoritative one. But to my mind the proper test as to what is capital expenditure is laid down in two English cases, one (1925) 10 Tax. Cas. 155<sup>1</sup> and the other in the judgment of Lawrence J. in (1941) 1 K. B. 111.<sup>8</sup> The observations of Viscount Cave in (1925) 10 Tax. Cas. 155<sup>1</sup> have already been referred to in the judgment of the learned Chief Justice: and what is to be remembered is that Viscount Cave points out that the test to be applied in order to determine whether an expenditure is a capital expenditure is not merely that it should be non-recurring but it should be an expenditure to bring into existence an asset or an advantage for the enduring benefit of a trade. To maintain an existing asset or to preserve an existing asset is not enough. The expenditure must be to bring into existence an asset which did not already exist or a new advantage which must endure for the benefit of that particular business or trade.

Now in this case when Sir Purshottamdas Thakurdas defended Mr. Shamadasani's suit, the asset, viz., the directorship or the seat on the Local Board of the Reserve Bank, already existed. All that he was doing was

7. (1910) 5 Tax. Cas. 529, Vallambrosa Rubber Co., Ltd. v. Farmer.

8. (1941) 1 K. B. 111 : 110 L. J. K. B. 705 Southern v. Borax Consolidated, Ltd.



to preserve and maintain an already existing asset. It is not suggested that as a result of the litigation any new asset came into existence or he obtained any new advantage for the purpose of the directorship. I can also understand a case where an assessee has to fight a litigation for the purpose of perfecting his title. It may then be contended that to perfect one's title is to bring into existence a fresh advantage which did not exist before. But in this case the title of Sir Purshottamdas Thakurdas was already complete; he was merely resisting the attack of a litigant who was trying to unseat him; and having succeeded, he did not in any way improve his position or acquire any fresh benefit but merely succeeded in preserving and maintaining an asset which he already possessed.

Lawrence J. also in (1941) 1 K. B. 111<sup>8</sup> observed that (p. 5) :

"... where a sum of money is laid out for the acquisition or the improvement of a fixed capital asset it is attributable to capital, but that if no alteration is made in the fixed capital asset by the payment, then it is properly attributable to revenue, being in substance a matter of maintenance, the maintenance of the capital structure or the capital assets of the Company."

Therefore, according to this learned Judge, there must be an acquisition or an improvement of a fixed capital asset before an expenditure can be considered to be a capital expenditure; but if the expenditure is incurred merely for maintenance of a capital asset, then it is not a capital expenditure. If we were to apply this test to the facts of this case, as I have already pointed out, it cannot be contended that what Sir Purshottamdas was doing was anything more than trying to maintain his capital asset. It may be noted that in that particular case in which Lawrence J. made these observations, (1941) 1 K. B. 111,<sup>8</sup> a company acquired land in America for the purpose of its business. Subsequently an action was brought in the American Courts against the company claiming that the company's title to the land and buildings erected thereon was invalid, and in defending the action the company incurred costs amounting to £6000 odd, and it was this sum of £6000 odd that the company was claiming as an expenditure which it was entitled to have exempted from the application of the tax.

Sir Jamshedji Kanga has also drawn our attention to a Nagpur case, I. L. R. (1943) Nag. 307.<sup>4</sup> In that case the assessee company incurred a certain expenditure as legal expenses in connection with a suit which it

had brought against another company to restrain the latter from using a trade mark to which the assessee had acquired exclusive right by long usage; and the Court consisting of Niyogi and Digby JJ. held that the expenditure was revenue expenditure and was allowable in computing the taxable income of the assessee company from the business. It will be noticed that what the company was trying to do was to preserve and maintain its most important capital asset, namely, the trade mark to which it had acquired exclusive right. Notwithstanding that, the Court came to the conclusion that the assessee was entitled to the exemption.

Now Mr. Setalvad has strongly relied for this point also on the judgment of our Court to which I have already referred, namely (1943) 11 I. T. R. 142.<sup>5</sup> In that case the Court not only held that the sum of rupees three lakhs paid by Sir Homi Mehta was not solely for the purpose of earning an income but they also came to the conclusion that the expenditure was in the nature of a capital expenditure; and Sir John Beaumont, C. J. came to that conclusion on the ground that one of the purposes for which that sum had been expended was the maintenance of the business reputation of the assessee. Now Mr. Setalvad has seized upon this observation of the learned Chief Justice and he argues that just as much as in that case so in this case also if moneys are spent for the maintenance of a capital asset then the expenditure is in the nature of a capital expenditure. Now reading the judgment of the learned Chief Justice as a whole, it is clear that he did come to the conclusion that when Sir Homi Mehta paid the sum of rupees three lakhs, his business reputation did not remain exactly the same after the payment as it was before and he in terms holds that the object of the payment was to enhance the reputation of the assessee and to avoid his being associated with a company which had failed. Therefore the assessee in that case, Sir Homi Mehta, obtained an advantage for an enduring benefit of his business or trade which brings the case within the definition of Viscount Cave in (1925) 10 Tax. Cas. 155<sup>1</sup> to which I have already referred. It cannot be said in this case that in succeeding in this litigation Sir Purshottamdas Thakurdas in any way enhanced his business reputation. His business reputation remained exactly where it was and all that he gained was that he succeeded in keeping the seat from which Mr. Shamdasani was trying to oust him. Under the circumstances I agree



with the learned Chief Justice that the Commissioner must fail on this reference and we should answer the question referred to us in the affirmative. Commissioner to pay the costs of the reference.

V.R./D.H. *Reference answered.*

[Case No. 86]

**A. I. R. (33) 1946 Bombay 407**

KANIA AG. C. J. AND CHAGLA J.

*Lady Dinbai Petit and others—*

*Appellants*

v.

*M. S. Noronha — Respondent.*

Appeal No. 30 of 1945, Decided on 14th October 1945, from judgment of Coyajee J. Reported in ('45) 32 A. I. R. 1945 Bom. 419.

(a) Specific Relief Act (1877), S. 45 — Prohibition — Writ of — Bombay High Court has jurisdiction to issue writ — S. 45 has not taken away such jurisdiction.

The jurisdiction exercised by the King's Bench Division in England to issue the writ of prohibition conferred by cl. 5 of the Charter of 1823 on the Supreme Court at Bombay was not controlled by the words used in cl. 55 of the Charter and continues to be invested in the Bombay High Court up to the present day and consequently the Bombay High Court has jurisdiction to issue a writ of prohibition: ('34) 21 A. I. R. 1934 Cal. 725; 62 Cal. 596; ('38) 25 A. I. R. 1938 Cal. 385, *Rel. on*; and *Obiter dictum to the contrary of Macleod C. J. in* ('26) 13 A. I. R. 1926 Bom. 247, *Not approved*; Case law discussed. [P 410 C 2; P 413 C 2; P 418 C 1, 2; P 420 C 1]

Section 45, Specific Relief Act, which deals with the forbearing of an act does not in terms deal with either the writ of prohibition or writ of *mandamus*. The section has not restricted the jurisdiction of the High Court to issue a writ of prohibition and it cannot be said that the jurisdiction of the High Court to issue a writ of prohibition has been impliedly taken away particularly when the Legislature has deliberately provided in S. 50 of that Act that the writ of *mandamus* (only) could not be issued thereafter. [P 410 C 1, 2; P 412 C 1, 2]

(b) Prohibition and Mandamus — Writs of — Distinction between.

The writ of prohibition and the writ of *mandamus* are two independent writs, to be issued under different circumstances. They are distinct, separate privileges. The writ of prohibition is limited to prevention of exercise of jurisdiction by a body performing judicial or quasi-judicial functions. It has nothing to do with executive Acts which may also be controlled by the writ of *mandamus*. [P 412 C 1, 2]

(c) Specific Relief Act (1877), S. 45, cls. (a) to (e) — Condition specified in cls. (a) to (e) being cumulative each of them must be satisfied — Acquisition of land under R. 75A, Defence of India Rules — Arbitrator appointed by Government to determine compensation — Application for order under S. 45 to restrain arbitrator from proceeding with arbitration — Acquisition of land challenged as illegal — Order cannot be made as condition in cl. (b) is not satisfied.

The conditions laid down under cls. (a) to (e) in S. 45, Specific Relief Act are cumulative and before

the Court can make an order under that section every one of those conditions would have to be satisfied. [P 415 C 1, 2; P 420 C 2]

Clause (b) of proviso to S. 45 requires that the doing or forbearing must be clearly incumbent on the person in his public character against whom the order is sought. It is not necessary that the law or the statute should specifically lay down that the public officer should forbear from doing something before the application of cl. (b) can be attracted. But it is essential that there must be in the law for the time being in force some duty cast upon the public officer. If he does not do the duty, then the Court can call upon him to do it. If he does it improperly or unauthorisedly, the Court can call upon him to forbear from doing it in that particular manner. [P 421 C 2]

A party who seeks to obtain an order under S. 45 cannot do so on the allegation that the statute which enjoins the doing or forbearing of the act is itself illegal or *ultra vires*. The wording of cl. (b) of the proviso clearly shows that the deciding authority against whom the order is sought must, for the discussion, be assumed to be legally clothed with the authority. If the legal existence of the authority or the fact that in law he is authorised to act is disputed the fulfilment of this condition is out of question. [P 417 C 1]

Where therefore in an application under S. 45 the applicant seeks to restrain an arbitrator appointed by Government to determine the amount of compensation payable to him in respect of land acquired by Government under R. 75A, Defence of India Rules, on the ground that the acquisition of land is illegal and *ultra vires*, the very foundation of the authority of the arbitrator does not exist and there would be neither the doing nor the forbearing of any act incumbent upon him in his public character. Consequently, the applicant would not be entitled to an order under S. 45 as the condition laid down in cl. (b) is not satisfied: 7 Bom. L. R. 161, *Ref.* [P 417 C 1; P 423 C 1]

(d) Certiorari — Writ of — Bombay High Court has jurisdiction to issue writ — Application for issue of writ against sole respondent — Governor-General-in-Council not made party — Fact that he appears in pursuance of notice under R. 584, High Court Rules, will not make him party — Question of prohibition under S. 306, Government of India Act, 1935, would not arise.

The Bombay High Court has jurisdiction to issue a writ of *certiorari*. [P 409 C 2; P 419 C 2]

On an application for issue of writs of prohibition and *certiorari* there is no obligation on the High Court under the High Court Rules to serve the rule on any party except the respondent against whom the writ is sought to be issued. Where a notice is served on the Governor-General-in-Council or a Province under R. 584 of the High Court Rules, the fact that they appear before the High Court would not make them automatically parties to the proceedings, when they are not made parties to the application. Consequently the question as to applicability of the prohibition contained in S. 306, Government of India Act, 1935, cannot arise in such a case. [P 420 C 1]

(e) Specific Relief Act (1877) S. 45 cl. (d) — Expression 'Specific and adequate legal remedy' — Scope of — Remedy by way of suit is covered by such expression.

The meaning of the expression 'specific and adequate legal remedy' in cl. (d) of proviso to S. 45.



cannot be restricted to merely a remedy given by a statute. It cannot be urged that the right of suit is not a specific and adequate legal remedy as contemplated by S. 45. [P 422 C 2]

The question which the Court has to consider in every case is whether the alternative remedy, whether it be a right of suit or a specific remedy given by statute, is as convenient, as beneficial and as effectual as the remedy which the Court can grant under S. 45 of the Act. (In this case it was held that as the remedy of suit against the Government would involve the giving of 60 days' notice under S. 80, Civil P. C., it was not as effectual and convenient remedy as the application under S. 45, Specific Relief Act.): (1897) 1 Q. B. 407, (1899) 2 Q. B. 632 and (1915) 1 K.B. 147, *Ref.*; Observations to contrary of Greaves J. in ('21) 8 A.I.R. 1921 Cal. 159, *Dissent*. [P 422 C 2]

(f) Civil P. C. (1908), O. 41, R. 2 — Question whether person is holding public office within S. 45, Specific Relief Act, cannot be disputed at stage of argument in appeal.

The question whether a person is holding a public office within the meaning of S. 45, Specific Relief Act, is a mixed question of law and fact and cannot be disputed in appeal at the stage of arguments when it was conceded in the trial Court. [P 415 C 2]

*Sir Jamshedji Kanga, F. J. Coltman, K. M.*

*Munshi and R. J. Kolah* — for Appellants.

*V. F. Taraporewala and M. M. Jhaveri* — for Respondent, (the Collector of Bombay and Province of Bombay.)

*M. C. Setalvad and G. N. Joshi* — for the Governor-General of India in Council.

**Kania Ag. C. J.** — This is an appeal from the judgment of Coyajee J. The material relevant facts are these. Under a trust-deed dated 17th January 1931, the petitioners, who are trustees, held vacant land admeasuring about 85000 square yards in the Tardeo locality in Bombay. In January 1942, the Controller of Supplies asked for the use of the land for storage of motor vehicles. In that correspondence, on 14th March 1942, it was stated that the trustee should let the land to the Controller of Supplies. The rent was to be 12 annas per square yard per annum and the period of lease was twelve months with an option for a renewal for a further period as may be necessary. The Deputy Controller by his said letter asked the appellants to send the draft terms and conditions of the proposed lease. In anticipation of the execution of the lease the land was occupied by the Controller of Supplies on 24th March 1942. On 31st March 1942, the Secretary to the Government of Bombay, Revenue Department, by order of the Governor of Bombay sent a memorandum to the Collector of Bombay. In that memorandum it was stated that the Government had decided that the old Petit Mills site at Tardeo should be requisitioned immediately under R. 79, Defence of India Rules, and the Collector was requested to lease temporarily to

the Supply Department so much of the land as was required by that department. In para 2 of the memorandum it was stated that the Government had also decided that proceedings for the acquisition of the said land under the Land Acquisition Act should be started simultaneously and the Collector was requested to send to Government the requisite proposals for its acquisition. Rule 79, Defence of India Rules, there referred to was the old rule in place of which the present R. 75A is substituted.

On receipt of this memorandum the Collector issued an order of requisition on the appellants. That is dated 9th April 1942. By their reply the executors of the late Sir Dinshaw Petit pointed out that under the orders of the Government of India the property had been given on lease and the necessary agreement had been concluded. They therefore expressed their inability to do anything under the order of the Collector. On 4th May 1942, the appellants' attorneys sent a draft of the agreement and on 23rd May 1942, the Assistant Controller of Supplies intimated that the draft had been forwarded to the Government Solicitor for his approval and remarks. Nothing was done by any Government department for a long time, in spite of reminders sent by the appellants. On 4th August 1942, the Collector, purporting to act under the memorandum which he had received, called upon the trustees to put in their claim for rent or compensation in respect of the premises requisitioned. On 30th October 1942, an appointment for a joint survey was suggested. While the matters were at this stage, the Collector of Bombay gave a notice dated 23rd October 1942, for acquisition of the property under R. 75A, Defence of India Rules. On 3rd December 1942, the Controller of Supplies wrote to the appellants' attorneys that the Government of India had concluded an arrangement with the Government of Bombay under which the latter were to lease to the Supply Department such portion of the requisitioned property as was required by the Supply Department for the duration of the war or for a shorter period if necessary, on terms to be settled between the Controller of Supplies and the Government of Bombay. Nothing further was done in the matter.

On 21st July 1943, the Government of Bombay framed rules under S. 19 (2) and (3), Defence of India Act, for the appointment of an arbitrator to determine the amount of compensation to be paid to the owners of properties requisitioned by the Government.



On 1st July 1944, the respondent, Mr. M. S. Noronha, was appointed the arbitrator by the Government. The appellants being aggrieved by the procedure adopted by the Government wrote to the respondent on 15th August 1944, intimating that they wanted to file a suit against the Government and for that purpose the necessary notice required under S. 80, Civil P. C., was being served. They requested the respondent to adjourn the proceedings or in any event to postpone the same for eight or ten days to enable them to take steps in the Court to stay the arbitration. By his letter dated 18th August 1944, the respondent declined to carry on correspondence and stated that as regards the stay of proceedings he could only take directions from the Government of Bombay and from no one else. The appellants then filed the present petition on 25th August 1944, and made Mr. M. S. Noronha the only respondent. It is contended in the petition that R. 75A, Defence of India Rules, 1939, framed under the Defence of India Act, 1939, was *ultra vires* and illegal. It is further contended that the action of the Government in acquiring the property under that rule and dropping the idea of acquiring the same under the Land Acquisition Act was mala fide inasmuch as it was thereby intended to deprive the appellants of the fifteen per cent. compensation permitted under the Land Acquisition Act. The order of acquisition was challenged as *ultra vires* and it was contended that the respondent should be prevented from proceeding with the arbitration. The prayers are for a writ of *certiorari*, a writ of prohibition, and an order and injunction under S. 45, Specific Relief Act, 1877, against the respondent.

On the petition being filed, Coyajee J. on 26th August 1944, issued an order calling upon the respondent to show cause why the writs and order and injunction asked for should not be issued against him, and granted interim relief till the hearing of the rule *nisi*. It was further ordered that the rule *nisi* be served on the Governor-General of India-in-Council, and the Province of Bombay and the Collector of Bombay. Under R. 584, Original Side Rules of our High Court, which is framed expressly under the Specific Relief Act, it is provided that the Court may in its discretion order any rule under Chap. VIII to be served on any party affected by the act to be done or forborne. When the matter came for hearing before Coyajee J. no application was made on be-

half of the Governor-General of India-in-Council, the Province of Bombay or the Collector of Bombay to be made a party. The record does not show that they have been ordered to be made parties. At the commencement of the hearing before Coyajee J., the Advocate General who appeared for the Province of Bombay contended that the petition was misconceived and should be dismissed on that ground. It was contended that the High Court had no jurisdiction to issue a writ of prohibition and, therefore, that prayer was misconceived. As regards the writ of *certiorari* it appears to be conceded that the High Court had jurisdiction, but it was argued that by reason of S. 306 (1), Government of India Act, 1935, no order could be made against the Province of Bombay or the Governor-General of India-in-Council and therefore the petition in that respect was misconceived. As regards the writ of mandamus it was argued that the conditions set out in the provisos to S. 45 of the Specific Relief Act were cumulative and the appellants had to show that they were all fulfilled. In the present case it was not so shown and therefore that relief could not be granted. All the respondents before us supported these contentions. The learned Judge accepted all these contentions and dismissed the petition on the preliminary objection. The appellants have appealed against that order. Taking the writ of prohibition first, it is necessary to appreciate the true nature and effect of the writ. In Halsbury's Laws of England, Vol. IX, p. 819, Art. 1394, it is stated as follows :

"The writ of prohibition is a prerogative writ, issuing out of the High Court of Justice, and directed to an ecclesiastical or inferior temporal court, which forbids such Court to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land."

Article 1396 runs as follows :

"With certain exceptions, the issue of the writ of prohibition, though not of course, is of right and not discretionary, and the superior court cannot refuse to enforce public order in the administration of the law by the denial of a grant of the writ. Smallness of the matter in dispute and delay on the part of the applicant are not in themselves ground for a refusal."

The relevant portion of Art. 1397 is as follows :

"Prohibition lies not only for excess of or absence of jurisdiction, but also for the contravention of some statute or the principles of the common law ; . . .

The Court in deciding whether or not to grant a writ of prohibition, will not be fettered by the fact that an alternative remedy exists to correct the absence or excess of jurisdiction, or an appeal



lies against such absence or excess. Similarly, the fact that . . . the party applying for prohibition has himself initiated the proceedings in the inferior Court is not material to the decision of the Court to grant or to refuse the writ. . .

Even when the information is laid by a stranger it would seem that the only discretion which the superior court has to refuse a prohibition is, if it is in doubt in fact or law whether the inferior court is exceeding its jurisdiction or is acting without jurisdiction."

I must point out that we are not concerned at this stage with the question whether in the present case a writ of prohibition should issue or not. We are concerned only with the question whether the High Court has jurisdiction to issue the writ of prohibition. According to the learned trial Judge it has no power to do so. I must also point out that the disability found by the learned trial Judge is in the High Court itself and has nothing to do with the party against whom the writ is asked for. Bearing clearly in mind this aspect of the question it is necessary next to turn to the statute and the Charter which confer jurisdiction on our High Court.

By 13 Geo. III, C. 63, S. 13, the Parliament provided for the creation of the Supreme Court at Calcutta. On 26th March 1774, a Charter was granted to the Supreme Court at Calcutta, and by cl. 4 of that Charter the jurisdiction so far exercised by the King's Bench Division in England was conferred on the Supreme Court at Calcutta. That is a general clause which sets out the nature of jurisdiction to be exercised by the Supreme Court. Clause 21 provides for the powers of supervision over subordinate Courts and in that connection mentions the writs of *mandamus*, *certiorari procedendo*, or error. In 1823, by 3 Geo. IV, C. 71, the Supreme Court of Bombay was established and cls. 5 and 55 of its Charter correspond to cls. 4 and 21 of the Charter of the Supreme Court at Calcutta. The High Courts Act, 24 & 25 Vic. C. 104, while abolishing the Supreme Court by S. 8, maintains, by S. 9, the same jurisdiction in the Courts to be constituted under the Act. The wording of S. 9 shows that the jurisdiction could be limited by the Letters Patent issued to establish the Courts or by subsequent Acts of the Legislature. A perusal of the Letters Patents of 1862 and 1865 shows that no limit or restriction was put on the jurisdiction of the High Court. The argument that the jurisdiction has been restricted by cl. 55 as I shall show later on must be rejected. The question therefore is, has S. 45 Specific Relief Act, restricted the jurisdiction of the High Court to issue a writ

of prohibition? In my opinion it has not. Section 9 of the High Courts Act, 1861, provides that unless the powers which so far existed in the then existing Supreme Courts were taken away, all the powers of Supreme Courts continued in the High Courts established under the said Act. The result is that before the Government of India Act, 1915, under the High Courts Act and the Letters Patent granted to the Bombay High Court the jurisdiction of the Court, as found in cl. 5 of the original Charter of 1823, was in these terms :

"... and to have such jurisdiction and authority as our Justices of our Court of King's Bench have and may lawfully exercise, within that part of Great Britain called England, as far as circumstances will admit."

By the Government of India Act of 1915, S. 106 (1) the High Courts are continued and their jurisdiction has also been continued as before. The same position continues under the Government of India Act of 1935, S. 223. Reading these provisions together, it is clear that the High Court at present has the jurisdiction which was conferred on the Supreme Court by cl. 5 of the Charter of 1823. The nature of the writ of prohibition is described by McCardie J. in (1921) 3 K.B. 169<sup>1</sup> in these terms (p. 174) :

"Now the writ of prohibition is a judicial writ issuing from a Court of superior jurisdiction and directed to an inferior Court for the purpose of preventing it from usurping a jurisdiction with which it is not legally vested : . . . If the jurisdiction of the judge of the inferior Court depends upon contested facts, it is his duty to decide upon the facts and his decision cannot be questioned on prohibition."

In (1921) 2 A. C. 570<sup>2</sup> the Lord Chancellor approved of the following passage in Short and Mellor, 2nd Edn. (1908), p. 252, as regards the description of the writ of prohibition (p. 192) :

[The writ is] "a judicial writ, issuing out of a Court of superior jurisdiction and directed to an inferior Court for the purpose of preventing it [the inferior Court] from usurping a jurisdiction with which it is not legally vested, or, in other words, to compel Courts entrusted with judicial duties to keep within the limits of their jurisdiction."

Bankes L. J. in (1924) 1 K. B. 171<sup>3</sup> further observed as follows (p. 193) :

"Originally no doubt the writ was issued only to inferior Courts, using that expression in the ordinary meaning of the word Court. As statutory bodies were brought into existence exercising legal

1. (1921) 3 K. B. 169 : 90 L. J. K. B. 1132 : 125 L. T. 625, *Turner v. Kingsbury Collieries, Ltd.*
2. (1921) 2 A. C. 570 : 90 L. J. P. C. 244, *In re Clifford and Sullivan.*
3. (1924) 1 K. B. 171 : 93 L. J. K. B. 390 : 130 L. T. 164, *Rex v. Electricity Commissioners* : London Electricity Joint Committee Co. (1920), *Ex parte.*



jurisdiction, so the issue of the writ came to be extended to such bodies. There are numerous instances of this in the books, commencing in quite early times."

At p. 204 Atkin L. J. in that connection observed as follows :

"The matter comes before us upon rules for writs of prohibition and certiorari which have been discharged by the Divisional Court. Both writs are of great antiquity, forming part of the process by which the King's Courts restrained Courts of inferior jurisdiction from exceeding their powers. Prohibition restrains the tribunal from proceeding further in excess of jurisdiction; certiorari requires the record or the order of the court to be sent up to the King's Bench Division, to have its legality inquired into, and, if necessary, to have the order quashed. It is to be noted that both writs deal with questions of excessive jurisdiction, and doubtless in their origin dealt almost exclusively with the jurisdiction of what is described in ordinary parlance as a Court of Justice. But the operation of writs has been extended to control the proceedings of bodies which do not claim to be, and would not be recognised as Courts of Justice. Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

It appears therefore clear that the authority to issue such writs existed in the King's Bench Division and such writs have been granted against bodies acting judicially or performing quasi-judicial functions. In India, the question of jurisdiction of the High Court to issue the writ of prohibition came to be considered directly by Panckridge J. in 61 Cal. 450.<sup>4</sup> It was argued before him that cl. 21 of the Charter of the Calcutta Supreme Court (which corresponds with cl. 55 of the Charter of the Supreme Court of Bombay) restricted the jurisdiction given to that Court under cl. 4. The learned Judge rejected the contention. He held that the language of cl. 21 could not be used to control the plain language of cl. 4 and the High Court at Calcutta had jurisdiction to issue the writ of prohibition. In 62 Cal 596<sup>5</sup> a Division Bench of the Calcutta High Court considered the argument in respect of the jurisdiction of the Court to issue writs of *certiorari* or prohibition and affirmed the jurisdiction of the Court to issue such writs. In I. L. R. (1938), 1 Cal. 476<sup>6</sup> the two previous decisions of the Calcutta High Court were accepted as correct and the jurisdiction of the Court to issue such writs was affirmed again.

4. ('34) 21 A.I.R. 1934 Cal. 725 : 61 Cal. 450 : 152 I.C. 914, In re National Carbon Co. Incorporated.

5. ('35) 62 Cal 596, Dorman Long & Co. Ltd. v. Jagadeshchandra Mahindra.

6. ('38) 25 A. I. R. 1938 Cal. 385 : I.L.R. (1938) 1 Cal. 476 : 181 I. C. 973, Indumati Debi v. Bengal Court of Wards.

Coyajee J. has not noticed any of these decisions in his judgment although we are told that they were cited at the bar. He has relied on 28 Bom. L.R. 264<sup>7</sup> for his conclusion that the Bombay High Court has no jurisdiction to issue the writ of prohibition. In that case the question arose in respect of taxing a bill of costs of an order made on an election petition. The bill was to be taxed by Mr. Gillett, the Taxing Master of this High Court. It being considered that there was no express authority to tax the bill by Mr. Gillett, the Chief Judge of the Small Causes Court wrote to the Secretary to the Government of Bombay suggesting that the matter may be disposed of by a special resolution directing the Taxing Officer to attend to this bill as well as other such bills, so that the difficulty in the way of the Commissioners, the parties, and the Chief Judge of the Small Causes Court in making and carrying out the orders of costs would be obviated. The Government, after consulting the Chief Justice about permitting Mr. Gillett to do the work, issued the following resolution:

"The Governor-in-Council is pleased to appoint the Taxing Officer of the High Court, Bombay, to tax the petitioner's bill of costs in Bombay Election Petition No. 11 of 1924 and to sanction the payment to him of a remuneration . . ."

When Mr. Gillett proceeded to tax the bill an application was made under S. 45, Specific Relief Act, to prevent him from doing so. In the course of his judgment Macleod C. J. considered the effect of the writ of mandamus and the writ of prohibition. It appears that no arguments were advanced about the difference in the nature and effect of the two writs. The two were treated as standing on the same footing. The Court held, as a fact, that Mr. Gillett, when taxing the bill, whether under the directions of a special resolution of the Government or at the request of the Government, was not a person holding a public office. In terms, that learned Chief Justice stated that that would be sufficient for the decision of that application. He further held that if Mr. Gillett was a person holding public office, it would be futile to contend that he had no jurisdiction to tax the bill. He compared the position with a decree passed by the High Court, dismissing a suit with costs, and an application being made by the unsuccessful plaintiff to prevent the Taxing Master from taxing the bill. The words of S. 50, Specific Relief Act,

7. ('26) 13 A.I.R. 1926 Bom. 247 : 50 Bom. 394 : 93 I. C. 918 : 28 Bom. L. R. 264, Mahomedally v. Jafferbhoy.



were not noticed during the argument or in the judgment. That case, in my opinion, therefore, is not directly helpful to us. The observations were clearly *obiter* because the Court found as a fact that Mr. Gillett was not a person holding a public office and unless that condition was fulfilled, S. 45, Specific Relief Act, could not be brought into operation at all. In the absence of argument the learned Chief Justice's attention was not drawn to the distinction which exists in England between the nature of the two writs, and particularly in India by reason of S. 50. Apart from authority, I think that the jurisdiction of the King's Bench Division to issue the writ of prohibition is retained by cl. 5 of the Charter. In my opinion, the authorities also support that view and the *obiter dictum* of Macleod C. J. in 28 Bom. L. R. 264<sup>7</sup> is insufficient to hold otherwise.

It appears to have been argued before the trial Court that as S. 45 deals with the forbearing of an act also, that section fully covered both the writs of mandamus and prohibition. Therefore, in respect of both these writs, in the absence of the conditions mentioned in the section being fulfilled, the Court had no jurisdiction to issue either writ. The learned trial Judge has not noticed that S. 45 does not in terms deal with either writ. Section 50, Specific Relief Act, expressly provides as follows :

"Neither the High Court nor any Judge thereof shall hereafter issue any writ of *mandamus*."

It should be noticed that while S. 50 forms part of Chap. VIII, Specific Relief Act, in that section there is no reference to S. 45 at all. The learned trial Judge construed S. 50 as taking away the right of the Court to issue the writ of mandamus and read S. 45 as enlarging the meaning of the word "mandamus" so as to include the writ of prohibition also. With respect, in my opinion, that is not the correct way to approach the question of jurisdiction of the Court. The jurisdiction of the Court, as I have pointed out, is found in clause 5 of the Charter. The next question to be considered by the Court is whether that jurisdiction has been curtailed or taken away, and if so, how and to what extent. The writ of prohibition and the writ of mandamus are two independent writs, to be issued under different circumstances. They are distinct, separate privileges. The writ of prohibition is limited to prevention of exercise of jurisdiction by a body performing judicial or quasi-judicial functions. It has nothing to do with executive acts which may also be controlled by the writ of mandamus. It must be recognised that the

Legislature is aware of the distinction between the writ of mandamus and the writ of prohibition, and there was nothing to prevent them from taking away the jurisdiction in respect of the writ of prohibition, if they were so minded, unless the conditions provided in S. 45, Specific Relief Act, were fulfilled. The jurisdiction of the superior Courts cannot be impliedly taken away by some words found in a section of an Act of the Legislature. It has to be taken away, if at all, by express words. This is particularly so when the Legislature had deliberately provided in S. 50 that the writ of mandamus (only) could not be issued thereafter. This rule of construction is recognised by the highest judicial authority. In Halsbury's Laws of England, Vol. IX, Art. 1455, p. 861, in dealing with the writ of *certiorari* it is stated as follows :

"It is enacted by various statutes that proceedings under them shall not be removed by the writ of *certiorari*. *Certiorari* is said to be 'taken away' by such statutes. *Certiorari* can only be taken away by express negative words. It is not taken away by words which direct that certain matters shall be 'finally determined' in the inferior court, nor by a proviso that 'no other court shall intermeddle' with regard to certain matters as to which jurisdiction is conferred on the inferior court."

In 1920 A. C. 508<sup>8</sup> at p. 526 this question was considered. Lord Dunedin dealt with the contention in these terms (p. 526) :

"None the less it is equally certain that if the whole ground of something which could be done by the prerogative is covered by the statute, it is the statute that rules."

It was held that to take away the prerogative there must be a statute which must expressly take away the prerogative, and the statute must cover the whole ground which was covered by the prerogative. Unless both these conditions were fulfilled the prerogative right could not be considered as taken away absolutely by a subsequent statute. In 43 Mad. 146<sup>9</sup> their Lordships of the Privy Council dealt with the contention that the right to issue the writ of *certiorari* was taken away. Lord Phillimore in delivering judgment observed as follows (p. 159) :

"As to *certiorari* it was contended on behalf of the respondent in the High Court, that there is no power in the High Court to issue a writ of *certiorari*, or alternatively that the provisions of S. 22 forbid recourse to this writ in cases which come under the Press Act.

"As to the first point it would seem that at any rate the three High Courts of Calcutta, Madras and

8. (1920) 1920 A. C. 508 : 89 L. J. Ch. 417 : 122 L. T. 691, Attorney-General v. De Keyser's Royal Hotel.

9. (19) 6 A. I. R. 1919 P. C. 31 : 43 Mad. 146 : 46 I. A. 176 : 52 I. C. 209 (P. C.), Annie Besant v. Advocate-General of Madras.



Bombay, possessed the power of issuing this writ: See (1829) 1 Knapp 110 at pp. 49, 51, 55 and 11 Cal. 275.<sup>11</sup>

"Supposing that this power once existed, has it been taken away by the two Codes of Procedure? No doubt these codes provide for most cases a much more convenient remedy. But their Lordships are not disposed to think that the provisions of S. 435, Criminal P. C. and S. 115, Civil P. C. of 1908 are exhaustive. Their Lordships can imagine cases, though rare ones, which may not fall under either of these sections. For such cases, their Lordships do not think that the powers of the High Courts, which have inherited the ordinary or extra-ordinary jurisdiction of the Supreme Court to issue writs of *certiorari*, can be said to have been taken away." The writs of *certiorari* and prohibition are complementary of each other and these observations apply equally to the jurisdiction to issue writs of prohibition.

On behalf of the respondent it was contended that the whole field of the writ of prohibition was covered by cl. 55 of the Charter and therefore the general words of cl. 5 conferring jurisdiction on the Court were cut down. The maxim "Express enactment shuts the door to further implications" was relied upon in this connection. Counsel referred to cl. 23 of the Letters Patent, also in this connection. In my opinion this argument is unsound. Clause 55 of the Charter in terms deals with the right of supervision of the Supreme Court over the Justices and other Magistrates appointed for the town and island of Bombay and the factories subordinate thereto. In respect of these judicial officers express power was given by the words used at the end of that clause. That portion runs as follows:

"... to which end, the said Supreme Court of Judicature at Bombay is hereby empowered and authorised to award and issue a writ or writs of Mandamus, Certiorari Procedendo, or Error, to be prepared in manner abovementioned, and directed to such Courts or Magistrates as the case may require, and to punish any contempt thereof, or wilful disobedience thereunto, by fine and imprisonment."

In my opinion this contention is based on two errors. The first is that cl. 55 deals in terms only with the Justices and other Magistrates appointed for the town and island of Bombay and the factories subordinate thereto. It does not deal with all authorities discharging judicial and quasi-judicial functions. The second error is that in terms it does not purport to limit or restrict the jurisdiction which existed otherwise in the Supreme Court. It affirms the power to issue the writs mentioned therein in respect of the

Courts there set out. On the construction of the Charter it is now clear that cl. 5 describes the nature of the jurisdiction which is vested in the Court. The later clauses deal with the territorial jurisdiction, jurisdiction over persons, and jurisdiction over matters. Those clauses have nothing to do with the nature of the jurisdiction of the Supreme Court. Clause 23 is a clause of that type and deals with the persons over whom the Court has jurisdiction. The effect of the concluding words used in cl. 55 came to be considered in 70 I. A. 129.<sup>12</sup> At p. 157 their Lordships considered the effect of the general clause giving jurisdiction to the Court, and at p. 164 while dealing with the clause corresponding to cl. 55 of the Bombay Charter they observed as follows:

"The terms of this clause make it difficult to think that Courts other than those mentioned were intended to be regarded as inferior courts for this purpose."

They affirmed the principle laid down in 43 Mad. 146<sup>9</sup> about the jurisdiction to issue the writ of *certiorari*. It is therefore clear that the words used in cl. 55 of the Charter did not control the general words used in cl. 5 of the Charter, and the jurisdiction to issue the writ of prohibition accepted to be vested in the King's Bench Division remains in the Bombay High Court. The next question is in respect of the writ of *certiorari*. The learned trial Judge has accepted the position that the power to issue such writ exists in the High Court. He came to the conclusion that the petition in that connection was misconceived for two reasons: (i) that the Governor General of India in Council and the Province of Bombay and the Collector of Bombay, although not in terms, are in fact parties to these proceedings; and (2) that under S. 306 (1), Government of India Act, 1935, the High Court had no jurisdiction to issue an order of the kind against them. On the first question I have already pointed out that when granting the interim injunction the learned Judge had not directed that these persons should be made parties. After the service of the rules, when those parties appeared, they did not apply to be made parties. Now the position may be considered from two points. Under the High Court Rules in respect of the writs of prohibition and *certiorari* there is no obligation to serve the rule on any party except the respondent. Because in the present case an order under

10. (1829) 1 Knapp 1, In re Justices of the Supreme Court of Judicature at Bombay.

11. ('85) 11 Cal. 275, Nundo Lal Bose v. Corporation for the town of Calcutta.

12. ('43) 30 A. I. R. 1943 P. C. 164 : I. L. R. (1944) Mad. 457 : I. L. R. (1944) Kar. P. C. 119 : 70 I. A. 129 : 210 I. C. 239 (P.C.), Ryots of Garabandho v. Zemindar of Parlakimedi.



s. 45, Specific Relief Act, was asked for it appears that a direction was given to serve the rule on the other parties. On the service of the rule the parties are not bound to appear. They are not named as respondents and no Court can make an order against them. The order made on the rule will not be binding on them. If the appellants sought to make the order binding on them it was their duty to make them parties to the application. Service of the rule is only an intimation that an application is being made by the applicant to the Court against a party named therein as a respondent for the reliefs mentioned therein and the order which the Court may make in that connection may affect (although it may not be binding on them) the parties on whom the rule is served. If they so desire they may attend and put forward their views before the Court. All this, however, does not make them parties. Mr. Taraporewala has recognised that position. On mere service of the rule, without making those persons parties, it cannot be considered that in law they become parties and were bound by the decision. As I have pointed out, when the notice of motion came for hearing the three parties on whom the rule was served did appear and put forth their views; but, neither they nor the appellants asked that they be made parties, and the Court has not ordered and made them parties. Under these circumstances, in my opinion, in law, they are not parties to the notice of motion. Such situation is not unknown in law. In (1916) 1 K. B. 595<sup>13</sup> the question of issuing a notice on an officer came to be considered. It was held that an information in the nature of a *quo warranto* will lie at the instance of a private relator against a member of the Privy Council whose appointment was alleged to be invalid. It was contended that neither the Crown nor the King were subject to the jurisdiction of the Court. The King's Court cannot order the King to do a thing. That argument was disposed of by Lord Reading C. J. in these terms (p. 610):

"We must start with this unquestionable principle, that when a duty has to be performed (if I may use that expression) by the Crown, this Court cannot claim even in appearance to have any power to command the Crown; the thing is out of the question. Over the Sovereign we can have no power. But a judgment against the respondents would have effect against them only: it would be an order upon the subject, not upon the Crown. It is then argued that this Court would be powerless to enforce a judgment of ouster in this case, that

we could not order the Clerk to the Privy Council who is the servant of the King, to remove the names from the roll of Privy Councillors, neither could we prevent immediate reinstatement of the names if the King thought fit to alter it. It is sufficient for the present purpose to say that a judgment pronounced in favour of the relator would not involve the making by this Court of an order upon the Clerk, neither would this Court be powerless to enforce the judgment if it were disobeyed by those against whom it was made."

It was observed that the Courts having been established by the King it was respectful and proper to assume that once the law was declared by a competent judicial authority it will be followed by the Crown. To the same effect there are observations in I.L.R. (1941) Mad. 807<sup>14</sup> at p. 813. In that case it was contended that as the order was sought to be made against the Board of Commissioners for Hindu Religious Endowments, Madras, it was an order against the Governor General of India-in-Council or the Government of the Province and the Court had no jurisdiction to do so. I am not concerned with the discussion in that case which relates to s. 306 (1), Government of India Act. I only desire to point out that the jurisdiction of the Court to issue an order against an individual was treated as distinct from an order against the Governor General of India-in-Council or the Province.

Mr. Taraporewala had to admit that on mere service of the rule the others did not become parties. It was suggested that if on service the parties appeared, they should be treated as parties. In my opinion that argument is unsound. On the service of the rule the parties have the option to appear or not to appear. Their position cannot be changed merely from the fact that they appeared. After they appear they can only put forward their views; but unless they are made parties the proceedings cannot be binding on them. I do not think therefore that from the fact that these parties appeared at the hearing of the notice of motion before Coyajee J. they became parties to the proceedings. In the present case again it is not open to these parties to contend that they are parties, because when called upon to disclose documents, by their letter of 8th January 1945 in terms they stated that they were not parties to the proceeding and therefore were not liable to disclose documents. Although they are not parties, as observed by Lord Reading C. J. in (1916) 1 K. B. 595<sup>13</sup> there is no reason to believe that

14. (41) 28 A. I. R. 1941 Mad. 878 : I. L. R. (1941) Mad. 807 : 200 I. C. 459, Ponnambala Desikar v. H. R. E. Board, Madras.

13. (1916) 1 K. B. 595 : 85 L. J. K. B. 630 : 114 L. T. 463, Rex v. Speyer; Rex v. Cassel.



the Government will not respect the order passed by the Court. In Halsbury's Laws of England, vol. IX, Art. 1413, it is stated that an application for a writ of prohibition may be made against a party or the Judge to be prohibited. That shows that an application to restrain the Judge alone is permitted. In the present case the petitioners have adopted that course and asked for relief against the respondent alone, who has to perform the judicial functions. In my opinion, therefore, the assumption of the trial Judge that on the present petition the Governor General of India-in-Council, the Province of Bombay and the Collector of Bombay were parties to the petition is not justified. So far they have not been made parties and are not parties to the petition.

The second point is still more material. On the construction of Section 306 (1), Government of India Act, the learned Judge held that the High Court has no jurisdiction to issue any of the writs against the Governor General or the Province of Bombay. This finding is not called for at all at this stage. The petitioners have not asked for any of the writs against any of these parties. Even if they are made parties to these proceedings, the prayer still continues to be for the issue of the writs and order only against the respondent Mr. Noronha. In the absence of any such prayers, it is not necessary to discuss the question whether this Court has jurisdiction to issue the writs of *certiorari* and prohibition against those parties, who appeared before the trial Court and also before us. By this conclusion I should not be understood to be in agreement with the reasoning of the learned trial Judge on the interpretation of S. 306 (1) of the Government of India Act. It is not necessary to decide that point and I pronounce no opinion for or against the conclusion of the learned Judge in that respect. Under the circumstances I think the learned Judge was in error in holding that petition in asking for a writ of *certiorari* against the respondent, Mr. Noronha, was misconceived and did not lie.

That leaves the question of an order under s. 45. Mr. Munshi pointed out that the nature of this writ, as authorised to be issued in England, is different from what can be issued by the Court under s. 45, Specific Relief Act. It was pointed out that in England the writ can be issued even if there was other legal remedy (*see Halsbury's Laws of England*, vol. IX, Art. 1269, note (p).) In connection with this relief it must be considered whether the five conditions found in the pro-

visos which are admittedly cumulative have been fulfilled. The first condition is that the person against whom the writ is sought must be holding a public office. Proceeding on the footing that Mr. Noronha is the only party on this notice of motion, the question whether he was holding a public office in the matter of determining the payment of compensation to the petitioners, appears to have been raised before the trial Court. It appears that after some argument this point was conceded by the respondent. Whether the respondent was holding a public office within the meaning of the section is a mixed question of fact and law and under the circumstances it is not open to the respondent in the appeal at this stage to dispute the point.

The first condition as found in proviso (a) is that the application should be made by some person whose property, franchise or personal right would be injured by the doing or forbearing to do the act in respect of which the order is asked for. Mr. Munshi's contention is this : He says that if the arbitrator is permitted to proceed with the adjudication the petitioners will lose the fifteen per cent. compensation which may be awarded to them if the land was acquired under the Land Acquisition Act. Against this it was contended that this dispute is not in respect of the act of the respondent. For that discussion the position that he has been properly appointed must be accepted. It is on that assumption that he is holding a public office and his action is sought to be restrained under s. 45, Specific Relief Act. It was further contended on behalf of the respondent that if the respondent is not validly appointed his award will be void and the appellants cannot be considered injured within the meaning of the first proviso. In this connection strong reliance was placed on 33 Bom. L. R. 19.<sup>15</sup> In that case it was observed that if the arbitration is itself completely invalid and without any jurisdiction it is not right for the Court to grant an injunction. On behalf of the petitioners, the contention in rejoinder was this : Reading ss. 32, 33, 45, and 46, Arbitration Act 10 [X] of 1940) in the matter of arbitration under a statute to which the Crown is a party the Arbitration Act applies and the right to make the application under s. 33, Arbitration Act, to stop the arbitrator from proceeding on the ground that there is no

15. ('31) 18 A. I. R. 1931 Bom. 151 : 55 Bom 659 : 130 I. C. 583 : 33 Bom. L. R. 19, *Ramdas v. Atlas Mills Co.*



valid reference at all exists. Therefore, to be free from harassment by an arbitration, in respect of which the arbitrator has no jurisdiction, is recognised a wrong in respect of which the legal remedy is provided by S. 33. It was argued that by reason of the rules framed by the Government of Bombay the right to proceed under S. 33 is taken away in respect of the adjudication to be made by the arbitrator under S. 19, Defence of India Act. It is, therefore, contended that there was an injury to the right of the petitioners and the condition was fulfilled. As against 33 Bom. L. R. 19<sup>16</sup> Mr. Munshi pointed out that in (1895) 1 Q. B. 253<sup>16</sup> an injunction was asked for to stay arbitration proceedings, and Lord Lindley in delivering judgment stated that there was no single case which in any way curtailed the power of the Court to stop an arbitration founded upon an agreement which was impeached. In that case the suit was filed in respect of the partnership disputes between the parties and the defendant was the other partner. The attempt was to stay the arbitration proceedings which were started by the defendant on the ground that there was no jurisdiction because the arbitration itself was impeached. In the same way in (1883) 11 Q. B. D. 30<sup>17</sup> there was a dispute between two companies as regards their respective liabilities in respect of an accident which had taken place due to the alleged negligence of a signal man at the junction line. The application was for an interim stay to restrain the defendants from proceeding with the arbitration. The argument on the other side was that the matter was outside the agreement to refer, and the arbitration would be futile and vexatious. The Court refused the injunction. In all those cases however it is material to remember that the action was in respect of the main dealing between the parties in connection with which the disputes had arisen, and the same were attempted to be decided by arbitration. None of those cases show that a substantive suit solely for the purpose of questioning the jurisdiction of the arbitrator was filed and the Court had granted an injunction. (1894) 10 T. L. R. 392<sup>18</sup> suggests the filing of such a suit, but the report is very short and it is possible that only relevant facts in respect of the application were reported. Apart

from that our attention has not been drawn to any case in which a substantive suit was filed only in respect of the challenged arbitration and the only relief asked was a stay of those proceedings by a permanent injunction. In the present case two things are wanting : First, the petition, so far as the respondent is concerned, is not in respect of the original transaction of acquisition. The relief is asked on the footing that the respondent has no jurisdiction to proceed. The parties to the original transaction are not parties to the petition. The other difficulty is that the arbitrator alone is the party respondent. In all the cases which are referred to in the judgment of the learned trial Judge and which were cited before us, the respondent was the defendant in the substantive suit, and not the arbitrator. Having regard to the structure of this petition I think there is considerable doubt about the soundness of the argument of the petitioners. The contention that they will lose the fifteen per cent. compensation if the land is acquired under R. 75A and thus be injured in respect of their property, does not appear to be sound. If the arbitrator has jurisdiction and the acquisition is valid, no question of any injury to property arises ; if the arbitrator has no jurisdiction, the award would be a nullity and cannot affect the petitioners' right to receive compensation which they are entitled to receive under the ordinary law. As, however, in my opinion the question of issue of an order under S. 45 is capable of being fully disposed of on the ground that the condition found in proviso (2) is not fulfilled, I do not propose to deal with this proviso more in detail.

The second condition is that such doing or forbearing is under any law for the time being in force clearly incumbent on such person in his public character. This contention was urged before the trial Court, but the learned Judge thought that as conditions (1), (4) and (5) were not fulfilled it was not necessary to decide this point. In my opinion the present petition cannot fulfil the second condition. According to this condition it must be obligatory on the person against whom the order is sought to do or forbear from doing the act in question under any law for the time being in force. That assumes the acceptance by the petitioners of the validity of the law under which the respondent has to act. In the present case if the first premise, viz., the appointment of the respondent as arbitrator, is accepted as valid, there can be no dispute about his doing or forbearing to

16. (1895) 1 Q. B. 253 : 64 L. J. Ch. 152 : 71 L. T. 676 : 43 W. R. 84, *Kitts v. Moore*.

17. (1883) 11 Q. B. D. 30 : 52 L. J. Q. B. 380 : 48 L. T. 695 : 31 W. R. 490, *North London Railway Co. v. Great Northern Railway Co.*

18. (1894) 10 T. L. R. 392, *Sissons v. Oates*.



do something which it is incumbent upon him to do or forbear. So far he has done nothing. He has only been nominated by the Government of Bombay to act under S. 19 (c) to determine the amount of compensation. On the other hand if his appointment is not authorised by law, he is not the holder of a public office at all. Therefore, it appears clear that on the allegations found in the petition itself the petition cannot fulfil the second condition of S. 45, Specific Relief Act. A party who seeks to obtain an order under S. 45 cannot do so on the allegation that the statute which enjoins the doing or forbearing of the act is itself illegal or *ultra vires*. The wording of the second proviso clearly shows that the deciding authority against whom the order is sought must, for the discussion, be assumed to be legally clothed with authority. If the legal existence of the authority or the fact that in law he is authorised to act is disputed, the fulfilment of this condition is out of question. As these conditions are cumulative, the application for an order under S. 45 as claimed in the petition cannot be granted.

The learned Judge held that conditions (d) and (e) were also not fulfilled. In his opinion a suit against the Government was the proper remedy which would effectively dispose of the disputes between the parties. Against that, however, it should be remembered that no suit can be filed against Government until the expiry of sixty days after a notice, as provided by s. 80 Civil Procedure Code, is given. In the interval, if the right of the party is likely to be seriously and irretrievably injured, I do not think the remedy of a suit can be considered the only remedy. Mr. Munshi urged that the remedy of a suit is not a specific or adequate remedy as mentioned in the fourth condition. That view appears to be based on the observations of Greaves J. in 48 Cal. 916.<sup>19</sup> at p. 924. Against that, however, I should point out that in (1897) 1 Q. B. 407,<sup>20</sup> it was held that when ordinary suit and the remedy of injunction can be had as a matter of discretion the Court must not issue the writ of mandamus. To the same effect there are observations in (1915) 1 K. B. 147<sup>21</sup> at p. 153. In view of my

conclusion in respect of the second condition I do not propose to discuss the question of the fulfilment of conditions (d) and (e). I only observe that for the argument of the appellants that the specific remedy mentioned in the fourth proviso means a special remedy separately provided by an Act of the Legislature, there appears no justification. It is true that the alternative remedy must be equally adequate and efficacious. But there is no reason why on that ground the remedy provided by an ordinary suit should be considered excluded. In my opinion the conclusion of the learned trial Judge in respect of the order under s. 45 is correct.

**Chagla J.** — I agree. The first question that arises is whether the High Court has the power to issue the writ of prohibition. The writ of prohibition is a prerogative writ which is issued by a superior Court to inferior Courts forbidding such Courts to continue proceedings therein in excess of their jurisdiction or in contravention of the laws of the land. Although the writ is not issued of course, it is of right and not discretionary. The object of the writ is to compel Courts to keep within the limits laid down by the statute and the Court by issuing the writ keeps the inferior Courts within those limits. At first this writ was issued only to subordinate Courts, but with the development of this particular writ and statutory bodies being set up which began to exercise judicial functions and legal jurisdiction the writ was also issued to bodies exercising judicial or *quasi-judicial* functions. The definition of Atkin L. J. in (1924) 1 K. B. 171<sup>3</sup> has now become a *locus classicus* (p. 205) :

"Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

At pp. 204 and 206 of that report Atkin L. J. points out the difference between the writ of *certiorari* and the writ of prohibition. He says that both writs are of great antiquity and the only difference is that the writ of prohibition restrains the tribunal from proceeding further in excess of jurisdiction and the writ of *certiorari* requires the record or the order of the Court to be sent up to the King's Bench Division to have its legality inquired into and, if necessary, to have the order quashed. The learned Lord Justice further observes that he could see no differ-

19. (21) 8 A.I.R. 1921 Cal 159: 48 Cal 916: 66 I. C. 600, Manick Chand Mahata v. Corporation of Calcutta.

20. (1897) 1 Q.B. 407: 66 L.J.Q.B. 321: 76 L.T. 199: 45 W. R. 336, The Queen v. Charity Commissioners for England and Wales

21. (1915) 1 K.B. 147: 84 L.J.K.B. 294: 112 L.T. 156, Rex v. Dymock (Vicar & Churchwardens).



ence in principle between *certiorari* and prohibition, except that the latter might be invoked at an earlier stage.

In my opinion this High Court has inherited the jurisdiction to issue the writ of prohibition conferred upon the Supreme Court by cl. 5 of its Charter. Clause 5 invested the Chief Justice and the Puisne Judges, severally and respectively, of the Supreme Court with such jurisdiction and authority as the Justices of the Court of King's Bench had and would lawfully exercise, within that part of Great Britain called England, as far as circumstances would admit. Now it is clear that this clause defines the nature of the authority that the Judges of the Supreme Court had. It does not deal with the territorial extent of that authority. Whereas cl. 5 relates merely to the nature of the authority which the Judges of the Supreme Court were to possess, the subsequent clauses in the Charter of the Supreme Court lay down and provide who were the persons who were to be subject to that authority. Clause 55 of the Charter refers to certain writs, namely, the writs of *Mandamus*, *Certiorari*, *Procedendo*, or *Error*, and it has been contended that the absence in this clause of any mention of the writ of prohibition goes to suggest that the Supreme Court did not have the jurisdiction to issue the writ of prohibition. Now clause 55 deals with the jurisdiction that the Supreme Court had to issue writs to the particular Courts mentioned in that clause and to the Justices and other Magistrates also mentioned in that clause. It is not possible to read cl. 55 as controlling and limiting the nature of the authority conferred upon the Judges of the Supreme Court by cl. 5 of the Charter. Clause 5 is wide and unlimited in its extent; and if the Judges of the King's Bench Division had a particular jurisdiction and had a particular authority, then that jurisdiction and that authority was conferred upon the Judges of the Supreme Court by cl. 5 of the Charter. The principle of construction I am suggesting cannot now be doubted or disputed in view of the recent decision of the Privy Council in 70 I. A. 129.<sup>12</sup>

The next piece of legislation which one might look at is the High Courts Act of 1861. By s. 8 of that Act the Supreme Court was abolished, and by s. 9 of that Act the new High Court which was established was to have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in

the Presidency abolished under that Act at the time of the abolition of the Courts mentioned in that clause. This jurisdiction was conferred subject to two provisos: *one* was that the Letters Patent to be issued to the High Courts pursuant to this Act might be provided differently with regard to the jurisdiction of the Judges on any particular matter, or *second* the Governor-General of India in Council might legislate so as to affect the jurisdiction of the Judges of the High Courts. When we turn to the Letters Patent which were issued pursuant to this Act, we find that s. 9, High Courts Act, is recited in the Letters Patent and there is nothing in the Letters Patent themselves to suggest that the jurisdiction that the Judges of the Supreme Court had under cl. 5 of the Charter of the Supreme Court was in any way affected by the Letters Patent. Then we come to the Government of India Act, 1915, and s. 106 of that Act provides that the High Court shall have all the jurisdiction, powers and authority as were vested in them at the commencement of the Act; and s. 223, Government of India Act, 1935, also says that the jurisdiction of the High Courts shall be the same as it was before that Act came into force. It is clear, therefore, that unless we find some Act of the Indian Legislature which has taken away from the High Courts the jurisdiction to issue a writ of prohibition which the Supreme Court had and which the High Courts inherited by various Acts of Parliament to which I have drawn attention, that power and that jurisdiction must still continue. It is also clear that the jurisdiction of the High Courts cannot be taken away by implication. I might draw attention to the well-known legal maxim that it is the office of a good Judge to enlarge his jurisdiction. In this case we are not seeking to enlarge our jurisdiction, but we have been asked to restrict and curtail the jurisdiction which we inherited from the Supreme Court. Maxwell on the Interpretation of Statutes, Edn. 8 at p. 115, points out that a strong leaning now exists against construing a statute so as to oust or restrict the jurisdiction of the Superior Courts, and Maxwell points out that this feeling owed its origin to the pecuniary interests of the Judges in former times when their emoluments depended mainly on fees. Fortunately the Judges are not now open to that charge and the desire to extend the jurisdiction of the Court must depend upon more creditable motives than they were in the past.



It has been suggested that s. 45, Specific Relief Act, has taken away the jurisdiction of the Court to issue the writ of prohibition. The argument is that s. 45 is a comprehensive section which deals both with the writ of mandamus and the writ of prohibition. It is pointed out that in England the writ of mandamus can only be issued for the purpose of directing a public servant to do a specific act and not asking him to forbear from doing any particular act, and from that it is sought to be inferred that when the Legislature enacted s. 45 it comprehensively dealt with both the writs, the writ of mandamus and the writ of prohibition. Now, in the first place, it must be noticed that s. 45 does not refer to either of the two writs and it is only when we turn to s. 50 that the Legislature refers only to the writ of mandamus and it provides by that section that neither the High Court nor any Judge thereof shall hereafter issue any writ of mandamus. Now I take it that the Legislature knew the distinction between the writ of mandamus and the writ of prohibition, and when the Legislature expressly took away the jurisdiction of the High Court to issue the writ of mandamus and did not refer to the writ of prohibition at all it is clear to my mind that it was not the object of the Legislature to deprive the High Court of that jurisdiction. When the Legislature was in express terms dealing with a particular writ—and it must have been patent to the draftsman of the Act that another writ could also be issued by the High Court and the High Court had jurisdiction to issue that writ and it was not thought proper to refer in s. 50 to the other writ at all, the only natural conclusion that one can arrive at is that the Legislature did not intend to interfere with the jurisdiction of the High Court to issue the writ of prohibition. That the jurisdiction of the High Court cannot be taken away by implication has been made clear by the Privy Council in 43 Mad. 146.<sup>9</sup> In that case the Magistrate had required security from Mrs. Besant in connection with the newspaper published by her in India called "*New India*" and a writ of *certiorari* was applied for against the Magistrate. It was sought to be argued that the writ of *certiorari* could not be issued and the High Court had no longer jurisdiction to issue the writ in view of s. 115, Civil Procedure Code, and s. 435, Criminal P. C. It was suggested that these two sections gave powers of revision to the High Court in civil and criminal matters and, therefore, the need for writ of *certiorari* had disappeared and the

Privy Council rejected that argument; and their Lordships observed as follows (p.159):

"Their Lordships can imagine cases, though rare ones, which may not fall under either of these sections. For such cases, their Lordships do not think that the powers of the High Courts, which have inherited the ordinary or extraordinary jurisdiction of the Supreme Court to issue writs of *certiorari*, can be said to have been taken away."

It also seems to be curious that whereas the High Court should have the jurisdiction to issue the writ of *certiorari*, it should not have a similar jurisdiction to issue the cognate writ of prohibition. As I have already pointed out, these two writs are complementary and co-related to each other. It is beyond doubt or dispute now that the High Court has the power to issue the writ of *certiorari*. The case I have just referred, 43 Mad. 146,<sup>9</sup> laid that down and 70 I. A. 129<sup>12</sup> also decided to the same effect, and our own High Court in 41 Bom. L. R. 984<sup>22</sup> and 46 Bom. L. R. 675<sup>23</sup> has also come to the conclusion that the power of the High Court to issue the writ of *certiorari* remains unimpaired. The learned Judge felt bound by the decision of the Court of appeal of our Court in 28 Bom. L. R. 264.<sup>7</sup> In that case Sir Norman Macleod, Chief Justice, observed (p. 269):

"Proceedings under this section [namely, Section 45, Specific Relief Act,] are in substitution for proceedings by writ of mandamus and writ of prohibition according to English practice."

Now, with great respect to the learned Chief Justice, he was not called upon in that case to make that observation. That observation was not necessary for the decision of the case. All that he had to decide, [which he did decide] was that the Taxing Master, Mr. Gillett, against whom an order was sought under s. 45 was not a person holding a public office. His decision was that Mr. Gillett was acting in his capacity as a private individual in taxing the particular bill of costs which he had been asked to do by the Government of Bombay. Against this obiter we have, on the other hand, a clear and emphatic decision of the Calcutta High Court in the judgment of Panckridge J. in 61 Cal. 450<sup>4</sup> where he held that the High Court had the power to issue a writ of prohibition. As it happened in that particular case, he refused to issue that writ on merits. A Divisional Bench of the Calcutta High Court consisting of Lord-Williams J. and Jack J. in 62 Cal. 596<sup>5</sup> accepted the same position and de-

22. ('39) 26 A.I.R. 1939 Bom. 471: 187 I.C. 8: 41 Bom. L. R. 984, *Muljee Sicka and Co. v. Municipal Commissioner*.

23. ('45) 32 A.I.R. 1945 Bom. 7: I. L. R. (1944) Bom 683: 46 Bom. L. R. 675, *Raghunath Keshav v. Poona Municipality*.



cided that the High Court had the power to issue both a writ of *certiorari* and a writ of prohibition; and in I. L. R. (1938) 1 Cal. 476<sup>6</sup> Panckridge J. following his own decision in 61 Cal. 450<sup>4</sup> actually issued the writ of prohibition. With respect to the learned Judge below, I prefer to follow the decisions of the Calcutta High Court on this point rather than place my reliance on a pure obiter of Sir Norman Macleod. Apart from authorities, it is clear to my mind, looking at the Charter of the Supreme Court and at the various parliamentary enactments, that the jurisdiction that the Supreme Court possessed of issuing writs of prohibition within the ordinary original jurisdiction of that Court is still preserved in the High Court and we have the same power and authority which the Supreme Court enjoyed.

The next question is whether if the writ of *certiorari* or the writ of prohibition were to be issued, would it offend against S. 306 Government of India Act, 1935? Now in this case the Province of Bombay and the Governor-General in Council were brought before the Court under R. 584 of the High Court Rules. Neither of them was made a party and it is important to note that in the petition no relief was sought either against the Province of Bombay or against the Governor-General in Council. It is clear, therefore, that if an order is made against the respondent, the Chief Judge of the Court of Small Causes at Bombay, that order could not possibly bind either the Province of Bombay or the Governor-General in Council. Halsbury's Laws of England, Vol. 9, p. 836 points out that the application for a writ of prohibition might be made against the party, or the Judge to be prohibited, or both. And in this particular case the petitioners have chosen to take out the rule only against the Judge and not against the party. I fail to see then how merely because of the fact that the Province of Bombay and the Governor-General in Council have been brought before the Court under R. 584 of the High Court Rules, they automatically become parties to the rule which has been issued only against the Chief Judge of the Small Causes Court. In view of this, S. 306, Government of India Act, of 1935 can have no application because what Mr. Taraporewala wanted to contend and argue was that under S. 306 the province of Bombay and the Governor-General in Council were exempted from having any writ of prohibition issued against them. I wish to make this perfectly clear that it was

not suggested by the Advocate General before Coyajee J. nor has it been suggested by Mr. Taraporewala before us that his clients, the Province of Bombay and Governor-General in Council, claimed any exemption under S. 306, Government of India Act, from being served under R. 584 of the High Court Rules. If such an exemption had been claimed, I should have thought it necessary to consider the terms of that section. I agree with the learned Chief Justice that I should not be taken to accept, with respect, the observations of the learned Judge below as to the construction of S. 306, Government of India Act.

I should like to draw attention to the observations of Lord Reading in (1916) 1 K.B. 595.<sup>13</sup> In that case the appointment of member of the Privy Council was challenged as invalid on the information of a private relator, and the argument that was presented to the Court was that such an order could not be made because it would be tantamount to making an order against the King or the Crown, and the Court being the King's Court, no order could be made upon the King. Even so, Lord Reading refused to accede to that argument; and after making it clear that the order was not upon the King, he continued (p. 610) :

"This is the King's Court; we sit here to administer justice and to interpret the laws of the realm in the King's name. It is respectful and proper to assume that once the law is declared by a competent judicial authority it will be followed by the Crown."

The parties here whom Mr. Taraporewala represents is not the Crown but it is the Government, and fortunately these Courts are not Government Courts. If the King is expected to respect the decision of the Courts, much more so are we entitled to expect that Government would respect the decision of the Court, and therefore if an order is made against the respondent, although it would not bind the Government in the strict sense of the term, it would be proper to assume that Government would carry it.

The third question that arises is whether an order should be made under S. 45, Specific Relief Act. As pointed out by the learned Chief Justice, the conditions laid down under the various sub-clauses in that section are cumulative, and before the Court could make an order every one of those conditions would have to be satisfied. The first condition which finds its place in sub-cl. (a) is that an application for such an order should be made by some person whose property, franchise, or personal right would be injured



by the forbearing or doing of the specific act. Now the question is whether the giving of an award by the arbitrator Mr. Noronha who, on the petitioners' own contention, is acting without jurisdiction and whose award would be a nullity would injure the property of the petitioners. It is argued by Mr. Munshi that he has been deprived of the right of getting fifteen per cent. which he would have got if the proceedings were under the Land Acquisition Act. But that argument, I am afraid, is not tenable because if the arbitrator has jurisdiction, then Mr. Munshi cannot get fifteen per cent. under the Land Acquisition Act. If the arbitrator has no jurisdiction and if his award is a nullity, then Mr. Munshi can ignore the award as the acquisition is bad and the reference following upon it is bad. It has been held by a Divisional Bench of our Court in 33 Bom. L.R. 19<sup>15</sup> that the giving of an award without jurisdiction does not inflict any legal wrong upon the person against whom the award is made; and in that case Sir John Beaumont, C. J. came to the conclusion that no perpetual injunction can be granted against a party from proceeding with an arbitration which was invalid and which was without jurisdiction. He considered various English cases, and the only English case to which his attention was drawn and in fact to which our attention was drawn was the case in (1894) 10 T. L. R. 392<sup>18</sup> where the English Court granted an injunction against the party in a suit where the only substantive relief was the restraining of the other party from proceeding with the reference. But this particular case seems to be of rather doubtful validity on this particular point because, as pointed out by Sir John Beaumont, the report of the case is extremely short and the question of jurisdiction was not considered by the Court at all. It is also not reported in the authorised series. The only report one finds is in the *Times Law Reports*. The other point urged by Mr. Munshi is that apart from injury to property, his personal right would be injured under sub cl. (a) of S. 45 if the arbitrator proceeded with the reference. As I read it, the personal right in this sub clause is a right which must be personal to the petitioner—something which is individual to him and not a general legal right which every subject enjoys under the law of the land. Mr. Munshi's contention is that he has a personal right not to have his dispute decided by this particular arbitrator. I do not think that that is a personal right which S. 45, sub cl. (a), contemplates. I frankly confess that the ques-

tion is not one free from difficulty; and fortunately it is not necessary for us to decide the question as the matter is much simpler when we come to sub.cl. (b).

Sub-clause (b) of S. 45 requires that the doing or forbearing must be clearly incumbent on the person in his public character against whom the order is sought. In England, as I have already pointed out, where the writ of mandamus is only issued for the purpose of doing something which is incumbent on the public officer no difficulty arises; but we have here also the right in the applicant to ask the public officer to forbear from doing something which is incumbent upon him in his public character by the law for the time being in force from forbearing. I agree with Mr. Munshi that it is not necessary that the law or the statute should specifically lay down that the public officer should forbear from doing something before the application of this sub-clause can be attracted. Now to my mind it is essential that there must be in the law for the time being in force some duty cast upon the public officer. If he does not do the duty, then the Court can call upon him to do it. If he does it improperly or unauthorisedly, the Court can call upon him to forbear from doing it in that particular manner. Now in this case it is not suggested that the arbitrator is discharging his duty improperly or arbitrarily. Mr. Munshi wants the Court to ask the arbitrator not to proceed with the reference when the Defence of India Act and the Rules made thereunder make it incumbent upon him to proceed with the reference. Mr. Munshi really wants the Court to ask him to forbear from proceeding with the reference on the assumption that the very foundation of his authority does not exist, namely, that the acquisition made by Government is illegal and *ultra vires*. If the very foundation of the authority of the arbitrator does not exist, then there is neither the doing nor the forbearing of any act incumbent upon him. In this connection Mr. Munshi relied on a decision of Mr. Justice Tyabji in 7 Bom.L.R. 161.<sup>24</sup> That decision, to my mind, far from assisting Mr. Munshi, illustrates the very principle I was attempting to lay down. In that case the Commissioner of Police at Bombay, acting under S. 28, Bombay City Police Act, 1902, issued a notice upon the applicants requiring them to vacate the premises occupied by them, and intimating that failure to comply with the notice would render

24. ('05) 7 Bom. L. R. 161, In re Tarabai.



them liable to punishment under S. 129 of the Act. The applicants applied to the High Court, under S. 45, Specific Relief Act, for a rule against the Commissioner of Police to show cause why the notice should not be cancelled and why he should not be restrained from carrying the same into effect. It was sought to be argued before Tyabji J. who heard the application, that there was no specific provision in any Act that the Commissioner of Police should cancel any notice that might be given by him. The learned Judge negatived that contention pointing out that if the Police Commissioner had to give notice in the manner laid down in the Act and if he failed to do so, it was open to the Court to direct him to cancel that notice. But what has got to be remembered is that the authority of the Commissioner of Police to issue the notice under S. 129, Bombay Police Act, was not challenged in that case; on the contrary the very basis of the application under S. 45, Specific Relief Act, was that the Police Commissioner was clothed with that authority to issue the notice under S. 26, Bombay Police Act, and being so clothed he was not exercising that authority properly.

I should also like to consider sub-cl. (d) of S. 45, Specific Relief Act, because it had been very fully and elaborately argued at the bar. That sub-clause provides that an order under S. 45 would only be made provided the applicant has no other specific and adequate legal remedy. Now what is the interpretation to be put upon the words "no other specific and adequate legal remedy"? The authorities clearly show that an alternative legal remedy must be as convenient, as beneficial and as effectual as the one which the applicant can obtain under S. 45, Specific Relief Act, before the Court would refuse the application. It is also clear that the remedy must be *remedium juris*—some specific legal remedy for a legal right. It is not enough that the party may have some other right which is not a legal right which the Court can enforce. For instance, in 40 Mad. 125<sup>25</sup> where a resolution of the Syndicate of the Madras University was challenged as *ultra vires*, it was suggested that the applicant could go to the Senate to set the matter aright and the Court rejected that argument pointing out that that was not a *remedium juris*—a legal right which the Court could enforce. At p. 165 Kumar-swami Sastriyar J. considers the various alter-

native remedies which were suggested at the bar, namely, (1) a petition to the Government direct, (2) a motion in the Senate to annul the decision of the Syndicate complained of or to rescind or modify the original resolution, or (3) an action to set aside the resolution if it were *ultra vires*; and with regard to the first two remedies, the learned Judge's opinion was that they were not *remedium juris*.

The other important and interesting question which arises in this appeal is whether the right of a suit is a specific remedy contemplated by S. 45, sub-cl. (d), Specific Relief Act. Mr. Munshi has strenuously contended that the specific remedy must be a remedy given by a statute and not merely a remedy by way of a suit. I see no reason to restrict the meaning of the expression "specific and adequate legal remedy" to merely a remedy given by a statute and not an ordinary right of suit. The question which the Court has to consider in every case is whether the alternative remedy, whether it be a right of suit or a specific remedy given by a statute, is as convenient, as beneficial and as effectual as the remedy which the Court can grant under S. 45, Specific Relief Act. I do not think it is possible to urge that the right of suit is not a specific and adequate legal remedy as contemplated by S. 45, Specific Relief Act. In the three English decisions to which our attention has been drawn, (1897) 1 Q. B. 407<sup>20</sup> at p. 414, (1899) 2 Q. B. 632<sup>26</sup> and (1915) 1 K. B. 147<sup>21</sup> at p. 153, the right of a suit was considered as an alternative remedy to the writ of mandamus. With respect to the learned Judge of the Calcutta High Court, I do not think that the opinion given by Greaves J. in 48 Cal. 916<sup>19</sup> that the mere right of suit is not the specific remedy contemplated by sub-cl. (d) of S. 45, Specific Relief Act, is the correct view. As I was saying, the Court may refuse to make an order under S. 45, Specific Relief Act, if it was satisfied that the applicant could obtain the same relief in the same convenient and efficacious manner by filing a suit. In this particular case I have no doubt that the right of suit was not as convenient and effectual a remedy as was the application under S. 45, Specific Relief Act, because if the applicant wanted to sue the Government he had to give notice of sixty days under S. 80, Civil P. C.

Inasmuch as the applicant has failed to comply with one of the conditions attached

25. ('18) 5 A. I. R. 1918 Mad. 763 : 40 Mad. 125 38 I. C. 817, In the matter of G. A. Natesan.

26. ('1899) 2 Q. B. 632 : 68 L. J. Q. B. 945: 81 L. T. 559, Reg. v. Leicester Guardians.



to S. 45, Specific Relief Act, namely the one which finds a place in sub-cl. (b), I agree with the learned Chief Justice that as far as the order under S. 45 is concerned, the applicant is not entitled to that order. With regard to the writs of prohibition and *certiorari*, the Court has jurisdiction to issue both the writs. There is no impediment in the way of the applicant as far as S. 306, Government of India Act, is concerned, and it would be for the learned Judge below to decide on merits whether either of these two writs should be issued against the respondent.

**Per Curiam.**—The result is that the appeal to the extent mentioned in the judgments is allowed. The order of the trial Court both as to the maintainability of the petition and in respect of the payment of costs to all parties is set aside. The petition is remanded to the trial Court for disposal on merits.

The learned Judge held in favour of the respondent on the question of mandamus. That part of the decision is confirmed by us, but on different grounds. Having considered all the relevant factors on the question of costs we think that the respondent should pay to the appellants two-thirds of the costs of the hearing of the petition before the trial Court. The respondent, the Governor-General of India in Council, the Province of Bombay and the Collector of Bombay must pay the costs of the appeal. Costs to be taxed on the long cause scale on the original side.

K.S./D.H. *Appeal partly allowed.*

[Case No. 87.]

**A. I. R. (33) 1946 Bombay 423**

KANIA AG. C. J. AND GAJENDRA-

GADKAR J.

V. N. Deshpande—Appellant

v.

Arvind Mills Co. Ltd., Ahmedabad —  
Respondent.

First Appeal No. 86 of 1945, Decided on 10th July 1945, from order of Joint First Class Sub-Judge, Ahmedabad, in Suit No. 3 of 1945.

(a) Specific Relief Act (1877), S. 57 — Negative covenants in contracts of service recognised and enforced—Such covenants are not void on ground of restraint of trade—Considerations in deciding whether agreement is unreasonably wide stated — Agreement of service held, on terms, enforceable and injunction could be granted — Contract Act (1872), S. 27.

A agreed to serve B under an agreement which provided that A should be in the exclusive employment of B for a period of three years commencing from 1st January 1944, and that during the said term, A should not, whether he be in the employment or not, get in the employment of any one

else as a weaving master or as an employee under any title discharging substantially the same duties with any firm, individual or company in any part of India including the Native States for the said period of three years or any portion of the remaining period of said term. After one year A left the service of B and entered the service of C as a weaving master. B filed a suit praying for an injunction restraining A from serving elsewhere in breach of the negative covenant contained in the agreement. A contended that the agreement was unreasonably wide and in restraint of trade and was therefore, unenforceable and that an injunction should not be granted:

*Held* (i) that agreements of service containing a negative covenant preventing an employee from working elsewhere during the term covered by the agreement were recognised in India and injunctions were granted in terms of the negative covenant; (ii) That illustrations (c) and (d) to S. 57 Specific Relief Act, in terms recognised such contracts and the existence of a negative covenant therein and therefore the existence of such a covenant in a service agreement did not make the agreement void on the ground that it was in restraint of trade and against the principles of S. 27, Contract Act; (iii) That the question whether a particular covenant in an agreement was unreasonably wide had to be decided by the nature of the agreement, the qualifications of the employee and the service he had to render, along with the places where the employee could get alternative service of the same nature; (iv) that under the circumstances of this case, the covenant was not unreasonably wide and that the defendant being a technical employee and it being difficult in the days of war to secure services of technical men it was a fit case for granting an injunction: *Case law discussed.* [P 425 C 1, 2]

(b) *Precedents—Construction of—Observations to be read in light of facts.*

Observations in every case have to be read in the light of the facts which the Court has to decide upon, and it will be a wrong principle of interpretation to merely take up a sentence and treat it as a general proposition of law, deprived of its context and the facts of the case in which the observation was made. [P 427 C 1]

C. P. C.—

(45) Chitaley, Preamble, N. 15, Pts. 9. & 11.

M. P. Amin, J. C. Shah and N. C. Shah—

for Appellant.

G. N. Thakor, Y. B. Rege and B. G. Thakor—  
for Respondent.

**Kania Ag. C. J.**—This is an appeal from the judgment of the Joint First Class Sub-Judge at Ahmedabad. The respondents filed this suit against the appellant to restrain him from working in the Rohit Mills, as a weaving master. The appellant had agreed to serve the second respondents under an agreement dated 28th March 1944. The period of service was three years commencing from 1st January 1944. It appears from the record that the appellant was in the service of the second respondents as a weaving master for several years before this agreement was entered into. As the second respondents are the managing agents of a number



of mills they reserved liberty to engage the appellant in any of the mills of which they were managing agents. With this general idea the agreement in question was entered into. Clauses 4, 8, 9 and 10 of the agreement are relevant. They run in these terms :

"4. That the said weaving master will neither absent himself from his work without leave nor engage himself directly or indirectly to work for any other person firm or company in any capacity whatever nor attempt to impede his employers in their business nor divulge any of the secrets, information or connections to any other person whatever.

8. That the said weaving master shall devote his whole time and attention to the services of the said agents, or if so directed to other agencies, wherein any of the above partners is interested as such, as aforesaid during the said term of three years and shall not during the said term whether he be in the employment or not, get in the employ of or be engaged or be connected as weaving master or as an employee under any title discharging substantially the same duties he may be discharging here with any firm or company or individual in any part of India including the Indian States for the space of the said years or any portion of the remaining period of the said term.

9. That the said weaving master shall not during the continuance of this agreement or thereafter divulge any of the secrets, process or information, etc., relating to the manufacturers or generally relating to any affairs of the agents and companies for whom he may work as weaving master in pursuance of these presents.

10. That the said weaving master hereby agrees not to leave the services of the said agents and not to serve or engage himself directly or indirectly to work for any other person, firm or company in India including the Native States in the same capacity and if the said weaving master attempts to do so the Agents have a right to prevent the said weaving master from doing so. The said agents shall have this right in addition to and without prejudice to any right they may have to claim damages from the said weaving master. . . ."

After working under this agreement for a year the appellant left the respondents' service and joined the Rohit Mills, as a weaving master. The Arvind Mills, in which the appellant was at the time actually engaged as a weaving master, and the managing agents, the second respondents, thereupon filed this suit. After reciting the agreement and the fact that it is difficult to get weaving masters in present times the plaintiffs prayed for an injunction against the defendant from serving elsewhere in breach of the negative covenant contained in the agreement. The prayer is found in para. 12A of the plaint. By his written statement the appellant contended *inter alia* that the agreement was not binding on him for the reasons mentioned therein. According to him he had not read and understood the agree-

ment. It was further alleged that at the time of signing the agreement Mr. Kasturbhai of the second respondent firm had agreed that if the appellant obtained service elsewhere on a salary of Rs. 1,000 to 1,200 the second respondents will not object to the appellant accepting such service. The appellant further contended that the agreement was penal and inequitable and therefore should not be enforced. In the trial Court oral evidence was led and the trial Judge accepted the evidence of the second respondents' witnesses in preference to the evidence led on behalf of the appellant. Before us the learned counsel for the appellant has not argued the question whether the agreement was binding or not. Having regard to the conclusion of the trial Court, he has frankly conceded that he cannot ask the Court to set aside that finding of fact.

On behalf of the appellant three points only were urged before us : (1) Whether the covenants of this agreement are unreasonable and in restraint of trade. It was argued that the whole agreement was therefore unenforceable. (2) That this is not a case of granting injunction. The burden of proof is on the respondents and they have failed to show that an injunction is the proper remedy under the circumstances of the case. (3) That even if an injunction were to be granted, the terms thereof are so wide that the Court should either refuse to grant the injunction or modify the terms suitably.

On the first question it must be pointed out that no issue had been raised in the trial Court to cover the contention that the agreement was void, as it was in restraint of trade. Counsel for the appellant drew our attention to issue 4. On looking at the relevant portion of the judgment (para. 17) it appears that under this issue it was only contended that the clauses in question were hard, inequitable and penal and therefore the Court should not grant the injunction under the circumstances. I do not find any argument advanced in the trial Court that the agreement was in restraint of trade and therefore void under S. 27, Contract Act. Mr. Amin cited several English decisions. I shall briefly deal with them towards the end of the case, as they were sought to be applied also in connection with the third point. It is sufficient to note at this stage that agreements of service, containing a negative covenant preventing the employee from working elsewhere during the term covered by the agreement, are known to Indian Courts. They were enforced in 5 Bom. L. R.



878<sup>1</sup>, 23 Bom. 103<sup>2</sup>, 14 Mad. 18<sup>3</sup>, which was approved in 26 Mad. 168<sup>4</sup> and 36 Cal. 354<sup>5</sup>. Illusts. (c) and (d) to S. 57, Specific Relief Act, in terms recognise such contracts and the existence of a negative covenant therein. It is therefore futile to contend that the existence of a negative covenant in a service agreement makes the agreement void, on the ground that it is in restraint of trade and against the principles found in S. 27, Contract Act. All agreements for personal service for a fixed period would, if the appellant's argument were accepted, be void. An agreement to serve exclusively for a week, a day or even for an hour necessarily prevents the person so agreeing to serve, from working during that period for anyone other than the person with whom he has so agreed. It can hardly be contended that such an agreement is void. In truth a man who works for a particular wage and for a certain period agrees to work in fact and such an agreement does not restrain him from doing so. To hold otherwise would, I think, be a contradiction in terms. In 5 Bom. L. R. 878<sup>1</sup> the Court dealt with this argument in these terms (p. 881):

"The section extends to agreements of a negative character such as are necessarily implied from contracts for whole time service, even if not expressed therein and the operation of such contracts as contracts for service, appears in such cases to prevent the application of section 27 of the contract Act to such negative agreements so far as they purport to impose restrictions only during the period of affirmative agreement for service."

The decisions mentioned above show that the High Courts in India have enforced such agreements and have enforced the negative covenant contained therein. It was contended that the restriction preventing the applicant from taking up service elsewhere in India including the Native States was unreasonable and very wide and made the agreement void. The question whether a particular covenant in a particular agreement was unreasonably wide has to be decided by the nature of the agreement, the qualifications of the employee and the service he has to render, along with the places where the employee can get alternative service of the same nature. I shall observe at this stage only that under the circumstances of this case, I do not think that the covenant is unreasonably wide, as contended by the

appellant. I shall consider this aspect of the question in detail when dealing with the English cases.

The second contention that no injunction should be granted must depend on the evidence on record. In the plaint it is alleged that the appellant is a technical employee and in these days of war it is difficult to secure the services of technical men. It is pointed out that if technical employees were allowed arbitrarily to leave service, after engaging themselves under a definite agreement for a fixed term, the working of industrial concerns in these days would be impossible. In support of this contention Mr. Kasturbhai gave evidence. After referring to this point generally it was only pressed in a somewhat lukewarm fashion. I can understand that attitude having regard to the evidence on record. It appears that in the trial Court also this point was not seriously urged. It is not disputed that the appellant is a man of experience and the agreement was made for a definite period of three years at an increased salary to maintain stability of service of a technical employee. Having considered the evidence on record I do not see any reason to differ from the conclusion of the trial Court that this is a fit case for granting an injunction.

That leaves the question of the terms of the injunction. At this stage I shall notice the English decisions on which Mr. Amin relied in support of his contention.

In 1894 A. C. 535<sup>6</sup> a patentee and manufacturer of guns and ammunition for purposes of war covenanted with a company to which his patents and business had been transferred that he would not for twenty-five years engage, except on behalf of the company either directly or indirectly in the business of manufacturer of guns ammunition. The Court granted the injunction in the terms of the covenant. Before the House of Lords it was argued that the clause was void as being in restraint of trade. It was further contended that it was unrestricted as to space and therefore injurious to the public interest of the country. Both these arguments were negatived and the House of Lords confirmed the injunction as granted. In dealing with the question of the terms being unreasonable Lord Macnaghten observed as follows (p. 595):

"The true view at the present time, I think, is this: The public have an interest in every person's

6. ('94) 1894 A. C. 535 : 63 L. J. Ch. 908 : 71 L. T. 489, Nordenfolt v. Maxim Nordenfolt Guns and Ammunition Co.

1. ('03) 5 Bom. L. R. 878, Pragji v. Pranjivan.
2. ('98) 23 Bom. 103, Charlesworth v. MacDonald.
3. ('90) 14 Mad. 18, Madras Railway Co. v. Rust.
4. ('02) 26 Mad. 168, Subba Naidu v. Haji Badsha Sahib.
5. ('09) 36 Cal. 354 : 1 I. C. 829, Burn & Co. v. MacDonald.



carrying on his trade freely : so has the individual. All interference with individual liberty of action in trading and all restraints of trade of themselves, if there is nothing more, are contrary to public policy and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public. That, I think, is the fair result of all the authorities.”

These observations have been accepted in a later case as laying down the correct standard for deciding whether particular covenants are in restraint of trade or not. I have already pointed that the covenant in that particular case, although it extended to over twenty-five years, was held binding and an injunction was granted in terms thereof.

In (1898) 1 Ch. 671<sup>7</sup> a traveller for the plaintiffs, a firm of wine merchants, agreed to devote the whole of his attention and time to the business of the plaintiffs, and not directly or indirectly to engage or employ himself in any other business, or transact any business with any other person or persons than the plaintiffs, for a term of ten years. The traveller having left the plaintiffs' employment after one year and entered the service of another firm, the plaintiffs moved for an injunction to restrain him from engaging in any other business, and from acting as a traveller for any other firm of wine merchants during the term of ten years. It was noticed that that agreement was terminable by the plaintiffs (the employers) after the first years by three months' notice in writing. The employee had no such right. In dealing with the question of granting the injunction Romer J. doubted whether the clause was intended to apply to the state of things existing after the employee had taken up service with another firm and was no longer acting as a servant of the plaintiffs and cannot be compelled so to act. The learned Judge pointed out that the covenant was unreasonably wide, because it prevented the employee from doing any work at all in connection with any business with any other employer. It was not restricted to the wine business or any other kind of business. Under the circumstances the application for injunction was refused. The observations of Romer J. in

connection with the applicability of the negative covenant after the employee ceased to be an employee under the agreement perhaps has led in the present case to the structure of cl. 8, in which, in terms, it is provided as follows : “ . . . and that shall not during the said term, whether he be in the employment or not, get in the employ of. . . ”

In (1913) A. C. 724<sup>8</sup> a canvasser (appellant) was employed by the employers (respondents) a clothing and supply company having branches all over England. The appellant agreed that he would not within three years after the termination of the employment be in the service of any person, firm, or company carrying on or engaged in a business the same as or similar to that of the plaintiff company, or assist any person employed or assisting in any such business, “within twenty-five miles of London aforesaid where the company did carry on its business.” It was held, assuming, without deciding, that the agreement was not too vague as regards the area of restriction to be enforced by injunction, that the restriction was wider than was necessary for the plaintiffs' protection. The facts as noted in the report show that the canvasser was a part-time employee and was paid by commission. It was particularly noticed that the restraint was for three years after he ceased to work for the employers. Mr. Amin relied on various passages in the judgments in the case. Briefly put the propositions of law are these : (1) That the party who seeks to enforce a covenant has to establish his right to do so. The burden of proof is on the party coming to Court. (2) The test laid down by Lord Macnaghten about the extent to which a covenant in restraint of trade may be agreed upon was approved. (3) Whether the particular restrictions are necessary for the protection of the rights of the employers must depend on the character of the business and the nature of the employment. In the view of Lord Shaw using Lord Macnaghten's language in 1894 A. C. 535<sup>6</sup> there is obviously more freedom of contract between a buyer and a seller than between a master and a servant, or between an employer and a person seeking employment. The observations of Tindal C. J. in (1837) 6 Ad. & E. 438<sup>9</sup> were accepted as good law. The observations were these (p. 454) :

8. (1913) 1913 A. C. 724 : 82 L. J. K. B. 1153 : 109 L. T. 449 *Mason v. Provident Clothing and Supply Co. Ltd.*

9. (1837) 6 Ad. & E. 438 : 6 L. J. (N.S.) E.X. 266, *Hitchcock v. Coker.*

7. (1898) 1 Ch. 671 : 67 L. J. Ch. 319 : 78 L.T. 646 : 46 W. R. 509, *Ehrman v. Bartholomew.*



"... Where the restraint of a party from carrying on a trade is larger and wider than the protection of the party with whom the contract is made can possibly require, such restraint must be considered unreasonable, in law, and the contract which would enforce it must be therefore void."

In their judgments their Lordships observed that negative covenants must not be considered as a means of coercing and punishing the workman and putting him under a tyrannous and therefore a legally indefensible restraint. At the same time it was pointed out that a compromise should be made between the rights of two individuals freely to enter into such contracts as they liked and the right of a party to obtain protection to the extent it is necessary to do so for the performance of the contract agreed between them, and the right of the public to obtain free service of a man. In my opinion, these general observations are not in conflict with the law as found in illustrations (c) and (d) to S. 57, Specific Relief Act. It is a well known principle of law that observations in every case have to be read in the light of the facts which the Court has to decide upon, and it will be a wrong principle of interpretation to merely take up a sentence and treat it as a general proposition of law, deprived of its context and the facts of the case in which the observation was made. (1913) A. C. 724<sup>8</sup> does not lay down anything which contravenes the right of the respondents in the present case to obtain an injunction. (1916) 1 A. C. 688<sup>10</sup> was also relied upon. In that case there was a sale of the goodwill of a business. The defendant had been in the company's employment as a draughtsman and otherwise from the time he left school. After several years' service he was engaged as an engineer for two years certain and thereafter subject to four months' notice on either side, upon the terms and conditions contained in the contract. The negative covenant was for a period of seven years from his ceasing to be in the employ of the company and was in very wide terms. The Court refused to enforce the covenant. The decision is obvious in view of the fact that the man's liberty of action was sought to be curtailed for a long time after the period of employment came to an end. The observations at p. 714 in that case are material to show that an injunction in terms of cl. 9 in the present case is not inappropriate. It was observed by Lord Shaw as follows (p. 714) :

10. (1916) 1 A. C. 688, *Herbert Morris, Limited v. Saxelby*.

"Trade secrets, the names of customers, all such things which in sound philosophical language are denominated objective knowledge—these may not be given away by a servant ; they are his master's property, and there is no rule of public interest which prevents a transfer of them against the master's will being restrained. On the other hand, a man's aptitudes, his skill, his dexterity, his manual or mental ability—all those things which in sound philosophical language are not objective, but subjective—they may and they ought not to be relinquished by a servant ; they are not his master's property ; they are his own property ; they are himself. There is no public interest which compels the rendering of those things dormant or sterile or unavailing ; on the contrary, the right to use and to expand his powers is advantageous to every citizen, and may be highly so for the country at large. This distinction, which was also questioned in argument, is just as plain as the other."

In (1934) A. C. 181<sup>11</sup> the brewers' license was transferred, as a part of the business and goodwill. It was covenanted that for fifteen years they would not engage in the trade or business of manufacturing or selling beer. In view of the wide words of the covenant and the fact that it was to be operative for a long time after the transfer of the goodwill the Court refused to enforce the negative covenant. Their Lordships only reaffirmed the principles which were stated in 1894 A. C. 535,<sup>6</sup> and confirmed in (1913) A. C. 724.<sup>8</sup> In most of these cases the point the Court had to consider was whether the particular covenant was in restraint of trade. I have already noticed that this point was not urged before the trial Court, and is not good in the present case, because of the circumstances here. Clause 4 of the agreement in terms provides that the defendant-appellant during the period of three years commencing from 1st January 1944, will be in the exclusive employment of the second respondents, who were the contracting parties. That is an affirmative agreement on the part of the employee to serve the employer, and no one else, during that period. By the first part of cl. 8 the appellant agreed to devote his whole time and attention to the service of the second respondents, or to any other firm in which the partners of the second respondents firm were partners, but limited during the said term of three years. The later part of that clause contains the negative covenant preventing the appellant during the said term, and whether he was in the employment of the respondents or not, from getting in the employment of any one else as a weaving

11. ('34) 21 A. I. R. 1934 P. C. 101 : 150 I. C. 232 : 1934 A. C. 181 : 103 L. J. P. C. 58 : 150 L. T. 503, *Vancouver Malt and Sake Brewing Co. v. Vancouver Breweries, Ltd.*



master or as an employee under any title discharging substantially the same duties, with any firm, individual or company in any part of India including the Native States for the said period of three years or any portion of the remaining period of the said term. Three points have been urged in connection with this clause. The first was that as the right to prevent the defendant from service, whether he was in the employment of the respondents or not, was a very wide restriction, no injunction should be granted in terms thereof. I have already pointed out that these words were perhaps included as a result of the observations of Romer J. in (1898) 1 Ch. 671.<sup>7</sup> Apart from the reason why they were so included, the clause, in my opinion, is perfectly clear and plain. If the respondent had committed a breach of the agreement, they could not rely on any terms thereof and enforce any covenant against the appellant. But, when the appellant commits a breach, he might contend that all those covenants were enforceable only when he was in service. After he ceased to be bound by the agreement, the terms thereof could not be enforced against him. To prevent such an argument being advanced the words "whether he be in the employment or not" are inserted in this clause. I do not think these words are meant to operate beyond the period of the agreement, i. e. three years or the remaining period of the said term, according to the date the appellant commits a breach thereof. There is no room for doubt because the words in question have been preceded by the words "during the said term." This contention therefore fails.

The second point was that under the covenant the appellant was prevented from taking any employment elsewhere in any capacity. This contention is based on a misreading of the words used in this clause. The appellant was a weaving master. The intention is that if he commits a breach of the agreement he shall not serve as a weaving master, with any other party, and it makes no difference whether he is described in that service as a weaving master or by any other designation provided he in fact and in substance is performing the duties of a weaving master or work connected with it. In order to leave no room for doubt the injunction should show that the appellant is prevented from working as a weaving master or doing any work of weaving master under whatever designation he is engaged.

The third objection was about the prevention against taking up service in the

whole of India including the Native States. It was argued that this is a far wider area than is necessary for the respondents' protection. As pointed out in the English cases, the question of extent of area in each case depends on the particular circumstances of the case. A weaving master is employed only in the textile mills. In India, the textile mills are generally located in well defined areas in British India. It is however well-known that within a distance of a few miles from these industrial centres there are Native States in which spinning and weaving mills are erected. The inclusion of the words "Native States" under the circumstances cannot be considered unreasonable. It was argued, why should this man be prevented from working in Calcutta, or Amritsar which are at a distance of over a thousand miles? The answer to that is twofold; first, that a textile mill is not erected in every town of India. The fact that a particular textile company is at a distance of over 500 or 1000 miles makes little difference in the appellant obtaining employment to the detriment of the respondents. The cloth manufactured by the respondents is sold all over India and known as cloth manufactured by their particular textile mill. It is stated in evidence that the second respondents are the managing agents of eight mills in Ahmedabad and have a very large production. The service of the appellant could be used in any of those mills, and therefore the fact that the restriction extends to the whole of India does not by itself make it unreasonable. In fact on the evidence there is ample material to hold that it was reasonable for the respondents' protection. The second answer is that knowing the conditions of trade in India, knowing the capacity of the second respondents to work as managing agents and knowing the capacity of the defendant also as an expert, the parties have freely entered into this agreement. Under the circumstances the Court is entitled to assume that it was a reasonable agreement between the parties. The evidence does not show that it was unreasonable in any way. Therefore, an injunction in terms of paragraph 8 is proper.

Clause 9 of the agreement prevents the appellant from divulging any secret information of the nature mentioned in that clause after the termination of his service. As pointed out in (1916) 1. A. C. 688<sup>10</sup> the defendant is not prevented from acquiring knowledge which makes him a better employee for the public for future employment. It



only prevents him from divulging information which he has received as respondents' employee to another party. It is therefore clear that the clause as worded is proper and an injunction granted in terms thereof is not unreasonable or of wider latitude than justified in law. Clause 10 only expressly gives the employer the right to apply for an injunction, in addition to the right to obtain damages. It is not intended to be operative after the three years period comes to an end. Although the words "during the said terms" are not used in that clause, that is clearly the intention because it is put side by side with the right to obtain damages and is considered an additional right to the right to recover damages. In law, if damages could be awarded, it is clear that they could not be so awarded beyond the period of three years. The right to restrain the defendant is therefore similarly limited to the period of three years. That was the only claim put forth by the plaintiffs and the written statement does not show that the defendant understood the agreement to contain any more extensive right.

The four Indian cases mentioned above clearly recognise the existence of a service agreement and show that an injunction was granted in terms of the negative covenant contained or implied therein. In 36 Cal. 354<sup>5</sup> the facts were these: One M was engaged by B & Co. as an assistant in their firm for a period of five years. It was provided in the agreement as follows:

"...he should diligently and to the best of his ability devote himself to the duties incumbent upon him and should faithfully observe and comply with such instructions as he might from time to time receive from the firm."

M left the service of the firm and took employment with another firm. On a suit being filed for an injunction, although there were no express negative covenants in the agreement, relying on S. 57, Illusts. (c) and (d) Specific Relief Act, the Court granted the injunction in the following terms:

"...to restrain the defendant from serving, working, or being employed by the said R or any person or persons other than the plaintiff company until the said agreement...should have been determined by effluxion of time..."

That injunction was not restricted to any area in which the defendant was not to take employment. We, therefore, grant an injunction against the defendant-appellant restraining him from getting in the employ of or being engaged or connected as a weaving master or as an employee under any

title discharging substantially the same duties as a weaving master, in the Rohit Mills or any other company or with any firm or individual in any part of India including the Native States for the term ending on 31st December 1946. The defendant-appellant is further restrained during the said period and thereafter from divulging any of the secrets, processes, or information relating to the manufacture or generally relating to the affairs of the respondents' companies for whom he had worked as a weaving master in pursuance of the agreement Ex. 36. The terms of the injunction are varied to that extent. The appeal is dismissed with costs. The *interim* stay is discharged and the appellant should pay the costs of that application.

D.R./D.H.

*Appeal dismissed.*

[Case No. 88.]

**A. I. R. (33) 1946 Bombay 429**

STONE C. J. AND KANIA J.

*The Paper Sales Ltd.—Appellants*

v.

*Chokhani Bros.—Respondents.*

O. C. J. Appeal No. 52 of 1944, Decided on 2nd November 1945, from two judgments of Chagla J., D/ 15th March and 10th November 1944.

(a) Contract Act (1872) Ss. 55 and 63 — Contract for delivery of goods within specified time—Failure to perform—Several agreements extending time for performance—There need not be continuous and unbroken chain of extension—Final agreement of extension is necessary.

When the purchaser seeks to have damages for breach of a contract assessed at a later date than that fixed by the contract for delivery, the effect of S. 55 is to put an agreement come to after the original date of performance of a contract has expired on the same footing as the original agreement. But it must be an agreement. Mere forbearance from suing or giving a formal notice of rescission does not amount to an extension of time for the performance of a contract within the meaning of S. 63 so as to alter the relevant date on which the damages are to be assessed. [P 431 C 2]

Under S. 55 the right of the promisee to avoid the contract after breach is not circumscribed by any chronological limitations. Nor is the element of time introduced into S. 63. Thus, in a case where after several agreements for extension for the performance of a contract there is an ultimate agreement that time should be extended to a particular date, it matters not that there are gaps between the intervening agreements, any more than it matters that there is, in the case of a single agreement to extend, an interval between the expiry of the original contract date for delivery and the making of the extension agreement for a new delivery date. What is vital is the final agreement to extend the delivery date. It is immaterial whether the agreement was made before the period of delivery stipulated in the initial contract had expired or remained



unexpired : ('22) 9 A. I. R. 1922 P. C. 178 *Rel. on*;  
(46) 33 A. I. R. 1946 Bom. 1, *Ref.* [P 432 C 1, 2;  
P 435 C 1]

(b) Evidence Act (1872) Ss. 101 to 103—Illegality—Onus is on party who so asserts.

The law presumes against an illegality, and the burden of proving that an illegality has taken place rests on the party who so asserts. [P 434 C 1]

*F. J. Coltman and S. M. Shah*—for Appellants.

*M. V. Desai and K. K. Desai*—for Respondents.

**Stone C. J.**—This is an appeal from two judgments of Chagla J. dated 15th March 1944, and 10th November 1944, by which he ordered the appellants to pay to the respondents Rs. 2,77,000 as damages for breach of contract. The fact that there was a contract whereby the appellants agreed to sell to the respondents one hundred tons of special featherweight bond paper, more particularly described in Ex. E, which is a letter dated 10/15th July 1942, is not now in dispute. Nor is it disputed that the appellants are in breach of that contract. The controversy is directed to the date of the breach and to the quantum of damages, if any. Mr. Coltman for the appellants admits with considerable force and logic that in order to determine that controversy it is essential to start at the beginning and to ascertain the terms of the contract. Unfortunately the position in this regard has become confused by the course which the proceedings have taken which necessitated an amendment by the respondents of their plaint after the hearing of the action had commenced and by a mistake in the respondents' pleadings which even at this late stage still persists. It is Mr. Coltman's submission that even after the amendment the contract and the extensions of time as pleaded have not been proved by the respondents. It is accordingly necessary to examine the pleadings in order to ascertain how the matter stands. The plaint, as it originally stood, pleaded the contract in these terms :

"As a result of the said negotiations the defendants agreed to sell to the plaintiffs and the plaintiffs agreed to purchase from the defendants on or about 17th July 1942, 100 tons of special featherweight bond 40 gms. per sq. mtr. at the rate of 12 annas per lb. nett f.o.r. Bombay, quality as per sample attached with the said letter dated 27th June 1942, delivery of the goods to be effected at the earliest possible date without any binding of any specific period. Hereto annexed collectively marked Ex. 'A' are copies of the letter dated 27th June 1942 addressed to the plaintiffs by the said International General United Trading Company and the letters dated the 10/15th July 1942 and 17th July 1942 exchanged between the plaintiffs and the defendants recording the terms and conditions of the said contract.

The plaintiffs also paid to the defendants as agreed a sum of Rs. 15,000 by way of deposit against the said contract."

The International General United Trading Company was the predecessor of the appellants, and there is no dispute that the appellants now stand in the place of the former company. With regard to the letters. The first letter which is dated 27th June 1942, is from the International General United Trading Company to the respondents :

"We shall thank you to kindly send us your written confirmation of your order for 100 tons of Special Featherweight Bond Finishing Printing Paper — 40 grams substance of Sirpur Paper Mills Limited at Rs. 0-12-0 per lb. nett for Bombay with a cheque for Rs. 17,000 only, being deposit of 10% against the Mills demand of 25% deposit."

"An immediate compliance will be highly appreciated."

The second letter which is dated 10/15th July 1942, is from the respondents to the appellants :

"Re : 100 tons Special Featherweight Bond.  
Dear Sirs,

As per telephonic talk we had with you we confirm herewith having purchased from you the undermentioned :

100 tons Special Featherweight Bond 40 gms. per sq. mtr. at 0-12-0 per lb. nett for Bombay, delivery to be completed within 2 months, quality as per sample attached with your letter dated 27th June 1942.

We also agree as desired in your above referred letter to send to you deposit against this contract. Please note we are arranging to send you a sum of Rs. 15,000 as deposit within a day or two.

Thanking you."

It is now common ground that the third letter, viz., that of 17th July 1942, has nothing whatever to do with this case. It is a letter written with regard to some other contract between the parties. But it is significant that it is from this wholly irrelevant letter that the delivery date "at the earliest possible date" is taken and that is how in para. 4 of the plaint the time for delivery is pleaded as being the earliest possible date, although the letter of 10/15th July 1942, in which delivery was to be in two months, is relied upon as recording the terms of the contract. The appellants by their written statement of defence so far as material admit the letters of 27th June and 10/15th July but deny that the letter of 17th July has any relevance and deny that the contract was as pleaded in para. 4 of the plaint and in particular that the date for delivery was at the earliest possible date. In that state of the pleadings the matter came on for trial and it appears to have been then realised by the respondents that their plaint was not in order and leave to amend and for an adjournment was sought and granted. As a result new para. 16A appeared in the plaint: but surprisingly no amendment was made to the defective para 4. Paragraph 16A is in these terms :



"In the alternative and without prejudice to the contention aforesaid, the plaintiff say that the time for delivery of the balance of goods deliverable by the defendants to the plaintiffs under the said contract was from time to time extended by the plaintiffs up to the end of December 1942 pursuant to the request of the defendants and it was only when the defendants failed and neglected to deliver the said balance even by the extended period, viz., the end of December 1942 that the defendants addressed to the plaintiffs their attorneys' letter dated the 31st December 1942 part of Ex. D to the plaintiffs purporting to send a reply to the plaintiffs' former attorneys' letter dated the 23rd December 1942 (wrongly described therein as the letter dated the 22nd December 1942). The plaintiffs say that the defendants were as aforesaid bound to deliver the said balance of the goods to the plaintiffs by the end of December 1942 or in any event within a reasonable time thereof. The defendants however failed and neglected to do so and committed a breach of the said contract as hereinbefore stated."

Particulars of para. 16A were ordered and by the particulars delivered four different extensions of time for delivery are pleaded. Under the terms of the letter dated 10/15th July 1942, delivery was to be completed "within two months." In the Court below and in this Court the delivery date, in spite of the unusual way of dating this letter, has been treated as being of 15th September 1942. The four extensions set out in the particulars are pleaded as being arrived at on the request of the appellants and agreed to by Mr. Keshavdev on behalf of the respondents, that is to say the extensions are pleaded as being the subject-matter of agreements, and not as casual extensions to be presumed from the respondents' forbearance, to avoid the contract under S. 55, Contract Act, 1872. The agreements for extension as pleaded are these :

(1) Agreement arrived at "in or about the second week of September 1942" for delivery "by the end of the month."

(2) Agreement arrived at "in the beginning of October 1942" for delivery "in or about a fortnight."

(3) Agreement arrived at "about the middle of October 1942" for delivery "in about a month."

Then follow allegations that in November 1942, there was an agreement about the delivery of one wagonload of the paper; but this was a small proportion of the paper to be delivered. Referring to this arrangement the particulars set out the circumstances of the fourth alleged extension :

"The plaintiffs having not received the goods as promised and having learnt that the goods were being delivered to some other party, the plaintiffs by their own letter as well as by their attorneys' letter both dated the 23rd November 1942 called

upon the defendants to deliver the contract goods.

Thereupon the defendants' Managing Director Mr. H. M. Shah with certain other person saw Mr. Keshavdev at his office in Stock Exchange Building in or about the last week of November 1942 and promised to deliver the remaining goods by the end of December 1942 and requested Mr. Keshavdev to wait till then and Mr. Keshavdev agreed to do so."

It will be convenient before passing to the evidence to refer to the case in 47 Bom. L.R. 719<sup>1</sup> upon which Mr. Coltman relies. That case, which is a recent decision of this Court, follows a decision of the Madras High Court, 37 Mad. 412,<sup>2</sup> and a later decision of the Privy Council, 24 Bom. L. R. 687,<sup>3</sup> and holds that where the purchaser seeks to have damages for breach of a contract assessed at a later date than that fixed by the contract for delivery, the effect of s. 55, Contract Act, 1872, is to put an agreement, come to after the original date of performance of a contract has expired, on the same footing as the original agreement. But it must be an agreement. Mere forbearance from suing or giving a formal notice of rescission does not amount to an extension of time for the performance of a contract within the meaning of s. 63 of the Act, so as to alter the relevant date on which damages are to be assessed. Accordingly in the case before us in order for the date at which damages are to be assessed to be extended from 15th September 1942 to 31st December 1942 being the date upon which the respondents rely, there must be an agreement extending the date of delivery. Mr. Coltman's submission on this part of the case is that the evidence of Mr. Keshavdev in support of the agreements to extend set out in the particulars falls far short of discharging the onus of proof which undoubtedly lies on the respondents. Mr. Coltman also attacks the veracity of Mr. Keshavdev and points to alleged inconsistencies in his evidence with certain letters written to the Mills who were producing the paper, and by the respondents' attorneys. The learned Judge in the Court below has said this about Mr. Keshavdev's evidence :

"I have watched the demeanour of Keshavdev in the witness-box, and I have no hesitation in saying that, as far as the matters which he has deposed to in this case are concerned, he has struck me as a witness of truth ; and I have no hesitation in accepting his testimony as to the agreement for the extension of time. Fortunately for him the

1. ('46) 33 A. I. R. 1946 Bom. 1 : 222 I. C. 337 : 47 Bom. L. R. 719, Anandram Mangtaram v. Bho-laram.

2. ('14) A. I. R. 1914 Mad. 573 : 37 Mad 412 : 14 I. C. 255. Mutthaya Maniagan v. Lakku Reddiar.

3. ('22) 9 A. I. R. 1922 P. C. 178 : 43 All. 257 : 48 I. A. 175 : 63 I. C. 589 : 24 Bom. L. R. 687 (P. C.), Muhammad Habid Ullah v. Bird & Co.



whole of his testimony is strongly corroborated, as I shall point out, by the correspondence that has taken place between the defendant Company and the Sirpur Mills and between the parties themselves."

That there are, when the question of the extension is considered, various omissions such as is to be found in Mr. Kanga's letter of 11th January 1943, which in effect is the letter of the respondents' solicitors before action and which, although it summarises the history of the matter, makes no mention of the extensions, cannot be disputed. But Mr. Keshavdev in his evidence has given this frank explanation :

"From the 17th of July onwards my belief was that under the contract I was bound to take delivery of the goods whenever the Mills consigned them to the defendants and that there was no fixed time for delivery."

*Question* : "Therefore there was no question of extension of time for giving delivery ?"

*Answer* : "The extension of time arose in this way that whenever I asked Bhawnani when he would deliver the goods he used to mention a certain period and I used to agree to wait till that period."

"I told my Solicitors that the contract in suit was set out in the letters of the 15th and 17th of July."

It comes to this, that the taint of the irrelevant letter of 17th July and the consequent belief in the mind of Mr. Keshavdev that delivery was to be at the earliest possible date has persisted from the inception of this transaction and must be borne in mind when considering whether Mr. Keshavdev has discharged the onus of 'proof with regard to any extension of time for delivery. Mr. Coltman's submissions with regard to these extensions is that in order to arrive at the ultimate date, 31st December 1942, there must be a continuous and unbroken chain of extensions covering the whole period from the delivery date in the contract, 15th September 1942, up to 31st December 1942, and he supports this argument by the pictorial simile of a wall in which, whilst the top rows of bricks are firmly bonded, the lower rows are loosely put together, so that the whole wall must collapse. In my judgment this line of reasoning is unsound, since by S. 55, Contract Act, the right of the promisee to avoid the contract after breach is not circumscribed by any chronological limitations. Nor is the element of time introduced into S. 63, Contract Act. In a case therefore in which after several agreements for extension there is an ultimate agreement that time should be extended to a particular date, it matters not that there are gaps between the intervening agreements, any more than it matters that there is, in the case of a single

agreement to extend, an interval between the expiry of the original contract date for delivery and the making of the extension agreement for a new delivery date. What is vital is the final agreement to extend the delivery date. In this case the final extension is the one which I have referred to as the fourth extension, by which the respondents allege that time was extended by agreement till 31st December 1942. The only witness for the respondents on this point was Mr. Keshavdev, and in his evidence-in-chief he says this :

"In the last week of November 1942, Himatlal Shah, a director of the defendant company and one Salebhoy of the Samsheer Printing Press saw me at our office."

Salebhoy told me that the defendants had received from the Mills 15 tons of the contract goods but Bhawnani had delivered these to some other party and he told me that the defendants were prepared to pay me compensation in the sum of Rs. 25,000 for non-delivery of these goods and that in future the defendants would give me delivery of the goods as and when received from the Mills. I agreed to take delivery in future as suggested by them, but with regard to the compensation I claimed a larger amount and they told me that they will let me know after consulting the Board of Directors. Nothing happened after that till the 31st December 1942 when we received a letter from the defendants' Advocate."

If the matter had rested there, there can be no doubt that this evidence alone would not have proved an agreement to extend the time for delivery up to 31st December 1942. But Mr. Keshavdev's evidence must be looked at as a whole, and under cross-examination he gave the following further evidence:

"Himatlal Shah and Salebhoy saw me at our office after Exs. M and N were written. I knew Salebhoy before he saw me in November 1942."

Salebhoy owns a printing press and a paper shop and is a respectable man.

Salebhoy came with Himatlal because they are closely connected and Salebhoy made a suggestion of compromise on behalf of Himatlal Shah.

Salebhoy did not suggest that I should accept Rs. 25,000 in settlement of the whole dispute between us and the defendants but only with regard to the 15 tons of the contract goods which had been delivered to some other party. He also told me that with regard to the remaining goods the defendants would be in a position to deliver the sale by the end of December 1942.

Salebhoy did not give a definite promise that the balance of the goods would be delivered by the end of December but he said that in all probability the goods would be delivered by that time. . . .

I told Salebhoy that I was prepared to take delivery of the goods whenever the Mills delivered them and he said that the defendants would give delivery as and when the Mills delivered them and that would be by the end of December."

Mr. Coltman has severely criticised the somewhat vague nature of this evidence, but it must be remembered that Mr. Keshavdev's



evidence has been accepted by the learned Judge, and that although he seems by November 1942, to have realised that the appellants were in default and could be pressed, he did not appreciate that the original date for completion was 15th September which had long since passed. With reference to the November meeting the learned Judge said.

"But fortunately there is one interview deposed to by Keshavdev and which is admitted by the defendant company, and that is the interview which took place at the end of November 1942 between Keshavdev, Himatlal Shah and Salebhoy; and the defendant company has called Salebhoy to give a version of that interview contrary to the one given by Keshavdev in his evidence. Salebhoy in his evidence states that at the end of November 1942 the defendant sent him and Himatlal Shah to the plaintiffs' office in order to bring about a compromise of the plaintiffs' claim against the defendants. Himatlal and Salebhoy went to the plaintiffs' office and saw Keshavdev. Salebhoy told Keshavdev that it would be advisable if the plaintiffs settled their claim against the defendants and he also told Keshavdev that he was authorised to offer Rs. 20,000 to Rs. 25,000. Keshavdev told Salebhoy that his claim came to about Rupees Three lakhs to rupees Three and a half lakhs and he could not possibly settle it for that small amount. Salebhoy told Keshavdev that his authority was limited to offering Rs. 20,000 to Rs. 25,000 and left. This curious emissary of peace who was sent by the defendant company to the plaintiffs office did not, according to him, even know what the dispute between the plaintiffs and the defendant company was. According to Salebhoy, all that he knew was that he was offering Rupees 20,000 to Rs. 25,000 and the plaintiffs were claiming Rupees Three and a half lakhs. He did not trouble about the whys or wherefores of this claim of the plaintiffs. The evidence of Salebhoy is so inherently improbable that it would be impossible for any Court to accept it. But one rather significant fact emerges from Salebhoy's evidence and that is that he admitted in cross-examination that Keshavdev told him that he did not want the money; he wanted his goods; and he wanted the delivery as soon as possible, as he had already sold these goods to a third party. This undoubtedly corroborates Keshavdev when he says that the time for the performance of the contract had been extended by mutual agreement. But what is difficult to understand—and Mr. Coltman has made no attempt to explain it—is why Himatlal Shah, a director of the defendant company, was not called when admittedly he was present at this interview. The only presumption that I can draw is that if Himatlal Shah had stepped into the witness-box, he would have supported the story of Keshavdev and not that of Salebhoy."

The learned Judge then sums up as follows:

"On the oral evidence and the documentary evidence which I have just reviewed, I hold that the time for delivery was extended from time to time up to 31st December 1942, and also that it was on 31st December 1942, that the defendant company finally repudiated the contract, and I therefore hold that the date of the breach was 31st December 1942."

Mr. Coltman for the appellants submits that this finding by the learned Judge is not in accordance with the evidence. It is true

that the evidence cannot be said to be very explicit, but looked at as a whole certain matters emerge with regard to the November interview:

(1) that Keshavdev rejected compensation and demanded the goods, which he had already sold to someone else,

(2) that the offer was made that delivery would be made when the goods were received from the Mills, and

(3) that the representation was made that the goods would be received from the Mills "by the end of December."

It was upon this offer and representation being made that Keshavdeo agreed to wait and to extend the time for delivery to a new date. If not directly fixed as being 31st December 1942, the new agreed date for delivery was to be within a reasonable time computed by reference to delivery by the Mills and the representation I have already referred to. That date can, in my opinion, looking at the evidence as a whole, be properly fixed as 31st December 1942. Accordingly I am not prepared to disturb the finding of the learned Judge to that effect.

This brings me to Mr. Coltman's second ground of appeal, that is to say, the quantum of damages, it being submitted that no damages have been proved at all. This raises a curious point, since what is said is, that the only evidence of market rates by which damages can be measured is evidence of transactions which are illegal as being sales colloquially spoken of as "black market" transactions. If this were so, I should have no hesitation in holding that the Court would not entertain any such evidence for the purpose of assessing damages. What occurred was this. After the learned Judge had delivered his judgment on 15th March, 1944, he adjourned the question of the quantum of damages to come before him at a later date, and in due course, having heard further evidence, he delivered judgment with regard to the damages on 10th November 1944. At the hearing to assess the damages the appellants called no evidence at all, and the only witness for the respondents who gave evidence with regard to actual sales was Hyder Mohsin Kameralli. This witness gave evidence with regard to five actual sales, the first three being in July and August 1942 and, therefore, not of material value. But the other two sales were actually effected on 31st December 1942, and, therefore, were sales at the critical date. In respect of these two sales, the two relevant entries in the



debit journal of the firm by whom the witness was employed were produced and these entries are Exs. A13 and A14.

Now the question of legality stands as follows. By an order of the Central Government dated 16th January 1942, under the powers contained in the Defence of India Rules the articles specified in the first schedule "shall not be sold by any Paper Mill in wholesale quantities to any dealer or other person at prices (f.o.r.) higher than those specified in col. 2 of the said schedule for deliveries" at places therein named. So far as material the article described in the first schedule is paper, which is "Bleached wood-free MF writing and MF printing paper 14 lbs. demy and above, including pulp boards but excluding blotting paper," and the controlled price is 6 as. 6 p. Then on 25th May 1942, the Government of Bombay in exercise of the powers conferred by the Defence of India Rules ordered that "Indian-made paper, for which the Government of India has fixed maximum wholesale prices under its Notification in the Department of Commerce, No. Econ. Ad. (P.C.) 16/41, dated 16th January 1942 shall not be sold retail at any place in the City of Bombay at prices higher than those mentioned in the annexed schedule."

It is not suggested that the two sales recorded by Exs. A13 and A14 contravened the Central Government's order. What is said is that they contravened the order of the Government of Bombay. Mr. M. V. Desai points out that this order only applies to retail sales, whereas he submits that the two examples of sales given by the witness are wholesale sales. On the one hand the witness's employers, as appears from his evidence, are wholesale merchants, and on the other hand the witness speaking generally says :

"We sold this paper both wholesale and retail and in respect of some of the sales we have issued cash memos."

Nothing in the debit journal entries of the two sales of 31st December 1942, shows whether they are wholesale sales or retail sales. It is to be observed that there was no cross-examination to the effect that these two examples were retail sales and were accordingly within the ambit of the order of the Government of Bombay and therefore illegal. Nor does it appear that in the Court below this point with regard to the two sales being illegal was taken at all.

The law presumes against an illegality, and the burden of proving that an illegality has

taken place rests on the party who so asserts. In my judgment, as there is not any evidence at all that these two sales given by way of example are retail sales and, therefore, illegal, it must be assumed that they were wholesale sales and, therefore, valid. That being so, it cannot be said that there is not any evidence upon which the learned Judge could assess damages. In my opinion there is no reason why this Court should interfere with the conclusion as to the quantum of damages which the learned Judge has arrived at. Accordingly this appeal must be dismissed with costs.

**Kania J.**—I agree. The relevant portions of the evidence of Keshavdev on which the success of the plaintiffs' case depends have been set out in the judgment of the learned Chief Justice.

Before us only two questions were argued on behalf of the appellants : (1) What was the date of the breach and (2) What damages, if any, the plaintiffs are entitled to? This discussion must therefore proceed on the footing that there was a contract for the sale of 100 tons of paper by the defendants to the plaintiffs on the terms contained in the letter dated 10/15th, July 1942, and that the defendants had committed a breach thereof. These two facts for the present appeal are admitted by the appellants.

The question of the date of breach must depend on proof of the extensions of time for delivery as pleaded by the plaintiffs in the particulars furnished in pursuance of the Court's order, after the plaintiffs amended the plaint by inserting para. 16A therein. On behalf of the appellants it was first contended that till after the hearing started Keshavdev and the plaintiffs were all along under the impression that delivery was to be effected at the earliest possible date without any binding of any specific period. It was contended that if this was the term of the contract according to the plaintiffs, there could arise no occasion for an agreement to extend time, because on that averment of the plaintiffs the time for performance had not expired. It was therefore contended that the evidence of Keshavdev was completely got up and unreliable. In my opinion this argument is unsound. The question of what was in the mind of persons who were discussing the period of delivery after 15th September is irrelevant to the question whether in fact an agreement for delivery at a later date was arrived at. The evidence of Keshavdev shows that after 15th September he asked for delivery and on behalf of the



appellants Keshavdev was told that delivery would be given by a certain later date and Keshavdev agreed to wait till then. Whether Keshavdev demanded delivery under the impression that the term was as set out in para. 4 or on the footing that 15th September was under the original contract the last date, is immaterial to the question that he asked for delivery and was offered delivery at a later date and he agreed to take delivery on such date.

The next question to be considered is whether the extensions pleaded by the plaintiffs have been established. In my opinion, the argument of the appellants that unless each one of the extensions as pleaded was proved satisfactorily the allegation that time was extended till the end of December cannot be held proved, is unsound. It is not a chain which the plaintiffs are called upon to establish. It is sufficient if they establish that at a certain interview both parties agreed that time for delivery should be the end of December under the contract made between the parties in July 1942. For that again it is quite immaterial to consider whether the arrangement was made before the period of delivery stipulated in the initial contract had expired or remained unexpired. That contention is set at rest by the judgment of the Privy Council in 48 I. A. 175.<sup>3</sup> It is therefore immaterial whether on the record there is evidence to prove the first, second and third extensions, if the plaintiffs satisfactorily establish that the parties had agreed to extend time of delivery up to the end of December at the last interview.

This brings me to the question whether at the interview in the third week of November the parties had agreed to extend time as contended by the plaintiffs. The material and relevant evidence of Keshavdev on this point has been set out fully in the judgment of the learned Chief Justice. Reading that evidence it may be arguable that a definite and specific agreement as set out in the particulars to extend time till 31st December was not established. It must, however, be remembered that the parties to the conversation were two businessmen, none of whom was a lawyer. The effect of that conversation was that the question of delivery of the balance of the goods was discussed between them and Keshavdev demanded delivery of the balance. Mr. Shah or Salebhoy on the defendants' behalf did not contend that they were not bound to give delivery. They did not contend that the time to give delivery had expired and the defendants were under

no obligation to give delivery. They stated that they would give delivery of the goods when received from the mills and Salebhoy stated that he could not promise a definite date but he expected the goods to be delivered by the end of December. Keshavdev's statement in evidence-in-chief was that he agreed to take delivery of the goods in future on those terms. From this evidence it is therefore safe to hold that both the sides agreed to an extension of time for delivery and it was agreed that the goods were to be delivered as soon as received from the mills and that was expected to be by the end of December. Even assuming that this does not amount to a definite agreement to give delivery by the end of December, it must amount to a promise to give delivery of the goods within a reasonable time after the interview, and the statement of Salebhoy was that under the circumstances that reasonable time would be the end of December. To this Keshavdev agreed. Differently approached, therefore, the arrangement between the parties themselves was to give and accept delivery of the goods if tendered up to the end of December. I, therefore, agree that there is no reason to disturb the finding of the learned Judge on the question of extension of time up to the end of December.

It was argued on behalf of the appellants that the correspondence which took place between the parties was against any such agreement. Mr. Coltman took us through each of the letters exchanged between the parties. It must be recognised that the question to be considered is, "was there an occasion to set out the agreement?" If so, the omission to do so may affect the credibility of the witness. But if there was no occasion to set out the extension, the omission cannot lead to an adverse inference against the fact of an extension. Throughout this correspondence the appellants had at no time contended that they had ceased to be liable to give delivery. Even in the last letter of 31st December they had stated that but for the mills stating that they were unable to deliver the goods the balance of 58 tons (according to the defendants) remained to be supplied to the plaintiffs against their order. That correspondence therefore did not give rise to any occasion for the plaintiffs to set up the plea of extension of time after 15th September. Even in the previous correspondence all along the complaint was either for non delivery of a promised consignment and an excuse for not doing so in that connection. I must also point out that when the two



letters of demand were sent by the plaintiffs to the defendants on 23rd November, if the defendants' case was that the time for delivery had expired and there was nothing to be done, it is surprising how they could write the letter of 24th November 1942. Thereafter referring to the three letters previously received they stated as follows : "We have to state that we shall write to you in reply in due course." No further letter was sent by them till 31st December. If their contention that the time to perform the contract had expired, their natural reply should have been that the contract was at an end and there remained nothing to be done and the correspondence must cease. Instead of adopting that attitude they wrote the reply in the above-quoted terms. So far as the defendants themselves are concerned, the evidence is still more clear. In the minutes of the meeting of the Board of Directors held on 16th November 1942, (Ex. A7) Mr. H. M. Shah was appointed managing director and the directors resolved that the goods when received should be delivered to the plaintiffs according to the company's contract with them. That clearly negatives the contention that the contract had come to an end or that the time for performance had expired and there was no outstanding liability to give delivery under the contract. The documents therefore instead of supporting the defendants' case clearly support the plaintiffs' case. I agree with the conclusion of the learned trial Judge on the construction of the correspondence and the minutes of the meeting of the directors. I agree therefore that the plaintiffs had established the extension of time up to 31st December 1942.

On the question of damages the plaintiffs called Hyder Mohsin Kamberally. His evidence was severely criticised and it was contended that the same should not be accepted. It was pointed out that he was an interested witness and had made contradictory statements in the course of his evidence. With all this criticism one must recognise that excluding all his oral evidence which was not supported by documents, the plaintiffs had proved their case. The plaintiffs proved through this witness two sales evidenced by Exs. A13 and A14. There was no cross-examination of the witness about the genuineness of these sales. The sales of paper covered by these two memos not being disputed, *prima facie* they are legal transactions. If the defendants wanted to contend that they were illegal transactions, on which the Court should not base its judgment, it was their

duty to elicit the necessary facts to lead the Court to that conclusion. Unfortunately in the cross-examination of this witness facts were elicited to show that the sale was of paper described in the Government of India notification of 16th January 1942. That itself was not sufficient to invalidate the transactions, because that notification only controls sales by a paper mill to any person. Neither Ex. A13 nor Ex. A14 is a sale by a paper mill. The notification which might have helped the appellants was the notification of the Government of Bombay which controlled the prices of retail sales in the City of Bombay. It appears, however, that the fact that the notification controlled only retail sales was overlooked. The result is that throughout the cross-examination of this witness it is not suggested that Exs. A13 and A14 were for retail sales. The rest of the evidence of this witness also does not help the appellants. The witness was a manager of a firm who dealt ordinarily as wholesale merchants though they also made retail sales. From that, however, it cannot be stated that the two sales were retail. Looking at the quantities mentioned in the two sales it cannot be stated that they were wholesale or retail. A sale of 200 reams as stated by the witness would be of three tons, and according to him another sale of 200 reams was a wholesale transaction. If so, no conclusion could necessarily be drawn from the fact that one of the sales was of 176 reams and the other was of 60 reams. The latter sale was to the Indian Paper Agency, Karachi. If the name of the purchaser is of any help in arriving at the conclusion, it certainly does not help the appellants. In any event, on this vague evidence the appellants cannot be held to have established that the sales were proved to be illegal and the Court should not rely on those two sales.

The next step to be established is that the quality of the goods covered by those two sales was the quality of the goods sold under the contract in suit. The oral evidence of this witness alone may not be sufficient to prove this. But he has actually proved sales of goods of these two qualities at about the same date with a slightly lower price for the Star Bank or Bond paper. It is therefore proved that in the normal course of business the paper sold to the plaintiffs was not inferior to the Star Bank paper. Therefore, the evidence is sufficient to establish that the two sales were a proper guide for the Court to award damages. If the defendants were so minded, they were not prevent-



ed from leading evidence to show that there were other transactions at less rates. The Court has to do its best it can on the evidence before it, and as the two sales, the genuineness of which was not challenged, have been satisfactorily established and as none is shown to be illegal, on the evidence on record, there is no reason to differ from the conclusion of the learned Judge that the damages should be awarded on the footing of these two sales. I therefore agree that the appeal should be dismissed with costs.

**Per Curiam.** — Appeal dismissed with costs. Messrs. N. C. Dalal & Co. with whom Rs. 1,500 were deposited for security for costs under the Prothonotary's order dated 29th September 1945, to hand over the same to the respondents' attorneys without claiming any lien thereon towards the costs of the appellants in this case.

V.W./D.H

*Appeal dismissed.*

[Case No. 89.]

**A. I. R. (33) 1946 Bombay 437**

DIVATIA AND BAVDEKAR JJ.

*Bhausaheb Jamburao — Applicant*

v.

*Sonabai and others — Opponents.*

Civil Appln. No. 1230 of 1944, Decided on 17th July 1945, for leave to appeal to his Majesty in Council in F. A. No. 66 of 1941.

(a) Limitation Act (1908), S. 12—Reasonable time in applying for copies can be included in period requisite under S. 12—Each case is to be decided on its own facts.

Having regard to the fact that some time is bound to be taken up between the passing and the signing of the decree, if an applicant for leave to appeal to His Majesty in Council waits for a reasonable time in applying for copies, he would be entitled to include that time in the period requisite under S. 12. If, however, he waits for an unreasonable time in applying for copies, he will not be able to include that period within the requisite time. So that each case is to be decided on its own facts. (Interval of 26 days was held unreasonable): ('28) 15 A. I. R. 1928 P. C. 103 and ('40) 27 A. I. R. 1940 Bom. 415, *fol.* [P 438 C 2]

Limitation Act—

('42) Chitaley, S. 12, N. 10, Pts. 1. and 3.

('38) Rustomji, Page 208, Note: "Time requisite."

(b) Limitation Act (1908), S. 5 — Sufficient cause — Mistaken advice of law by pleader is sufficient cause.

Where the delay in applying for copies is caused by the erroneous advice received by an applicant for leave to appeal to His Majesty in Council from his advocate, such mistaken advice of the law is a sufficient cause for excusing delay in making the application: ('37) 24 A. I. R. 1937 P. C. 276 and ('18) 5 A. I. R. 1918 P. C. 135, *fol.* [P 439 C 1]

Limitation Act.—

('42) Chitaley, S. 5, N. 13, Pt. 7.

('38) Rustomji, Page. 106, Pt. 7.

(c) Civil P. C. (1908), S. 110—Substantial question of law.

Where the decision of the High Court is given in accordance with a previous Full Bench decision, which, however, is subsequently overruled by the Privy Council, that is a substantial question of law. [P 439 C 1]

C. P. C. —

('44) Chitaley, S. 110, N. 17.

('41) Mulla, Page 403.

G. N. Thakor and B. D. Belvi—for Applicant.  
D. L. Manerikar—for Opponents (Nos. 2 & 3.)  
B. M. Kalagate — for Opponent No. 4.

**Divatia J.** — This is an application by the appellant in F. A. No. 66 of 1941 for leave to appeal to His Majesty in Council against the decree dismissing his appeal and confirming the decree of the trial Court. The opponents have taken a preliminary objection that the application is beyond time. Their contention is that the period of limitation for filing the application is ninety days under Art. 179, Sch. 1, Limitation Act, 1908, to which the petitioner is entitled to add the period requisite for obtaining copies of the judgment and decree under S. 12, Limitation Act. Even so, the application is beyond time. The material dates are as follows: The judgment of this Court was given on 12th July 1943. The decree was drawn up by the office and signed by the advocates on the 19th. After the bill of costs was prepared by the Registrar's office it was shown to the advocates of both parties and signed by them on 6th September and thereafter on 8th September the decree itself was signed by the Registrar. The petitioner applied for certified copies of the judgment and decree on 2nd October, i.e., within the period of ninety days allowed under Art. 179. The certified copy of the decree was ready on 20th October and the certified copy of the judgment was ready on 4th November. Thereafter this application was filed on 26th November. The Registrar's office, relying upon a recent decision of this Court in 42 Bom. L.R. 872<sup>1</sup> held that the application was in time, and thereafter it was regularly numbered and placed for admission before this Court. A rule was issued and the opponents in answer to the rule have taken this preliminary objection that the petitioner was not entitled to the benefit of the period between the passing of the decree and the signing of it, and that therefore, the application is time-barred even if he be entitled to the period between the date of his application for certified copies and the dates when they were ready. On

1. ('40) 27 A.I.R. 1940 Bom. 415: 192 I.C. 275: 42 Bom. L. R. 872, Balappa Tammanna v. Dymappa Bhusappa.



behalf of the petitioner reliance was placed on the head-note of the decision in 42 Bom. L. R. 872<sup>1</sup> which is as follows:

"In presenting an appeal, the appellant is entitled to deduct from the period of limitation for filing his appeal not only the time requisite for obtaining a copy of the decree appealed against but also the time taken by the Court in signing the decree."

We think the head-note is too wide and is not in accordance with the actual decision in the case. The appeal in that case was filed very shortly after the application for the copy of the decree. It was held that the applicant was entitled to a reasonable time to apply for a copy and that he must have known that the decree would not be drawn up for a few days and until it was drawn up, he could not get a copy of it. It was further held that the petitioner was entitled to consult his pleader as to whether a copy was necessary and whether in any event there was likely to be an appeal. It was then observed (p. 873):

"... if we exclude the time between the date when the decree was pronounced and the date when it was signed, which is only fourteen days the appeal is within time."

This decision does not, in our opinion, lay down that in every case a party is entitled, as a matter of right, to the benefit of the interval between the passing of the decree and its being signed. All that was stated was that the party had applied for a copy within a reasonable time and that the period which elapsed between the passing of the decree and the signing of it was only fourteen days, and that also being a reasonable period it should be included in it. For the expression "the time requisite" reliance was placed on the recent decision of the Privy Council in 30 Bom. L. R. 842.<sup>2</sup> It was held in that case that the word "requisite" in S. 12, Limitation Act, means not only merely "required" but "properly required", and that it throws upon the pleader or counsel for the appellant the necessity of showing that no part of the delay beyond the prescribed period was due to his default, but he was not responsible for the time taken by the officials of the Court in preparing and issuing the two documents, viz., the copies of the decree and judgment. The expression "two documents" seems to have been construed by this Court in 42 Bom. L. R. 872<sup>1</sup> as meaning not merely the preparation of the certified copies of the judgment and the decree but also the preparing and signing of the

copy of the decree itself as also preparing a certified copy thereof. It was on that basis that it was held that the party would get the benefit of the time which was properly required for the preparation and issue of the copies. In the present case the decree was signed by the advocate of the appellant on 6th September and the application for copies was not made before 2nd October. In our opinion this interval of time cannot be regarded as a reasonable one, and no explanation is given for the lapse of that period. But the appellant relies on an affidavit made by him in this Court to the effect that the appellant was advised by his advocate that he was entitled as of right to the period between the drawing up of the decree and the signing of it, and that his application in that case would be in time. He says further in his affidavit that after the certified copy of the judgment was ready in November 1943, he saw his advocate and he told him that although the Registrar's office was at one time saying that the petition was beyond time, he would show to the office that it was well within time, and in fact the learned advocate seems to have persuaded the Registrar's office that it was within time on the strength of the decision in 42 Bom. L. R. 872.<sup>1</sup> It seems to us, however, that in holding that the application was within time, the Registrar's office merely relied upon the head-note in that case and not upon the actual decision. The head-note no doubt would give the idea that the parties would be entitled, as a matter of right, to the interval of time between the passing and the signing of the decree. That, however, is not the case. The Privy Council case in 30 Bom. L. R. 872<sup>2</sup> has been construed by this Court in 42 Bom. L. R. 872,<sup>1</sup> and in our opinion the effect of the law as stated by our Court is that having regard to the fact that some time is bound to be taken up between the passing and the signing of the decree, if the applicant waits for a reasonable time in applying for copies, he would be entitled to include that time in the period requisite under S. 12, Limitation Act. If, however, he waits for an unreasonable time in applying for copies, he will not be able to include that period within the requisite time. So that each case is to be decided on its own facts. In the present case, as I said, the period between the passing of the decree and the application for the certified copies is, in our opinion, unreasonable, and therefore the petitioner would not be entitled to the benefit of that period as a matter of right.

2. (28) 15 A. I. R. 1928 P. C. 103 : 6 Rang. 302: 55 I. A. 161 : 109 I. C. 1 : 30 Bom. L. R. 842 (P. C.), Jijibhoy N. Surty v. T. S. Chettyar Firm.



However, treating the application as beyond time, we think that in this case there is sufficient ground for excusing delay. It seems that the delay in applying for the copies has been caused by the advice, erroneous though it was, received by the applicant from his advocate in this Court. The learned advocate thought that the head-note in 42 Bom. L.R. 872<sup>1</sup> sufficiently represented the actual decision in the case, and relying upon the headnote, he thought that he was, as a matter of right, entitled to that period. It has been laid down by the Privy Council in 43 Bom. 376<sup>3</sup> that mistaken advice of the law by a pleader may be a sufficient cause for excusing delay, and to the same effect is another decision in A. I. R. 1937 P. C. 276,<sup>4</sup> where it is held that:

"Mistaken advice given by a legal practitioner may in the circumstances of a particular case give rise to sufficient cause within the meaning of S. 5, Limitation Act, though there is certainly no general doctrine which saves parties from the results of wrong advice."

We think that on the facts of this case the learned advocate on behalf of the appellant believed in good faith that on the head-note in 42 Bom. L. R. 872<sup>1</sup> his client was entitled to the period between the passing and the signing of the decree, and we, therefore, excuse the delay in making this application. On the merits it is conceded on behalf of the opponents that the amount or value of the subject-matter of the suit in the Court of first instance is Rs. 10,000 and upwards and the decree from which an appeal is sought to His Majesty in Council also involves a claim or question respecting property of the amount or value of Rs. 10,000 and upwards. As there are concurrent judgments of the trial Court and this Court in appeal, there must be a substantial question of law, and in our opinion there is a substantial question of law in this case. The decision of this Court is given in accordance with the previous Full Bench decision in I. L. R. 1937 Bom. 508.<sup>5</sup> That decision, however, has been recently overruled by their Lordships of the Privy Council in 46 Bom. L. R. 1.<sup>6</sup> and that is a

3. ('18) 5 A. I. R. 1918 P.C. 135 : 43 Bom. 376 : 46 I. A. 15 : 52 I. C. 897 (P.C.), *Sunderabai v. Collector of Belgaum*.

4. ('37) 24 A. I. R. 1937 P. C. 276 : 31 S. L. R. 672 : 169 I. C. 769 (P. C.), *Rajendra Bahadur v. Rajeshwar Bali*.

5. ('37) 24 A.I.R. 1937 Bom. 279 : I.L.R. (1937) Bom. 508 : 170 I. C. 393 (F. B.), *Balu Sakharan v. Lahoo Sambhaji*.

6. ('43) 30 A.I.R. 1943 P.C. 196 : I. L. R. (1944) Bom. 116 : I.L.R. (1944) Kar. P.C. 28 : 70 I. A. 232 : 210 I. C. 369 : 46 Bom. L. R. 1. (P. C.), *Anant Bhikappa v. Shankar v. Ramchandra*.

substantial question of law.

Accordingly, we give to the petitioner the certificate as prayed for in terms of para. 8 (a) of the petition. We make the rule absolute. In view of the fact that we have excused the delay, we direct that the petitioner should pay to the opponents the costs of this application.

V.R./D.H.

*Rule made absolute.*

[Case No. 90.]

**A. I. R. (33) 1946 Bombay 439**

LOKUR AND GAJENDRAGADKAR JJ.

*Govind Dhondo — Appellant*

v.

*Godubai Dhondo and others —*

*Respondents.*

First Appeal No. 169 of 1941, Decided on 24th July 1945, from decision of Joint Civil Judge (Senior Division) at Belgaum, in Civil Suit No. 244 of 1938.

(a) Hindu law—Adoption—Widow of regenerate class unchaste — Still she can adopt — Widow must perform physical act of taking and delegate performance of religious ceremonies to some one — Delegation need not be express.

A widow of one of the three regenerate classes, though unchaste or otherwise impure, can make a valid adoption, provided she performs the physical act of taking the boy in adoption and delegates the performance of necessary religious ceremonies to some one, and those ceremonies are duly performed by him. Such delegation need not be express: ('46) 33 A. I. R. 1946 Bom. 123; ('21) 8 A. I. R. 1921 Bom. 301; 22 Bom. 590 and ('42) 29 A. I. R. 1942 Bom. 12; *Rel. on.* [P 442 C 1]

Hindu Law—

('40) Mulla, Page 531, Pt. (t); Page 545, S. 490.

('38) Mayne, Page 207, Pt. (a).

(b) Hindu Law — Adoption — Nature of — Adoption is religious act—But giving and taking are secular and can be performed by *Shudras* — Adoption among *Shudras* need not be in presence of *Agni* — Among regenerate classes presence of *Agni* is required if change of *Gotra* is involved.

The adoption among the Hindus is essentially a religious act although it may involve secular benefits also and its main purpose is to secure spiritual benefit to the adoptive parents. Yet the giving and the taking which are essential for the completion of an adoption are held to be secular acts and can be performed even by the *Shudras*. As they have no *Gotras*, the adoption among the *Shudras* need not be performed in the presence of *Agni* and, therefore, no *datta homa* is necessary. Similarly, even among the three regenerate classes, when the adopter and the boy to be adopted are of the same *Gotra*, the adoption does not involve a change of *gotra* and the presence of *Agni* is not required. But where an adoption results in a change of *Gotra* such change must be made in the presence of *Agni*: ('15) 2 A. I. R. 1915 P. C. 7, *Foll.*

[P 442 C 2]

Hindu Law—

('40) Mulla, Page 516, Pt. (x), Page 544, Pt. (m); Page 545 Pt. (t).

('38) Mayne, Page 252, Pts.(e)(j), Page 253, Pt.(1).



(c) Hindu law — Adoption — *Datta homa* — Rites necessary for *homa* indicated — Unchaste widow is incompetent to perform rites — Widow should delegate performance of rites — *Bona fide* observance of ceremonial is what is necessary — Defects in ceremony — Doctrine of *factum valet* should be invoked — Adoption by unchaste widow — Performance of *homa* delegated to *R* — *R* retiring after *punyahavachana* — Thereafter widow performing ceremony as *yajaman* — Widow performing Ganapati-worship and uttering words of renunciation — Defects in ceremony and part taken by widow therein held did not affect validity of adoption.

Whenever the presence of any Hindu deity is desired, he is to be invoked, worshipped, offered food and then sent away. In the case of *Agni* these rites together are called *homa*. An unchaste widow is regarded as *patita* (degraded or impure) and undoubtedly she is incompetent to invoke, worship, feed or send away a deity. Therefore, some one deputed by her should perform these acts for her, and when he has secured the presence of *Agni*, she should perform the physical act of taking the boy in adoption in the presence of that *Agni*. She cannot delegate the act to any body else : 10 Bom. H. C. R. 241, 1 *Rel. on.*

[P 442 C 2]

But the Court should not attach undue importance to an error in the details of the rituals in the course of such an elaborate ceremony as *datta homa*. It is necessary to exact nothing more than a *bona fide* observance of the ceremonial in compliance with the prescribed procedure, and to avoid complicating the law of adoption with the subtleties of ceremonial law. It is to cure such flaws due to accident or ignorance that the doctrine of *factum valet* is to be invoked : ('15) 2 A. I. R. 1915 P. C. 7 and 11 Mad. 5 (F.B.), *Foll.*

[P 444 C 2; P 445 C 1]

A widow who was unchaste took a boy in adoption. She delegated the performance of *homa* to one *R* who however retired after *punyahavachana* and the widow herself acted as the *yajaman* throughout the subsequent ceremony. She performed the worship of Ganapati and when oblations were thrown into the fire by the priest who was appointed by her to perform the whole ceremony, she uttered the words of *tyaga* or renunciation, i. e., she told *Agni* that the oblations were for him and were not hers :

*Held* that the performance of the Ganapati worship being a non-essential part of the ceremony and uttering the words of *tyaga* by the widow being superfluous, since the priest himself must have repeated those words and asked the widow to utter them, these defects in *homa* ceremony were not fatal to the validity of the adoption and that the part taken by the widow was not such as would affect the validity of adoption. [P 445 C 1]

Hindu Law —

('40) Mulla, Page 545, S. 490.

('38) Mayne, Page 254, Para. 186.

(d) Hindu law — Adoption — Partition between surviving coparceners — Still widow of predeceased coparcener can adopt — Adopted son can claim share by repartition.

Though a partition between the surviving coparceners puts an end to the coparcenary, it cannot defeat the right of the widow of a predeceased coparcener to adopt a son to him, and if the adoption be otherwise valid, the adopted son is entitled to claim a repartition of the family property and

claim his share in it: ('43) 30 A. I. R. 1943 P. C. 196 and ('45) 32 A. I. R. 1945 Bom. 229 (F.B.), *Foll.* [P 445 C 1]

Hindu Law —

('40) Mulla, Page 533, S. 471.

('38) Mayne, Page 237, Para. 169.

(e) Hindu law — Joint family property — Presumption — Property purchased by member of joint family — Presumption as to property being joint arises only if there is adequate nucleus — Nucleus insufficient — Onus shifts from party alleging self-acquisition.

The mere existence of a nucleus of joint family property is not sufficient to raise a presumption that property purchased by a member of a joint family is joint family property; only the existence of an adequate nucleus will give rise to that presumption. It is, therefore, not enough to prove merely that there was some ancestral property to serve as a nucleus, but it must further be shown that the nucleus was such that the property in dispute could have been acquired with its aid. The existence of an insignificant nucleus is not enough to render subsequently acquired property a joint family property. It must be shown that the nucleus was such as could have reasonably formed the basis of the acquisition of the property. Hence the onus which lies on the party alleging self-acquisition shifts as soon as it is shown that the alleged nucleus was not sufficient to have reasonably formed the basis of the acquisition of the property in dispute : ('37) 24 A. I. R. 1937 Bom. 446 and ('38) 25 A. I. R. 1938 Mad. 841, *Rel. on.* [P 445 C 2; P 446 C 1]

Hindu Law —

('40) Mulla, Page 256, Pt. (j)

('38) Mayne, Page 374, Pt. (o)

(f) Hindu law — Joint family property — Blending — Presumption is against blending — Property acquired by member of joint family property without income from joint family — Onus lies on party alleging blending with joint property.

The presumption is against blending of self-acquired property with ancestral family property and when once it is shown that a particular property was acquired by a member of a joint Hindu family without the income from the joint family and, therefore, was his self acquisition, the onus lies upon the person who pleads that though it was separate property, it lost its separate character by reason of being blended with the other joint family properties. [P 446 C 1]

Hindu Law —

('40) Mulla, Page 246, S. 227.

('38) Mayne, Page 361, Para 288.

*G. R. Madbhavi and B. D. Belvi* — for Appellant.  
*K. R. Bengeri and P. V. Vase and A. G. Desai, and P. S. Malvankar* — for Respondents 1 and 2 to 9 respectively.

**Stone C. J.** — We feel unable to proceed with this matter, as there are certain matters of fact which are not before us, and so we propose to send the case back to the Joint First Class Subordinate Judge of Belgaum for him to take further evidence on the following issues :

(1) Whether it is necessary for the due performance of the *datta homa* ceremony that the widow could take part in it ?

(2) This Court having decided as a matter of law, that if it is necessary for the widow to take part in the *datta homa* ceremony, she can, though



unchaste, delegate her duties : whether that delegation can be made to the officiating priest or must be made to somebody else ?

(3) Whether on the facts of the present case delegation took place to the officiating priest, or whether the widow herself took part in the religious ceremony ?

(4) Whether the *datta homa* ceremony is necessary when the giver and taker belong to *Bharad-waj* and *Shrivatsa* gotras respectively ?

All parties to the appeal are to be at liberty to adduce any further evidence on these issues which they may see fit. Neither party dissenting, we direct that the findings be returned within three months after the record is received by the lower Court. The appeal will be adjourned *sine die*.

[On receipt of the findings on the above issues the appeal was further heard by Lokur and Gajendragadkar JJ.]

**Lokur J.** — This appeal arises out of a suit filed by the minor plaintiff through his natural father Mr. Jamakhandi, pleader, as his next friend for a declaration that he is the legally adopted son of Dhondo Govind Kulkarni, the deceased husband of defendant 1, and for partition and possession of his half share in the suit property, on the ground that it was the joint family property of the said Dhondo and defendants 2 to 9 and that Dhondo had died in union with them. The plaintiff alleged that Dhondo having died without issue in 1910, his widow defendant 1 had taken him in adoption with all the necessary ceremonies on 28th October 1936. Defendant 1, Godubai alias Annapurnabai, supported the plaintiff's claim, but defendants 2 to 9 denied both the fact of his adoption by her and its validity. They alleged that as defendant 1 was leading a life of unchastity after her husband's death, she was not competent to make any adoption and that the plaintiff's adoption was, therefore, invalid. They admitted that Dhondo had died in union with them, but claimed that some of the properties in suit were their self-acquisition. The trial Court held that they had failed to prove that any of the properties in suit was their self-acquisition and that the plaintiff had proved the factum of his adoption by defendant 1. But it dismissed the suit on the ground that the adoption was invalid by reason of defendant 1's unchastity after her husband's death. The plaintiff having appealed against the decree, this Court thought it necessary to have findings on certain issues regarding the performance of *datta homa* and its necessity for a valid adoption. Those findings have now been recorded by the lower Court and both parties

have put in objections to them. But before dealing with them, it is necessary to consider whether the alleged unchastity of defendant 1 has been established.

Defendant 1 was married to Dhondo in 1910, when she was only about 12 years of age, and he died of plague within seven or eight months thereafter before she had attained puberty. She then lived with her father at Shettihalli and did not go to her husband's village Kudnur. Her father having filed a suit for her maintenance, her husband's cousin Keshav, defendant 2's father, passed a deed of maintenance agreeing to pay her Rs. 50 a year from 1st March 1917. The amount was received by her father every year till his death in September 1923 and thereafter her brother used to receive it every year till the year 1926. According to the contending defendants, defendant 1 became pregnant a few months before her father's death and went to Belgaum, where she gave birth to a male child in the Civil Hospital on 16th June 1923. Thereafter she stayed on in Belgaum leading a life of shame, and again gave birth to a male child in the same hospital on 16th September 1928. As defendant 2 came to know this, he stopped paying maintenance to her. Defendant 1 thereafter went to live with Mr. Jamakhandi, whose son she is now claiming to have taken in adoption. [After discussing evidence about defendant 1's unchastity, the judgment went on.] This is sufficient to hold that defendant 1's unchastity after her husband's death is established. It is not necessary to determine whether defendant 1 was leading an immoral life on or about the date of the adoption. Her delivery after her husband's death made her *patita* (degraded) and it is not alleged that she took any *prayaschitta* (expiation) thereafter. She must, therefore, be held to have remained a *patita* woman till the date of adoption. It is not now disputed that defendant 1 did go through the formalities of adopting the plaintiff. Mr. Jamakhandi says that he gave the plaintiff in adoption to defendant 1 in the presence of numerous witnesses, including several leading pleaders of Belgaum, and that *datta homa* was duly performed. The factum of adoption is not now challenged, but it is contended that she was incompetent to make an adoption by reason of her unchastity and that the *datta homa* was not properly performed. Regarding the validity of an adoption by an unchaste widow the following four issues were sent down for findings :



(1) Whether it is necessary for the due performance of the *datta homa* ceremony that the widow should take part in it?

(2) This Court having decided as a matter of law, that if it is necessary for the widow to take part in the *datta homa* ceremony, she can, though unchaste, delegate her duties, whether that delegation can be made to the officiating priest or must be made to some one else?

(3) Whether on the facts in the present case the delegation took place to the officiating priest, or whether the widow herself took part in the religious ceremony? and

(4) Whether *datta homa* ceremony is necessary when the giver and taker belong to *Bharadwaj* and *Shrivatsa* gotras respectively?

On these issues, the lower Court has returned the following findings:

(1) Yes. (2) The delegation can be made to the officiating priest. (3) There was delegation to the officiating priest of most of the duties, and the widow also herself took part in the religious ceremony. (4) Yes.

After the remand we have had to consider the validity of an adoption by an unchaste widow of one of the three regenerate classes. In 47 Bom. L. R. 975<sup>1</sup> and following the rulings in 45 Bom. 459,<sup>2</sup> 22 Bom. 590<sup>3</sup> and 43 Bom. L. R. 920<sup>4</sup> we have held that a widow of one of the three regenerate classes, though unchaste or otherwise impure, can make a valid adoption, provided she performs the physical act of taking the boy in adoption and delegates the performance of necessary religious ceremonies to some one, and those ceremonies are duly performed by him. We have also observed that such delegation need not be express. The plaintiff has led evidence to show that these requirements were complied with by defendant 1 when he was taken in adoption by her, and for a proper appreciation of that evidence it is necessary to go a bit deeply into the rationale of the *datta homa* and the rituals involved in it. Among the three regenerate classes certain important ceremonies like *upanayana* (investiture with sacred thread), marriage and adoption, which effect a change in the status, are to be accompanied by a *homa*, that is to say, they must be done in the presence of *agni* (God of fire) who is one of the most prominent deities of the *Rigveda* and is described as follows:

"He is one of the most prominent deities of the *Rigveda*. He is an immortal, has taken up his

abode among mortals as their guest; he is the domestic priest, the successful accomplisher and protector of all ceremonies; he is also the religious leader and preceptor of the gods, a swift messenger employed to announce to the immortals the hymns and to convey to them the oblations of their worshippers, and to bring them down from the sky to the place of sacrifice." (*Apte's Dictionary*.)"

The adoption among the Hindus is essentially a religious act although it may involve secular benefits also and its main purpose is to secure spiritual benefit to the adoptive parents. Yet the giving (दान) and the taking (प्रतिग्रह) which are essential for the completion of an adoption are held to be secular acts and can be performed even by Shudras. As they have no *gotras*, the adoption among the Shudras need not be performed in the presence of *agni* and, therefore, no *datta homa* is necessary. Similarly, even among the three regenerate classes, when the adopter and the boy to be adopted are of the same *gotra*, the adoption does not involve a change of *gotra* and the presence of *agni* is not required [42 I.A. 135<sup>5</sup>]. But where an adoption results in a change of *gotra*, such change must be made in the presence of *agni*. Whenever the presence of any Hindu deity is desired, he is to be invoked (आवाहन), worshipped (पूजन), offered food (नैवेद्य) and then sent away (विसर्जन). In the case of *agni* these rites together are called *homa* and the ceremony to witness which he has been invited should be performed before his departure (विसर्जन). The details of these rites are to be found in various religious books like धर्मसिंधु, निर्णयसिंधु, प्रयोगपारिजात, संस्कारकौस्तुभ, and ब्रह्मकर्मसमुच्चय, and they are correctly described in the evidence of the plaintiff's expert witness Dattambhat recorded after the remand. An unchaste widow is regarded as *patita* (degraded or impure) and undoubtedly she is incompetent to invoke, worship, feed or send away a deity. It has, therefore, been held that some one deputed by her should perform these acts for her, and when he has secured the presence of *agni*, she should perform the physical act of taking the boy in adoption in the presence of that *agni*. In निर्णयसिंधु Kamlakarbhattacharya says (third edition, p. 183):— दत्तकत्वं होमसाध्यमुक्तम् । स्त्रियाश्च होमासंभवस्तथापि व्रतादिवद्विप्रद्वारा होमादिकारयेत् । (The ceremony of adoption can be accomplished only with the accompaniment of *homa*, and although women are incompetent to perform *homa*, like other

1. ('46) 33 A. I. R. 1946 Bom. 123 : 47 Bom. L.R. 975, Pratab Bawaji v. Bai Suraj.

2. ('21) 8 A. I. R. 1921 Bom. 301 : 45 Bom. 459 : 59 I. C. 800, Basvant Mushappa v. Mallapa Kallapa.

3. ('98) 22 Bom. 590, Laxmibai v. Ramchandra.

4. ('42) 29 A. I. R. 1942 Bom. 12 : 198 I. C. 488 : 43 Bom. L. R. 920, Ramu Bala v. Jana Dala.

5. ('15) 2 A. I. R. 1915 P. C. 7 : 39 Bom. 441 : 42 I. A. 135 : 29 I. C. 639 (P. C.), Bal Gangadhar Tilak v. Shrinivas Pandit.



religious vows, they should get *homa* performed through a priest). This is a general remark relating to all women. He adds : एवं शूद्रस्यापि स्त्रीशूद्राश्च सधर्माणः इति स्मृतेः (So also in the case of Shudras, as Smriti has laid down that women and Shudras are alike as regards religious ceremonies). In the same way it is necessary even for an unchaste woman to perform the requisite *homa* ceremony through a priest. To ascertain whether this was done we have to consider the different stages of the ceremony described in the evidence of Dattambhat. All these stages have to be gone through whether the adopter is a man or a woman. Mr. Desai for the respondents has taken us through the description of all these stages of *homa* and they may be summed up as follows :

(1) *Sankalpa* — Taking a vow to perform the particular ceremony.

(2) *Ganapati puja* — Ganapati who is said to be the remover of obstacles is worshipped at the commencement of every important religious undertaking.

(3) *Punyahavachan* — Pronouncing the day to be auspicious (पुण्याहं)

These three rites are preliminaries or *angas* as Dattambhat calls them, and do not form the essential part of the *homa*. Thereafter the adopter who is the *yajamana* or the worshipper has to appoint a priest well versed in rituals to officiate as *acharya* to guide or direct him in performing the *homa*. This is called —

(4) *Acharya Varana* — Choosing the *acharya*.

Dattambhat says that a *yajamana* is indispensable for every ceremony, but an *acharya* can be dispensed with if *yajamana* himself is conversant with the procedure and *mantras*. But usually even such a *yajamana* does appoint an *acharya* for performing the *homa* for him.

(5) *Acharya* and *Vishnu* are then worshipped and a *sankalpa* is made for feeding Brahmins and relations.

(6) *Homa Sankalpa* — Here begins the main *homa* ceremony with a view to perform the *datta homa*.

(7) *Sthandila Sthapana* — Preparing a piece of square ground for an altar.

(8) *Agni Sthapana* — Placing or kindling fire on the altar and invoking Agni.

(9) *Anvadhana* — Depositing fuel on the sacred fire.

(10) *Ajyotpavana* — This consists in sprinkling ghee on the sacrificial fire with two blades of *kusha* grass.

(11) *Havana* — Oblations, some of rice and some of ghee are to be thrown into the sacrificial fire and every time the *yajamana* says अग्नये इदं न मम। (This is for *agni* and not mine)

In the case of all other deities food or *naivedya* is merely to be presented and thereafter eaten by the worshipper and his relatives. But in the case of *agni* he consumes the oblations and reduces them to ashes leaving nothing to the *yajamana*. Hence the *yajamana* has to utter these words of *tyaga* or renouncement.

(12) This is followed by *vibhuti grahana*. — putting out the fire and taking the ashes, श्रेयोदान and श्रेयोग्रहण — conferring the merit of the *homa* on the *yajamana* and कृष्णार्पण or ईश्वरार्पण — resigning everything in favour of God.

The actual adoption which consists in the physical acts of दान (giving) and प्रतिग्रह (taking) is performed in the presence of *agni* usually between *ajyotpavana* and *havana*. At that time, after worshipping Ganapati, the giver places the boy on the lap of the taker saying "Receive my son" and the taker then says "I accept him" प्रतिगृह्णामि.

All these rites were gone through when defendant 1 took the plaintiff in adoption. But being an unchaste widow she was incompetent to take part in any of the religious acts. She did delegate the performance of *punyahavachana* to one Rangappa. But it appears that this Rangappa, her deputy, retired after *punyahavachana*, and then defendant 1 herself acted as the *yajamana* throughout the subsequent ceremony. Mr. Jamakhandi, the plaintiff's next friend, who is himself a pleader, never alleged in the plaint, or at any time before the remand, that defendant 1 had delegated the performance of religious ceremonies to any one. After remand he alleged that she had delegated them to Shripadbhatji by appointing him as *acharya*. He means to suggest that *acharya varana* itself amounts to such a delegation. That is not wholly incorrect, since *acharya varana* is the selection of a priest to guide the *yajamana* in the performance of the *homa*. Mr. Desai contends that *acharya varana* does not amount to delegation of the religious duties to be performed by the *yajamana* himself and that the *acharya* is merely to recite *mantras* and get the rites performed by the *yajamana*. Shripadbhat says that when oblations were thrown into the fire by him it was defendant 1 herself who uttered the words "अग्नये इदं न मम।" eleven times and that she herself acted as the



*yajamana* throughout the *homa* ceremony. The reason is obvious as Dattambhat says that the adopter has to act as *yajamana* although he (*yajamana*) may have appointed an *acharya*. Shripadbhat did not know that defendant 1 was a *patita* woman and had no reason to think of asking her to depute some one else to perform the duties of the *yajamana*. He says :

"At the time of the *datta homa* ceremony I did not know that defendant 1 was unchaste. I admit that a Brahmin unchaste widow is unfit for association (*vyavahara-bahya*). Had I known that defendant 1 was unchaste, I would not have got her to perform the various acts and to repeat the various *mantras* and words which she did during the ceremony. . . . A Brahmin who permits a religious rite to be performed by an unchaste widow himself becomes blameworthy."

According to Dattambhat a *yajamana* can delegate his duties to *acharya*, but he cannot substitute another *yajamana* in his stead. This may be true in the case of a *yajamana* who is not *patita*. He admits that one who is *patita* is *ayajya* (by whom a priest cannot get any religious act done). Hence such a *patita* cannot act as a *yajamana* and, therefore, if *homa* is to be performed, some one has to be deputed to act as a *yajamana*. In 22 Bom. 590,<sup>3</sup> a relative of the adopter had been so deputed. This delegation should be made from beginning of the religious rites, and in fact Rangappa had been deputed by defendant 1 at the time of *punyahavachana*. Thereafter he himself should have acted as the *yajamana* and defendant 1 should have been allowed only to perform the secular overt act of accepting the plaintiff in adoption in the presence of the sacrificial fire when he was offered by his father. Mr. Desai contends that she could not even do that act as she had to utter the word "प्रतिगृह्णामि" (I accept). But that word is not a ritual; it is only the Sanskrit equivalent of "I accept." She might as well have said that in her own language giving her assent to take the boy in adoption. This is only a physical act and in spite of her impurity she herself must do it and cannot delegate it to anybody else. As held in 10 Bom. H. C. R. 241<sup>6</sup> :

"Hindu law does not allow any one but the widow to act vicariously for the man to whom the son is to be affiliated; the widow is a delegate either with express or implied authority, and cannot extend that authority to another person so as to enable him to adopt a son to her husband."

Hence defendant 1 herself was bound to receive the plaintiff in adoption and her unchastity would not come in the way of

taking him on her lap when offered by his father in token of accepting him as her son. After her husband's death she alone could perform that act, but as their *gotras* were different, she had to perform it in the presence of *agni*, and we have to consider whether the adoption must be held invalid by reason of the part taken by her in the performance of the *homa*.

As regards *Ganapati-puja* Dattambhat says that a woman can perform it, but he does not say whether an unchaste woman can do so. It may be conceded that she cannot, as she is a *patita* woman. But it is only an *anga* or non-essential part of the ceremony and its omission does not vitiate the *homa* or the adoption. As soon as the *acharya* was selected, the performance of the *homa* was undertaken by him. The *sankalpa* (vow) taken by the *acharya* after he is selected is as follows :

यजमानानुज्ञया पुत्रप्रतिग्रहांगत्वेन विहित होमं कारिष्ये (धर्मसिंधु with Moghe's translation, sixth edn., p. 160, and also ब्रह्मकर्मसमुच्चय Chapter 113 p. 167) (With the assent of the *yajamana* I will perform the *homa* prescribed as part of the ceremony of the adoption of a son).

This shows that the *acharya* is responsible for the due performance of the *homa*, from inviting *agni* (आवाहन) until sending him away (विसर्जन). Shripadbhat did all these acts with appropriate rituals. The only flaw pointed out is that when he offered the oblations to the sacrificial fire defendant 1 uttered the words : "अग्नये इदं न मम" that is to say, she told *agni* that the oblations were for him, and were not hers. She need not have said this, as the oblations were actually offered by the *acharya* and as he was responsible for the *homa* he must have uttered those words himself. Her uttering of those words was ineffective and, therefore, superfluous. Such a superfluity could not vitiate the offering of the oblations (हवन). Moreover, if at all it was a flaw, it was subsequent to the giving (दान) and the taking (प्रतिग्रह) which were completed duly in the presence of *agni* immediately after *ajyot-pavana* and any subsequent irregularity in the ceremony would not invalidate the adoption. Moreover, we should not attach undue importance to an error in the details of the rituals in the course of such an elaborate ceremony. As observed by Lord Shaw in 42 I. A. 135<sup>5</sup> (p. 149) :

" . . . If one has recourse to the ancient writings when Brahminical influence was most predominant one finds the ceremonial part of adoption the subject of highly elaborate detail; and it is beyond all question that in the course of ages many of these

6. ('73) 10 Bom. H. C. R. 241, Bhagvandas Tejmal v. Rajmal.



details have disappeared as essentials within the legal sphere."

We entirely agree with the remark made by a Full Bench of the Madras High Court in 11 Mad. 5<sup>7</sup> that it is necessary to exact nothing more than a *bona fide* observance of the ceremonial in compliance with the prescribed procedure, and to avoid complicating the law of adoption with the subtleties of ceremonial law. It is to cure such flaws due to accident or ignorance that the doctrine of *factum valet* is to be invoked. Our attention is called to a remark appearing on p. 256 of Mayne's Hindu Law, Edn. 10, 1938, that where the performance of *datta homa* is essential, its omission cannot be cured by the application of *factum valet*. But in the present case *datta homa* was performed. Although the *acharya* himself had undertaken to perform the whole of the ceremony he allowed defendant 1 to perform the *Ganapati-puja* and utter the words of *tyaga*. The former was non-essential and the latter was superfluous since the *acharya* himself must have uttered the words of *tyaga* and asked defendant 1 to repeat them. We do not think that these defects in the *homa* ceremony are fatal to the validity of the adoption. We thus agree with the findings of the lower Court on the four issues sent down, and add to the finding on issue 3 that the part taken by the widow was not such as would affect the validity of the adoption. We, therefore, hold that the plaintiff's adoption by defendant 1 is proved and valid.

Defendant 1's husband Dhondo was a half sharer in the joint family, and the plaintiff is entitled to that share. Defendants 2 to 9 contended in their written statement that as there was a partition amongst them after the death of Dhondo, the family coparcenary had come to an end, and that defendant 1's right to adopt was thereby lost. This contention is no longer tenable in view of the rulings of the Privy Council in 46 Bom. L.R. 1<sup>8</sup> and of this Court in 47 Bom. L.R. 121.<sup>9</sup> In the latter case it has been held that though a partition between the surviving coparceners puts an end to the coparcenary, it cannot defeat the right of the widow of a predeceased coparcener to adopt a son to him, and if the adoption be other-

7. ('87) 11 Mad. 5 (F. B.), *Govindayyar v. Dorasami*.

8. (43) 30 A.I.R. 1943 P.C. 196 : I.L.R. (1944) Bom. 116 : I.L.R. 1944 Kar. P.C. 28 : 70 I.A. 232 : 210 I.C. 369 : 46 Bom. L.R. 1 (P.C.), *Anant Bhikappa v. Shankar Ramchandra*.

9. ('45) 32 A. I. R. (1945) Bom. 229 : I.L.R. 1945 Bom. 353 : 221 I. C. 279 : 47 Bom. L. R. 121 (F.B.), *Ramchandra Balaji v. Shankar*.

wise valid, the adopted son is entitled to claim a repartition of the family property and claim his share in it.

It is admitted that Annaji and Govind were undivided and that after Annaji's death his sons also continued to be coparceners of Govind and Dhondo. But it is urged that they were doing business separately and had acquired properties out of their savings independently of each other, so that whatever was so acquired by Annaji or any of his sons was their self-acquisition in which the plaintiff has no right to claim a share. A large number of documents have been produced on both sides to show how various properties were acquired and were dealt with by them. At this stage it may be pointed out that the only ancestral property which could yield any income was the two *Kulkarni watan* lands. The plaintiff's guardian says that at present the income from those lands may be about Rs. 200 or Rs. 250; while defendant 5 says that it may be about Rs. 100 or Rs. 125. There is no evidence to show what the income was when Annaji began to acquire the properties in suit. It may be assumed that the income may have been about Rs. 100 or Rs. 150 a year, even on the basis of the estimate of the present income given by the plaintiff's guardian. It is contended that as there was this nucleus of joint family property, all the acquisitions made by Annaji must be deemed to be joint family property and that the burden of proof that any of those properties were treated as Annaji's self-acquisition lies upon the contending defendants. This position was realized by the lower Court and the issue on this point was so framed as to throw the burden of proof on the defendants. But the legal position is not that the mere existence of a nucleus is sufficient to raise a presumption that property purchased by a member of a joint family is joint family property, but that only the existence of an adequate nucleus will give rise to that presumption. This has been the subject of several decisions of different High Courts. But it is not necessary to deal at length with the case-law on this point since its result has been correctly stated by this Court in I.L.R. (1937) Bom. 708<sup>10</sup> in the following terms (p. 708) :

"If there is a joint family, which possesses a nucleus of joint family property, then property acquired by a member of that family is presumed to be joint family property. The nucleus of joint family property necessary to give rise to the pre-

10. ('37) 24 A.I.R. 1937 Bom. 446 : I.L.R. (1937) Bom. 708 : 171 I. C. 623, *Babubhai Girdharlal v. Ujamlal Hargovandas*.



sumption must be family property from which the purchase money for the property in dispute might have been derived wholly, or at any rate in considerable part. The mere possession of joint family property at the date of the purchase of the property in dispute is not enough to raise the presumption that the property is joint family property."

The same view was expressed in I.L.R.(1938) Mad.696.<sup>11</sup> It is, therefore, not enough to prove merely that there was some ancestral property to serve as a nucleus, but it must further be shown that the nucleus was such that the property in dispute could have been acquired with its aid. The existence of an insignificant nucleus is not enough to render subsequently acquired property a joint family property. It must be shown that the nucleus was such as could have reasonably formed the basis of the acquisition of the property. Hence the onus which lies on the party alleging self-acquisition shifts as soon as it is shown that the alleged nucleus was not sufficient to have reasonably formed the basis of the acquisition of the property in dispute. It is not alleged in this case that although Annaji acquired the property out of his own earnings he treated it as joint family property and blended it with the ancestral family property. The presumption is against blending and when once it is shown that a particular property was acquired by a member of a joint Hindu family without the income from the joint family and therefore was his self-acquisition, the onus lies upon the person who pleads that though it was separate property, it lost its separate character by reason of being blended with the other joint family properties. No such allegation has been made on behalf of the plaintiff, and Mr. Madbhavi frankly stated to us that his contention was that the property in suit was never Annaji's self-acquired property and not that it had subsequently become joint family property by reason of its being blended with other joint family property. We need not, therefore, consider whether Annaji and his sons allowed the property in suit which they claim as self-acquired property to lose its separate character by allowing it to be treated as joint family property. [After dealing with questions of fact arising in the case, the judgment concluded.]

We, therefore, set aside the decree of the lower Court and declare that the plaintiff's adoption by defendant 1 Godubai is proved and valid. We further declare that out of the immoveable properties described in the

11. ('38) 25 A.I.R. 1938 Mad. 841 : I.L.R. (1938) Mad. 696 : 179 I.C. 344, Vythianatha v. Varadaraja.

plaint, only the first house in para. 1, cl. A, and the two Kulkarni watan lands, revision survey Nos. 256/5 and 311/7 at Kudnur, described in para. 1, cl. C, are joint family property, and that the plaintiff is entitled to a half-share in them. We direct that a preliminary decree for a partition of the said two lands under O. 20, R. 18 (1), and of the said house under O. 20, R. 18 (2), Civil P. C., shall be drawn up. The lower Court shall give the necessary directions for the partition of the house as required by O. 20, R. 18 (2), Civil P. C. We further order defendants 2 to 9 to pay Rs. 250 to the plaintiff as the value of his share in the household cattle and pots and pans described in para 1, cls. E and F of the plaint. The plaintiff shall recover from defendants 2 to 9 mesne profits of the share awarded to him from the date of suit, to be determined under O. 20, R. 12, Civil P. C. The rest of the plaintiff's claim is rejected. Parties to bear their own costs throughout.

V.R./D.H. *Appeal partly allowed.*

[Case No. 91.]

**A. I. R. (33) 1946 Bombay 446**

SEN AND RAJADHYAKSHA JJ.

*Narhari Ganpati Borkar—Accused*

v.

*Emperor.*

Confirmation Case No. 12 and Criminal Appeal No. 295 of 1945, Decided on 24th July 1945.

(a) Criminal trial — Misdirection — Murder trial by jury — Eye-witness not examined — Witness's deposition in committing Court not produced — Sessions Judge directing jury to consider non-examination of witness as not giving rise to adverse inference against prosecution — Charge held was vitiated by misdirection.

In a trial for murder with the aid of jury one of the eye-witnesses was not examined for the first two days of the hearing when he was present in Court. On the third day it was found that he had made himself scarce. His deposition in the Committing Magistrate's Court was not produced under S. 33, Evidence Act. In his summing-up the Sessions Judge told the jury that the fact that the witness had not been examined on behalf of the prosecution need not give rise to an adverse inference against the prosecution :

*Held*, that the Sessions Judge was wrong in telling the jury that the fact that the witness had not been examined need not give rise to an adverse inference. He ought to have pointed out the possible presumptions that might arise against the prosecution from the circumstances in the case relating to the non-examination of the witness and that he should have left it to the jury to act or not to act on any of the presumptions as they thought fit and that, consequently, the summing-up was vitiated by a serious misdirection. [P 450 C 1]

Cr. P. C. —

('41) Chitale, S. 297, N. 11.

('41) Mitra, Page 1018, Para. 915.



(b) Criminal P. C. (1898), Ss. 423(2) and 537—  
Erroneous verdict—Verdict must be erroneous  
in appellate Court's opinion—Trial by jury—  
Misdirection—Appellate Court can convict  
accused if evidence is sufficient—Else new  
trial may be ordered.

The provisions of S. 537 require the High Court, when exercising its powers of appeal under S. 423, to be satisfied that the misdirection has in fact occasioned a failure of justice. That being so, there can be little doubt that the words "such verdict is erroneous" occurring in S. 423 (2) mean that such verdict is erroneous in the opinion of the appellate Court : 26 Mad 1, *Rel. on.* [P 450 C 2]

Hence, where in the case of a trial by jury the summing up of the Sessions Judge suffers from a misdirection in telling the jury that the fact that an important eye-witness had not been examined need not give rise to an adverse inference, the High Court in appeal has to consider whether the evidence in the case is or is not sufficient to sustain the conviction, taking into consideration the fact that an important eye-witness has not been examined for the prosecution. If the evidence is sufficient to sustain the conviction the appeal of the accused has to be dismissed; but if the High Court finds the evidence more or less inconclusive i. e. such as no decisive pronouncement can be made in the absence of the eye-witness the proper course would be to order retrial: ('33) 20 A.I.R. 1933 Bom. 153, *Foll.*; 21 Cal 955 and 25 Cal 230, *Not foll.*; *Case law considered.* [P 451 C 2; P 452 C 1]

Cr. P. C. —

('41) Chitale, S. 423, N. 40, Pt. 12.

('41) Mitra, Page 1359, Para 1151.

(c) Criminal P. C. (1898), Ss. 374 and 375 (2)—  
Reference—Practice—Prisoner sentenced to  
death—Conviction on unanimous verdict of  
jury—Whole case is reopened on matters of  
fact and law.

With regard to the reference under S. 374, the practice of the High Court of Bombay is that where a prisoner has been sentenced to death, even though the conviction is on the unanimous verdict of the jury, the whole case is reopened before the High Court both on matters of fact as well as on matters of law: ('15) 2 A. I. R. 1915 Bom. 243 and ('21) 8 A. I. R. 1921 Sind 84 (F. B.), *Rel. on.* [P 452 C 1]

Cr. P. C. —

('41) Chitale, S. 376, N. 1, Pts. 1 and 2.

('41) Mitra, Page 1235, Para 1059.

G. N. Joshi — for Accused.

S. B. Jathar, Assistant Govt. Pleader —  
for the Crown.

**Sen J.**— This is a reference under S 374 of the Criminal P. C., 1898, by the Sessions Judge of Thana who has convicted the accused Narhari Ganpati Borkar under S. 302, Penal Code, 1860, and sentenced him to death. The accused has also appealed against the conviction and the sentence. The case against him was as follows:

The accused was originally working as a wood-cutter at Kalyan where he contracted intimacy with a Maratha woman named Shevanti, and they lived together for some time at Kalyan. Thereafter they went to Pen and lived there for some months. At the time of the Diwali of 1944, i. e. in October

1944, the accused went to his native place while Shevanti returned to Kalyan on or about 16th October 1944. There she met one Govind Ragho, a former acquaintance of hers and one Shankar Chhagan, a driver of a military lorry. She went thereafter to live with Shankar as his mistress in a chawl called Khadyachi chawl at Kalyan. Some time in October the accused came back to Pen and not finding his mistress there went to Kalyan on 27th October 1944. He learnt from Govind that Shevanti had been living as Shankar's mistress and he accordingly went to the room of the accused in Khadyachi Chawl. He asked Shevanti to go with him but she did not agree. On the night of 27th October he slept on the verandah of Shankar. The next day he repeated the question with similar result. Thereafter the accused told Shevanti that if she was not willing to go with him, she should return the ornaments which he had given her while she had been living with him. Shevanti at first refused to comply with this request also; but as he persisted in his demand the three ornaments which the accused had given her were returned to him on 29th October 1944. Shankar had stayed in his room and had not gone out for work for two or three days up to 29th October. On 30th October being assured by Shevanti that the accused would not come again to give her trouble, he went to his work, leaving Shevanti in the room. At that time certain people had been living in the room of Shankar, viz., one Vithal *alias* Vithoba, his wife Tulsi, their small child and a labourer Nana. Nana as well as Tulsi both used to work in a military camp near Kalyan. On 30th October Nana and Shankar had both gone out for work while Vithal had stayed in the room with Shevanti. At 5 or 5.30 P.M. the accused came there and suggested that as he and Shevanti were going to part they should go to the adjoining toddy-booth and have some drinks. The accused, Shevanti and Vithal went to the toddy-booth and consumed six bottles of toddy there. Thereafter Shevanti and the accused left the booth followed by Vithal. In the meanwhile Tulsi, wife of Vithoba, who had gone to a well behind the chawl for washing clothes had returned to the room, and shortly thereafter Nana also came there. Nana suggested to Tulsi that they should go to the military camp to get their wages. Tulsi then locked up the room and the two went out together. As they came on the main road leading to the town, she saw her



husband Vithoba coming and therefore asked Nana to shout to Vithoba to come and get the key from her. Nana accordingly called out to Vithoba and as Vithoba was coming towards them, Nana was heard to shout that Shevanti was being murdered. Both Vithoba and Tulsi then saw the accused stabbing Shevanti in the back, after which she fell down and the accused ran away. Vithoba ran after the accused, but he could not catch him. Vithoba then came back to where Shevanti had fallen on the ground, and he then suggested to Nana and his wife that they should go to get their wages but at the same time should inform Shankar about what had taken place. Shankar had left his work at about 6.30 P.M. and was returning home. He met Tulsi on his way and heard from her that Shevanti had been murdered by the accused. Going to the scene of the offence, he found Vithal sitting near the dead body of Shevanti. He made some attempt to find out the accused but was unsuccessful, after which he went to the police station along with Govind whom he had also met, and lodged the first information. Thereafter the Police Sub-Inspector came to the scene of the offence and after keeping a constable to watch the body recorded the statements of Vithoba and Tulsi on the spot. He also examined Nana the same night. Next morning the inquest on the dead body of Shevanti was held and a *panchanama* regarding the scene of the offence was made. Other witnesses were examined on that day and the succeeding day, search was made for the accused at several places and he was ultimately found in the house of his sister at Murti on 14th November 1944. His person was searched on 17th November and his *dhoti*, shirt and cap, which appeared to bear some blood marks, were attached. One Kharote of Kalyan who stated that the accused had pawned three ornaments with him on 30th October 1944, for Rs. 5 was also examined.

The accused was put up for trial on the charge of the murder of Shevanti, and the evidence in the case was mainly that of Shankar who had given the first information, Govind, Vithal, Tulsabai, Ramchandra, the owner of the toddy booth, the Medical Officer, who produced the *post mortem* notes, as well as the opinion of the Imperial Serologist and the Chemical Analyser regarding the clothes of the accused, and the Police Sub-Inspector.

The defence of the accused was that Shevanti had been in his keeping for about

twelve months, that he had gone to Khadyachi Chawl to take her from the room of Shankar, that he had asked her to come away with him or to return his ornaments, that she returned the ornaments which he pledged with Damodar Kharote and that thereafter he went to his native place in the Poona District. He denied that he had anything to do with the offence. The alleged eye-witnesses are Nana, Vithal and Tulsabai. Out of these three, Vithal and Tulsabai were examined in the Sessions Court but not Nana. Nana was present in the Court for the first two days of the hearing but later on his whereabouts could not be traced. With regard to the offence Vithal stated, after describing how the accused came to Shankar's room at about 5 P. M. and invited Shevanti and him to the toddy booth where they drank six bottles of toddy :

"After we had finished the drink the accused asked Shevanti to go with him. She replied that as he had taken from her the ornaments she would not come. Shevanti then got up and was walking ahead. The accused went behind her. I also got up and followed them. Shevanti and the accused were walking abreast by the road over the bridge. I was a little distance behind them. They sat on the road and were talking with each other. I was standing nearby on the road. Some time later Nana and my wife Tulsabai came near the bridge and they asked me to take the key of the room as they were going to the military camp for getting their wages. I went upto them and took the key. The accused and Shevanti were sitting on the road about fifty paces away from the toddy booth. I had gone about 40 paces from that place to take from Nana and Tulsabai the key of the room. Nana then shouted that the accused had stabbed Shevanti. I looked behind and saw that the accused was standing with an open penknife in his hand. I saw the accused stab Shevanti in the back. Then she fell down and the accused started running below the bridge. I ran to catch him but found that he had disappeared."

Tulsabai's evidence on this point is as follows :

"He (i. e., Nana) told me that I should go with him to the military camp to get our wages. I then locked the room and went out together. When we came near the road I asked Nana to shout to my husband who was seen by us with the accused and Shevanti near the bridge. Shevanti and the accused were sitting on a stack of metal and my husband was then walking away from near them. Nana then shouted to my husband that he should take the key of the room as we were going to get our wages. While my husband was coming towards us Nana shouted, 'Shevanti is killed.' I looked towards Shevanti and saw the accused stabbing Shevanti with a pen-knife in the back. The accused then ran away."

Shankar has stated that he was free from his work at 6.30 P. M., that as he was coming home he met Tulsabai at Shivaji Chowk and that she told him that Narahari, i. e.,



the accused, who had taken away the ornaments the previous day, had murdered Shevanti. If, therefore, Shankar's evidence is relied upon, the name of the accused was given out to him shortly after the offence by Tulsabai. The other parts of the prosecution case appear to us to be fully borne out by the evidence of the witnesses, the principal ones among whom I have already named. The medical evidence shows that the main injury found on the body of the deceased Shevanti was an incised wound in the back, there being a corresponding injury in the internal organs cutting through the visceral pleura. According to the Medical Officer this injury was *ante mortem* and had been caused with an instrument like a knife and the death was due to haemorrhage from the internal injury. He is also of opinion that this injury was sufficient in the ordinary course of nature to cause death.

There is no doubt, therefore, that this was a case of murder. The learned advocate for the accused-appellant has contended that the evidence in the case should not be considered sufficient to support the conviction. The three main grounds which he has urged in support of his contention are, firstly, that the learned Sessions Judge's summing-up is vitiated by a serious misdirection in that Nana Yeshwant Shinde, an alleged eye-witness, not having been examined by the prosecution, and the statement made by him in the Committing Magistrate's Court not having been put in, the learned Sessions Judge was wrong in directing the jury to consider the fact that the witness had not been examined as not giving rise to an adverse inference against the prosecution; Mr. Joshi's contention being that the jury's verdict must be deemed to have become erroneous owing to this misdirection; secondly, he has tried to show that there was considerable delay in the first information reaching the police after the commission of the offence; this, according to him, was a very suspicious circumstance, for the delay gave time to interested parties to connect false evidence; and he has also contended that the evidence shows that a deliberate attempt was made by several witnesses to minimise this delay; and thirdly, he has pointed out that there were a large number of important discrepancies in the evidence showing, according to him, that the evidence of the main witnesses is unreliable.

As to the question of misdirection, it is no doubt true that Nana, according to the prosecution case, was the first person to see

Shevanti being stabbed by the accused, and he ought, therefore, to have been examined by the prosecution in the early stages of the proceedings. The first date of the hearing was 12th June 1945, when the Circle Inspector, Shankar, Govind and Vithal were examined. On the next day the *panch*, the Police Head Constable, the Medical Officer and Tulsi were examined. On 14th June Ramchandra Bhoir, the toddy booth-keeper, two *panchas*, the Police Sub-Inspector, the Head Constable and an unimportant witness named Shripati were examined. On 15th June an application was made on behalf of the Crown stating that the prosecution witness Nana Yeshwant Shinde had been present in Court for two days but that on inquiries made it was learnt that he had left Kalyan due to the cholera epidemic prevailing there and that his whereabouts could not be ascertained in spite of efforts on the part of the Police Sub-Inspector and other constables. It was, therefore, prayed that his evidence might be cancelled as he could not be produced in Court. This application was supported by the evidence of the Police Sub-Inspector, exhibit 35, who stated that he had made inquiries at Kalyan the day before and on that day but that Nana could not be found and that his whereabouts were unknown. The evidence of Nana recorded in the Committing Magistrate's Court could not under S. 288, Criminal P. C., be put in and treated as evidence in the case. But there seems to be no reason why it was not possible to produce Nana's deposition in the Committing Magistrate's Court under the provisions of S. 33, Evidence Act. It seems clear from the application made on behalf of the Crown, Ex. 32, that Nana had been present in Court on 12th June when nearly all the important prosecution witnesses were examined. The prosecution have not explained why Nana was not examined on either of the two days when he was present nor why his deposition recorded in the Committing Magistrate's Court was not put in as evidence in this case. It seems to us that these circumstances are capable of giving rise to at least two presumptions against the prosecution in this case, first, that the prosecution was reluctant to examine this witness as he was not going to support their case, and secondly, that Nana had made himself scarce in order that he might avoid saying what he did not wish to say or that he did not want to antagonise the prosecution by stating what he knew. Either of these presumptions can arise



against the prosecution. It seems to us, therefore, that the learned Sessions Judge was wrong in telling the jury that "the fact that any witness has not been examined on behalf of the prosecution need not give rise to an adverse inference against the prosecution and you have to decide the truth or reliability of the evidence of the witnesses who have been examined." In our opinion the learned Sessions Judge ought to have pointed out the possible presumptions that might arise against the prosecution from the circumstances in this case relating to the non-examination of Nana and that he should have left it to the jury to act or not to act on any of such presumptions as they thought fit.

We have before us the proceedings of the case submitted to us under S. 374, Criminal P. C., as well as the appeal preferred by the accused against his conviction and the sentence passed upon him. Under the proviso to S. 376 "no order of confirmation can be made until the period allowed for preferring an appeal has expired, or if an appeal is presented within such period, until such appeal is disposed of. It is, therefore, our duty first to dispose of the appeal and then to deal with the reference under S. 374, Criminal P. C.

Under S. 423 (2) this Court can alter or reverse the verdict of a jury, only when it is of opinion that such verdict is erroneous owing to a misdirection by the Judge, or to a misunderstanding on the part of the jury of the law as laid down by him. We have already held that the summing-up of the learned Sessions Judge suffers from an important misdirection by the Judge. Before, therefore, we can alter or reverse the jury's verdict, it will be necessary to find whether the verdict of the jury is erroneous owing to such misdirection. In this connection a reference to S. 537 would be useful. That section lays down that subject to the provisions thereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on appeal on account of any misdirection in any charge to a jury unless such error, omission, irregularity, or misdirection has in fact occasioned a failure of justice. The words "in fact" were expressly inserted into the Code of 1898. It has been remarked in 26 Mad 1.<sup>1</sup> that those words were so introduced "apparently in order to emphasise the duty of the Court to go into the merits before interfer-

ing in consequence of a misdirection or other error." Prima facie, therefore, the provisions of S. 537 require the High Court, when exercising its powers of appeal under S. 423, to be satisfied that the misdirection has in fact occasioned a failure of justice. If that be so, there can be little doubt that the words "such verdict is erroneous" occurring in S. 423 mean that such verdict is erroneous in the opinion of the appellate Court. In 21 Cal. 955<sup>2</sup> it was held that where a verdict is vitiated owing to misdirection by the Judge, the Appeal Court has no option but to set aside the verdict and direct a retrial, because

"were the appeal Court to go into the facts in such a case, it would be substituting the decision of the Judges of that Court for the verdict of the jury, who have the opportunity of seeing the demeanour of the witnesses and weighing the evidence with the assistance which this affords, whereas the Judges of the Appeal Court can only arrive at a decision on the perusal of the evidence."

An English case, (1894) A.C. 57,<sup>3</sup> was relied on in support of this proposition. This case was followed in 25 Cal. 230<sup>4</sup> where it was held that where there has been a misdirection, the provisions in S. 423 (d) and S. 537, Criminal P. C., did not require that the Court was to go through the facts and find for itself whether the verdict was erroneous upon the facts. These two cases were decided in 1894 and 1897 respectively, i.e. prior to the amendment of 1898. The view taken by our High Court, however, in 19 Bom. 749<sup>5</sup> was that when a part of the evidence which had been allowed to go to the jury was found to be irrelevant and inadmissible, it was open to the High Court in appeal either to uphold the verdict upon the remaining evidence of the record or to quash the verdict and order a re-trial. It was there held that the law as settled in England and as stated in (1894) A.C. 57<sup>3</sup> with reference to the granting of new trials where evidence had been improperly admitted, did not apply to India; and their Lordships expressly dissented from the decision in 21 Cal. 955.<sup>2</sup> In 27 Bom. 626<sup>6</sup> the trial having been by a jury in the Sessions Court, it was held that there had been misdirection in the case and their Lordships raised the question whether

1. ('02) 26 Mad. 1, *Emperor v. Edward William Smither*.

2. ('94) 21 Cal. 955, *Wafadar Khan v. Queen-Empress*.

3. (1894) 1894 A.C. 57 : 69 L.J.P.C. 41 : 69 L.T. 778, *Makin v. Attorney General for New South Wales*.

4. ('98) 25 Cal. 230, *Ali Fakir v. Queen-Empress*.

5. ('95) 19 Bom. 749, *Queen-Empress v. Ramchandra Govind*.

6. ('03) 27 Bom. 626, *Emperor v. Waman*.



the verdict could be pronounced to be erroneous owing to the misdirection. They referred to the decision of Melvill J. in 6 Bom. H. C. R. Cr. 47<sup>7</sup> and holding on the basis of that decision that the verdict of the jury had been so far invalidated that the appellate Court could not any longer accept it as a conclusive decision on the facts, they said (p. 636) :

"It is competent to us, under circumstances, to consider whether, after excluding the evidence wrongly admitted, the rest of the evidence is sufficient to sustain the verdict and to determine the appeal : See *Queen-Empress v. Ramchandra*, Criminal Ruling No. 11 of 1895.<sup>5</sup>"

It seems to us, therefore, that they interpreted the word "erroneous" as meaning invalidated by reason of the misdirection to such an extent that the Appellate Court could not any longer accept it as a conclusive decision on the facts. In 6 Bom. H. C. R. Cr. 47<sup>7</sup> Melvill J. had observed as follows (p. 50) :

"The duty of the Appellate Court is, in my opinion, first to consider whether the evidence improperly admitted is material, and such as is likely to have exercised a prejudicial influence on the minds of the jury. If it be so, then, as it is impossible to know the exact amount of weight which the jury attached to the particular evidence in question, their verdict is so far invalidated that the Appellate Court cannot any longer accept it as a conclusive decision on the facts. . . . If the Appellate Court thinks that the verdict of the jury is founded, in part, upon evidence which should not have been admitted, or that the appellant has been prejudiced by some misdirection or omission of proper direction on the part of the Judge, the Appellate Court is at liberty to treat the case as if it had been tried by the Judge with the aid of assessors. . . ."

The effect of this view is hardly distinguishable from the view that it is the High Court which has to see whether the verdict of the jury is erroneous on the facts owing to the misdirection. This is the view of the Calcutta High Court in 29 Cal. 782<sup>8</sup> and 59 Cal. 1361.<sup>9</sup> The first of these cases relied on an earlier case reported in 5 W. R. Cr. 80<sup>10</sup> where the following rule had been laid down in a Full Bench case by Peacock C. J. (p. 90) :

"It would tend to defeat, and not promote justice, if a verdict of guilty were set aside, and a new trial granted, for a defective summing-up with reference to the weight of evidence in a case in which the High Court would, upon the evidence

given on the trial, have affirmed a conviction, if, instead of a trial by jury, the trial had been before a Judge and Assessors it appears to me that the question to be considered is not whether, upon a proper summing-up of the whole evidence, a jury might possibly have given a different verdict, but whether the legitimate effect of the evidence would require a different verdict."

In 59 Cal. 1361<sup>9</sup> it was held that under S. 423 (2), Criminal P. C., the High Court would not interfere unless the Judge's misdirection had caused the jury to come to a conclusion which was in fact wrong. In 26 Mad. 1<sup>1</sup> the case in 5 W. R. Cr. 80<sup>10</sup> was followed in preference to the cases in 21 Cal. 955<sup>2</sup> and 25 Cal. 230<sup>4</sup> and their Lordships observed (p. 16) :

"We cannot say that there has, in fact, been a failure of justice without considering the credibility of the evidence, and I think it would be unreasonable, and contrary to the express direction of S. 537 to hold that once a misdirection, even though it be an important one—is established we are bound mechanically to order a re-trial, even though in our judgment the evidence for the prosecution is untrustworthy."

It was objected in that case that the High Court, not having an opportunity of observing the demeanour of the witness, was at a disadvantage in weighing the evidence and that in weighing the truth of the evidence, the High Court were assuming the functions of the jury. Their Lordships' answer to this argument was that this was a duty so frequently cast on Judges of High Courts in India that no adverse argument could be drawn from it, and they referred in this connection to S. 307, Criminal P. C., as a section which imposed on the High Court the duty of itself trying jury cases. The latest case decided by our High Court which we have been able to find on the point under consideration is 35 Bom. L. R. 174<sup>11</sup> where it was held that :

"In the case of a trial by jury, the appellate Court has power, in the event of any misdirection or admission of inadmissible evidence, either to convict or acquit the accused according as the evidence is or is not sufficient for conviction; or, where the facts have to be determined and the evidence is of such a character as to render it difficult to pronounce any opinion on its character without hearing the witnesses, a new trial may be ordered."

The question for us, therefore, to consider is whether the evidence in this case is or is not sufficient to sustain the conviction taking into consideration the fact that an important eye-witness has not been examined for the prosecution. If we find that the evidence is sufficient to sustain the conviction, the appeal will have to be dismissed;

11. ('33) 20 A. I. R. 1933 Bom, 153 : 138 I. C. 553 : 35 Bom. L. R. 174, *Emperor v. Ramchandra*.

7. ('69) 6 Bom. H. C. R. Cr. 47, *Reg v. Ramswami Mudliar*.

8. ('02) 29 Cal. 782, *Jamiruddi Masalli v. Emperor*.

9. ('32) 19 A. I. R. 1932 Cal. 474 : 59 Cal. 1361 : 139 I. C. 873, *Sarojekumar Chakrabarti v. Emperor*.

10. ('66) 5 W. R. Cr. 80 : Beng. L. R. Sup. Vol. 459 (FB), *In re Elahee Buksh*.



but if we find the evidence more or less inconclusive, i.e., such as no decisive pronouncement can be made in the absence of Nana, the proper course for us would be to order a re-trial. We must, therefore, now proceed to consider the evidence on merits. [His Lordship after considering the evidence on merits concluded thus:] The result of our appreciation of the evidence, therefore, on the question whether the murder has been committed by the accused is, firstly, that the evidence of the two eye-witnesses, Vithal and Tulsabai, is entirely reliable. As to Nana, it is not improbable that he was absent because of the reason actually given in the application, Ex. 92, viz., because there was cholera in the town of Kalyan. Even if he had not supported the prosecution case, we would have relied on the evidence of Vithal and Tulsabai and regarded the case against the accused as proved.

With regard to the reference under S. 374, Criminal P. C., it has been pointed out in 17 Bom. L. R. 1072<sup>12</sup> that the practice of this Court has been that where a prisoner has been sentenced to death, even though the conviction is on the unanimous verdict of the jury, the whole case is reopened before the High Court both on matters of fact as well as on matters of law, though there does not seem to be any considered case in which this has been held to be the law on the subject. There can, in our opinion, be little doubt that this practice is correct. A reference to S. 375, Criminal P. C., shows that when proceedings are submitted under S. 374, and the High Court thinks that a further inquiry should be made into, or additional evidence taken upon, any point bearing upon the guilt or innocence of the accused, it has the power to make such inquiry or take such evidence itself or direct it to be made or taken by the Court of Session. Sub-s. (2) of S. 375 lays down specifically that "such inquiry shall not be made nor shall such evidence be taken in the presence of jurors or assessors." This, it seems to us, is a clear indication that the whole case is reopened before the High Court on submission under S. 374, and that the High Court is bound to go into the facts as well as the law although the conviction is by the verdict of the jury. This view is in accordance with the decision in 15 S. L. R. 103<sup>13</sup> where it is held that a High Court has

power to substitute its own finding for the unanimous verdict of the jury in a trial for murder, when the sentence comes on for confirmation before the High Court. I have already stated that our conclusion is that the conviction of the accused under S. 302, Penal Code, is fully supported by the evidence in this case.

With regard to the sentence, the learned Sessions Judge has taken the view that the case does not show any extenuating circumstances and that the crime was committed "out of vengeance and some deliberation." We, however, do not think that there was any premeditation in the commission of the offence. When the accused invited Shevanti to go with him to the toddy booth, he took Vithal also with him. According to Vithal, the accused and Shevanti first left the room and thereafter the accused came back to call him. Vithal also has stated that there had been no quarrel between the accused and Shevanti before he took her to the toddy booth, nor had they any quarrel at the toddy booth. It is clear from the evidence that the accused had not given up the hope of inducing Shevanti to return to him to the last. Vithal saw them sitting together on a heap of metal shortly before the offence was committed. It appears to us that it was only when all his attempts to persuade Shevanti to come with him had failed that he got suddenly incensed (it is also to be remembered that he was under the influence of liquor) and with hardly any premeditation inflicted the fatal injury on the deceased. That being our view, we think that there are certain extenuating circumstances in this case, and the sentence of death is not the appropriate sentence to be inflicted on the accused. We, therefore, confirm the conviction of the accused under S. 302, Penal Code, and alter his sentence to one of transportation for life.

V.R./D.H. *Conviction confirmed.*

[ Case No. 92. ]

**A. I. R. (33) 1946 Bombay 452**

LOKUR J.

*Shrinivas Abaji Desai and others—  
Appellants*

v.

*Damodar Appaji—Respondent.*

Appeal No. 53 of 1943, Decided on 12th September 1945, from decision of Dist. Judge, Bijapur, in Appeal No. 85 of 1942.

Majority Act (1875), S. 3 — Person not domiciled in British India—Act does not apply —Age of majority is to be determined by law

12. ('15) 2 A.I.R. 1915 Bom. 243; 31 I.C. 994 : 17 Bom. L. R. 1072, Emperor v. Daji Yesaba

13. ('21) 8 A. I. R. 1921 Sind. 84 : 15 S. L. R. 103 : 64 I.C. 657 (F.B.), Crown v Gul Wd. Loung.



of his domicile.—Person domiciled in Jamkhandi State which has adopted Majority Act and Bombay Court of Wards Act—His estate taken by Court of Wards, Jamkhandi—He attains majority at age of 21—He can file execution application in British Indian Court within three years after attaining age of 21 under S. 6 read with S. 8, Limitation Act.

There is no doubt that the Majority Act is intended "to prolong the period of non-age" and fix the age of majority "in the case of persons domiciled in British India". Hence the Act is not applicable to those who, though, residing or having dealings in British India, are not domiciled there. In the case of such persons the age of their majority is to be determined by the law of their domicile. [P 453 C 2]

A person who is domiciled in Jamkhandi State, which has adopted the Majority Act as well as the Bombay Court of Wards Act, is governed by those Acts, and his age of majority is extended from 18 to 21 years if his estate was taken by the Court of Wards of that state under its superintendence before he was eighteen. Such a person is, therefore, entitled to the benefit of the extended period of limitation under S. 6, Limitation Act, and under that section read with S. 8 he can file an application for execution in a Court in British India within three years after he has attained the age of 21: (1869) 1 H. L. Sc. 441, 7 All. 490, (F.B.), and 19 Bom. 697, *Rel. on.* [P 454 C 1, 2]

#### Limitation Act—

('42) Chitaley, S. 6, Notes 24 and 36.

('38) Rustomji, page 121, Note: "Majority now determined by Indian Majority Act."

V. H. Gumaste—for Appellants.

N. S. Anikhindi—for Respondent.

**Judgment.**—This is an appeal from an order passed by the District Judge of Bijapur remanding the respondent's darkhast to the executing Court. The respondent Damodar Pote is a subject of Jamkhandi State and is domiciled in that State. He was born on 29th June 1916, and during his minority, the Court of Wards, Jamkhandi, took over superintendence of his estate, and obtained a mortgage decree in the Court of the First Class Subordinate Judge at Bijapur against the appellants in Suit No. 69 of 1929 on 24th July 1930. The Court of Wards then gave a darkhast to execute the decree in 1932, but it proved infructuous and the darkhast was disposed of on 31st January 1934. The provisions of the Majority Act, 1875, having been adopted by the Jamkhandi State, the respondent attained majority at the age of 21 on 29th June 1937. The Court of Wards then withdrew its superintendence on 1st July 1937, and the respondent presented this darkhast on 9th February 1940, to recover the decretal amount by sale of the mortgaged property. Although the decree itself showed that it had been obtained by the Court of Wards, the executing Court did not apply its mind to the question whether the

respondent attained majority at the age of 18 or 21, and dismissed the darkhast as time-barred, with the bare remark that "it was not shown how the darkhast was in time." The respondent appealed against that order and the learned District Judge held that the darkhast would be in time if the superintendence of the decree-holder's estate was assumed by the Court of Wards of Jamkhandi State before he attained the age of 18 years, and if the darkhast was presented within three years of his having attained the age of 21 years. The respondent has put in an extract from the birth register to show that he was born on 29th June 1916, but as these questions were not considered by the executing Court, the darkhast was remanded for disposal according to law.

It is now urged on behalf of the appellants that even assuming that the respondent was born on 29th June 1916, he should be deemed to have attained majority on 29th June 1934, since he, not being domiciled in British India, is not entitled to the benefit of S. 3, Majority Act, 1875. There is no doubt that the Majority Act, 1875, is intended "to prolong the period of non-age" and fix the age of majority "in the case of persons domiciled in British India." Hence the Act is not applicable to those who, though residing or having dealings in British India, are not domiciled there. In the case of such persons the age of their majority is to be determined by the law of their domicile. In (1869) 1 H. L. Sc. 441<sup>1</sup> decided by the House of Lords in 1869, Lord Westbury observed (p. 457) :

"The political status may depend on different laws in different countries; whereas the civil status is governed universally by one single principle, namely that of domicile, which is the criterion established by law for the purpose of determining civil status. For it is on this basis that the personal rights of the party, that is to say, the law which determines his majority or minority, his marriage succession, testacy, or intestacy, must depend."

In 7 ALL. 490<sup>2</sup> it was held that the Majority Act, 1875, being not applicable to European British subjects not domiciled in India, the law of their domicile determined their age of majority, and that in spite of S. 3 of the Act, they did not attain majority till the age of 21. It obviously leads to inconvenience and confusion if a person be a minor in one place and a major in another. Hence the civil status is always to be determined by the law of domicile, un-

1. (1869) 1 H. L. Sc. 441, *Udny v. Udny*.

2. ('85) 7 All. 490 (F.B.), *Robilkhand and Kumaun Bank v. Row*.



less there is any statutory provision to the contrary. The benefit of the extended period of limitation under S. 6, Limitation Act, can be claimed by a "minor" and under that section read with S. 8 he can file a darkhast within three years after attaining majority. The word "minor" is not defined in that Act. Those sections do not specify the age of majority, and if the Majority Act, 1875, is not applicable, the age of majority must be determined according to the law of domicile. Mr. Gumaste for the appellants contends that since the respondent cannot claim the benefit of the first part of S. 3, Majority Act, he must be deemed to have attained his majority at the age of 18 under part 2 of that section, whatever be his age of majority in the Jamakhandi State. If the respondent's age of majority be 21 in the place of his domicile, the Majority Act, 1875, is not intended to reduce the period of non-age of foreigners not domiciled in British India. If the first part of S. 3, is not applicable to the respondent, part 2 also is equally inapplicable. It is, therefore, necessary to see what is his age of majority according to the law of his domicile. In the Allahabad Full Bench case cited above, Oldfield J. observed (p. 501) :

"... the Legislature would appear, . . . by limiting the operation of the [Indian Majority] Act (Act 9 [IX] of 1875) to persons domiciled in British India, to have intentionally excluded from its operation persons not domiciled there, and to have left such persons to be governed by the law of their domicile."

The same principle was laid down by this Court in 19 Bom. 697,<sup>3</sup> where it was held that the question of the capacity of a person to enter into a contract is decided by the law of his domicile. Jamakhandi State, where the respondent is domiciled, has adopted the Majority Act, 1875, as well as the Bombay Court of Wards Act. The respondent is, therefore, governed by both those Acts, and his age of majority is extended from 18 to 21 years, if his estate was taken by the Court of Wards under its superintendence before he was 18.

It is pointed out that the decree which is sought to be executed was passed in respect of mortgaged property in Bijapur District and therefore the Court of Wards in Jamakhandi State could not take that property under its superintendence. But that does not alter the age of majority of the respondent. As soon as his estate, whatever it was, was taken over by the Court of Wards of Jamakhandi State, he became entitled to the

3. ('95) 19 Bom. 697, *Kashiba v. Shripat Narshiv.*

benefit of S. 3, Majority Act, as it was made applicable to all the subjects of Jamakhandi State. Hence according to the law of his domicile he was a minor until he attained the age of 21. He would, therefore, be entitled to the benefit of S. 6, Limitation Act, and could file the darkhast within three years after he attained the age of 21 years. Hence arises the necessity of the two issues framed by the lower appellate Court. The respondent has made an application (No. 695 of 1945) requesting that he should be allowed to put in certain documentary evidence with regard to the two issues sent down by the lower appellate Court. But those issues cannot be disposed of merely on documentary evidence and the judgment-debtor also would require an opportunity to meet them. Hence the question of limitation cannot be disposed of without a remand as ordered by the lower appellate Court. I, therefore, dismiss the appeal with costs and I dismiss the application summarily.

V.R./D.H.

*Appeal dismissed.*

[Case No. 93.]

**A. I. R. (33) 1946 Bombay 454**

KANIA AG. C. J. AND GAJENDRAGADKAR J.

*Prabhatsang Vaghela and others—*

*Plaintiffs—Appellants*

v.

*Bhagwatsang Jhala and others—*

*Defendants—Respondents.*

Second Appeal No. 86 of 1942, Decided on 14th August 1945, from decision of Dist. Judge, Ahmedabad, in Appeals Nos. 116, 117 and 118 of 1940.

(a) Second appeal—Question of law.

The proper inference to be drawn from the contents of documents is a question of law and the High Court can consider whether the conclusion arrived at by the lower Court is correct.

[P 455 C 2]

C. P. C. —

('44) Chitaley, S. 100, N. 29.

(b) Grant—Grant of land burdened with service—Resumption.

Where there is a grant of an office, the services of which are remunerated by grant of land, the lands are resumable at the option of the grantor; but where there is a grant of land burdened with service, the lands can be resumed (i) if there is a default on the part of the grantee in the performance of service or (ii) if there is a condition express or to be inferred from the circumstances of the case, authorising the grantor to resume the same at will. The condition which is supposed to exist must be a condition found in the grant, either on looking at the grant or by reason of the user. But it has to be a condition of the original grant. *Case law referred.*

[P 457 C 1]

(c) Evidence—Document written by claimant supporting his own claim or right kept in his file—Its contents not brought to opponent's notice—Opponent's rights are not affected.



If a document is not served on the other side and the contents thereof are not brought to the opponent's notice, merely because the claimant wrote something in his handwriting, which supported his own right or claim, and kept a copy in his file, that cannot in any way prejudice or affect the opponent's rights. [P 458 C 1]

*G. N. Thakor and B. G. Thakor*—for Appellants.

*H. C. Coyajee, N.M. Shah and H.M. Choksi*—for Respondent No. 1, heirs of Respondent No. 2 and Respondent No. 3.

**Kania Ag. C. J.**—These are three second appeals covered by one judgment of the District Judge at Ahmedabad. They arise out of three separate suits filed by the same plaintiffs, but against different defendants. The common question covered by the litigation was whether the plaintiffs, who were the *wantias*, were entitled to resume the lands from the defendants. The trial Court, after considering the evidence, both oral and documentary, held that the plaintiffs' contentions were not proved, and dismissed the suits. On appeal, the learned District Judge of Ahmedabad was of opinion that the oral evidence was not material. He considered the documentary evidence only for the purpose of determining whether the plaintiffs had established their contentions. In his view, the plaintiffs had succeeded in doing so. He, therefore, allowed the appeals and passed decrees in favour of the plaintiffs. The defendants have filed these second appeals.

[2] The material facts are these: The plaintiffs claimed that they were the *wantias* of the village Savlana in Viramgam Taluka and were the absolute owners of the fields and houses in the village along with defendant 5, who was stated to be a co-owner with them. These parties are described as *jhalas*. It was alleged that defendants 1 to 4 were in possession of the fields and houses as *jivaidar* servants and *chakars* of the plaintiffs and defendant 5. They stated that the fields were granted to the defendants on condition of rendering service to the *wanta-wallas*, and as they, defendants, were rendering services, they were permitted to enjoy the produce of the said lands. The plaintiffs contend that in case the defendants refused to do so, or the plaintiffs desired not to receive any further services, the plaintiffs could resume possession of those properties. It was stated in the plaint that the defendants had wrongfully refused to render services and set up title as absolute owners of the properties. In para. 8 of the plaint, it was stated that plaintiffs and defendant 5, and H. H. Shree Ghanshamsingh-

jee Saheb Bahadur of Dhrangadhra State were equal sharers in the said lands and that the Dhrangadhra Durbar had got as much interest in the said properties as that of the plaintiffs. Just as the defendants had been rendering services to the plaintiffs, similarly they were bound to render such services to the Dhrangadhra State and had been doing so. The plaintiffs referred to a document passed on 15th April 1913, in favour of the Dhrangadhra State. The plaintiffs claimed that they had filed the suit without joining the Dhrangadhra Durbar as a party, because the *sanad* of the *wanta* of Savlana was granted to them alone and in the Government records the lands stood in their name. The prayers were for possession of the lands mentioned in the plaint. The defendants' contention was that these lands were given to them for services already rendered several decades ago and they were the owners of the lands. The plaintiffs had no right to demand services. The defendants alleged that the reference to Dhrangadhra State was irrelevant as the Dhrangadhra State had no interest or right in the lands mentioned in the plaint. The parties went to a hearing with the result I have mentioned above.

[3] As these are second appeals, we are bound by the findings of fact of the lower appellate Court. In the present case, however, there is no difficulty on that point, because the learned District Judge has expressly stated that for his conclusion he has not relied on any oral evidence. At the end of para. 24 of his judgment, he has stated as follows:

[4] "... But in my opinion this matter must be decided not on oral evidence but on the documentary evidence in the case. . ."

[5] In our opinion, he was right because, as summarised by him, only one witness had mentioned relevant facts on behalf of the plaintiffs. The District Judge had considered the evidence of four witnesses called on behalf of the defendants and found that the case must be decided on documentary evidence. The conclusion drawn by the learned District Judge is thus on a perusal of the documents and the proper inference to be drawn from the contents thereof. The same is a question of law, and we have, therefore, to consider whether the conclusion is correct.

[6] The law on the point is clear. In respect of lands held under such circumstances, the Judicial Committee of the Privy Council had occasion to consider the point in 13



M.I.A. 438.<sup>1</sup> Their Lordships stated as follows. (headnote) :

[7] Where the *sannads* created a service tenure and the lands were granted *pro servitis impensis et impendendis*, i.e., for the services, partly as a reward for past, and partly as an inducement for future, the grantees, though liable to forfeit the lands, if they wilfully failed in the performance of the duties imposed by the *sannads*, were not liable to have such lands resumed, on the ground that there was no longer occasion for the performance of the particular services required.

[8] In 28 Bom. 305<sup>2</sup> the Court laid down the following propositions in respect of lands held under such circumstances (headnote) :

[9] "The combination of an interest in land and an obligation as to service may fall under three heads *viz.* : (1) there may be a grant of land burdened with service, (2) there may be a grant in consideration of past and future service, and (3) there may be the grant of an office the services attached to which are remunerated by an interest in land. In either of the first two classes of grants it may be made a condition that the interest in the land should cease when the services are no longer required, but in the absence of a provision to that effect lands held under those grants are not resumable at will."

[10] "Where a plaintiff Inamdar asserts that he has a right to resume, he has to establish that the combination is such as permits of resumption and where there has been long and undisturbed possession enjoyed by the defendant and his predecessors, it will require strong evidence on plaintiff's part to make out his case."

[11] The matter came again to be considered by the Privy Council in 29 Mad. 52.<sup>3</sup> The headnote correctly sets out the material conclusion of their Lordships. It runs as follows :

[12] "Where a grant of land is subject to a burden of service, and is not a mere grant in lieu of wages, the grantor has no right to put an end to the tenure whether the services are performed or not, as long as the grantees are willing and able to perform the services."

[13] At p. 57, their Lordships observed as follows :

[14] "Without altogether adopting the further reasons adduced by the learned Judges in support of their view, their Lordships are of opinion that the considerations above stated are sufficient to establish that the grant in this case was a grant subject to a burden of services, and was not a mere grant in lieu of wages. This disposes of the case, for it is well settled that where lands are held upon such a grant 'as long as the holders of those grants are willing and able to perform the services, the zamindar has no right to put an end to the tenure whether the services are required or not.' "

1. (70) 13 M. I. A. 438 : 5 Beng. L. R. 529 : 2 Sar. 588 : 2 Suther 358 (P. C.), *Forbes v. Meer Mahomed Tuquee*.

2. ('01) 28 Bom. 305, *Lakhamgavda v. Keshav Annaji*.

3. (05) 29 Mad. 52 : 33 I A 46 : 8 Sar. 897 (P. C.), *Venkata Narasimha Appa Rao Bahadur v. Sobhanadri Appa Rao*.

[15] In 39 Bom. 68<sup>4</sup> it was held that in the Bombay Presidency where *desbhat vatan* lands are granted for the performance of personal services, no presumption can be made that the grantor has the option to determine the services, and to resume the lands. If a grantor takes up that position and claims that as his right, he must show either that the terms of the grant give him that right or if the terms of the grant are unknown, that the proved circumstances justify an inference that he has that right.

[16] Heaton J. observed as follows (p. 70):

[17] "In our Presidency the trend of decisions and what I may describe as the tone of thought in this Court, have always been in the direction of, within reason, protecting the rights of the occupants of lands and not increasing and exaggerating the rights of the inamdar or zamindar or whatever he may be termed. I think that the Bombay cases do undoubtedly disclose a reluctance to presume a right to resume lands where resumption involves ejectment . . ."

[18] A little later the same learned Judge observed as follows :

[19] "For the reasons that I have given, I find myself entirely unable to presume that in this presidency where there is a grant of land even for personal service, it is at the option of the grantor to determine the services and thereupon to resume the land."

[20] In 43 Bom. 37<sup>5</sup> Beaman J. in delivering the judgment, considered that heads (1) and (2) formulated in 28 Bom. 305<sup>2</sup> really fell under one head and the question in each case was, whether the land was granted with the obligation to render service or whether there was the creation of an office and the lands were given as remuneration for performing the services attached to the office.

[21] The last relevant decision which deserves notice in the present case is 33 Bom. L. R. 974.<sup>6</sup> In that case the Judicial Committee of the Privy Council held that in the case of a grant of an office to be remunerated by the use of land, the land will *prima facie* be resumable. On the other hand, in the case of a grant of land burdened with service *prima facie* it will not be resumable; but the terms of the grant or the circumstances in which it was made may establish condition of the grant that it was resumable. The onus is on the grantor to make out such a condition.

4. ('15) 2 A. I. R. 1915 Bom. 96 : 39 Bom. 68 : 28 I. C. 12, *Yellava Sakreppa v. Bhimappa Gireppa*.

5. ('18) 5 A. I. R. 1918 Bom. 115 : 43 Bom. 37 : 47 I. C. 330, *Chanarappa v. Bhima*.

6. ('31) 18 A. I. R. 1931 P. C. 157 : 132 I. C. 736 : 33 Bom. L. R. 974 (P. C.), *Lakhamgauda v. Baswantrao*.



[22] The learned District Judge has noticed all these relevant cases. At the end of para. 6 of his judgment he formulated the following proposition of law :

[23] " . . . . On a consideration of these authorities it seems to me to be clear that where there is a grant of an office, the services of which are remunerated by grant of land, the lands are resumable at the option of the grantor ; but where there is a grant of land burdened with service, the lands can be resumed (i) if there is a default on the part of the grantee in the performance of service or (ii) if there is a condition express, or to be inferred from the circumstances of the case, authorising the grantor to resume the same at will."

[24] I must point out for clarity that the condition which is supposed to exist must be a condition found in the grant, either on looking at the grant or by reason of the user. But it has to be a condition of the original grant. On a consideration of the documents, both the lower Courts came to the conclusion that in the present case it cannot be held that the original grantors created an office, which was remunerated by the income of these lands. It was pointed out that there was no creation of a recognised office such as the office of Mukhi, Patel, Desai, Karkun or Killedar. We agree with the conclusion of both the lower Courts that, in the present case, there was no creation of office which was remunerated by the income of the lands in suits. The plaintiffs have, therefore, to establish that the lands were granted by their predecessors-in-title to the predecessors-in-title of the defendants, burdened with services and with a condition that if the services were not rendered, the lands were liable to be resumed. In the present case, we are not concerned with the question whether the lands were resumable at will, because a demand was made on the defendants to perform the services. In the notice (Ex. 48) the plaintiffs complained that the defendants were very irregular in their service and had shown hostility in performing their duties. For that reason the plaintiffs desired to resume the lands. We do not think it is also necessary to consider whether the defendants had established their title to the lands, as claimed in their written statement. The plaintiffs having brought the suits, it is their duty to establish their title first before the defendants could be called upon to enter on their defence. It is common ground that these lands were originally granted to the defendants' predecessors 200 or 300 years ago, and have remained in possession of the defendants and their ancestors for that time. In the course of evidence it appears

to be stated that the Dhrangadhra Durbar came to have an interest in half the share of the *wanta* as a mortgagee or assignee about 125 years ago. That is noted by the learned District Judge in para. 11 of his judgment. It must, however, be noted that plaintiff 2, in giving evidence, stated as follows :

[25] "There are seventy Parajas in our *wanta*. We have passed a *kachha* document in favour of Dhrangadhra State. I have seen this document. I have got a copy of this document. The original is with the State. Ten Parajas of Brahmins have not been mentioned in this document. The ten Darajas of our *charkhed* have also not been mentioned in this document. The suit lands which are in possession of the defendants have also not been included in this document."

[26] It is, therefore, clear that in order to establish the plaintiffs' right to resume the lands in suit, they have got to establish that these lands were burdened with the obligation to render services, and there was a condition attached to the grant that if the services were not rendered, the lands were liable to be resumed. This point is material to be considered, because considerable evidence of the acts and omissions in respect of lands under the control of the Dhrangadhra Durbar has been adduced. Principally, it is on that evidence that the learned District Judge came to his conclusion in favour of the plaintiffs. I shall consider that evidence presently.

[27] Starting on the footing that the plaintiffs have to establish their title and right to resume the lands the best evidence would be of the plaintiffs' and their predecessors' acts, and the acts of the defendants and their predecessors, in respect of the lands in suit, or, in any event, in respect of the lands in the possession of the plaintiffs. Evidence in respect of lands under the control of the Dhrangadhra Durbar is not direct evidence regarding the lands in suit. The plaintiffs themselves have not given evidence to show that the defendants or their predecessors were bound to render any service, or, that the plaintiffs had a right to resume possession of the lands. They have also not produced any document to support either of these two aspects of the matter. The result is that if the evidence led in connection with lands held by the Dhrangadhra Durbar is excluded, neither the oral nor documentary evidence of the plaintiffs can support the judgment of the lower appellate Court. The question, therefore, is whether the documents produced by witnesses of the Dhrangadhra



Durbar support the plaintiffs' claim in respect of the lands in suit, when, as I have pointed out, the Dhrangadhra Durbar has nothing to do with the lands in suit. The learned District Judge has considered this evidence in different paragraphs of his judgment and for convenience I shall deal with the same in that order.

[28] In para. 11 of his judgment he dealt with a copy of a notice which was prepared under the direction of the Dhrangadhra State authorities and which was to be served on the defendants' predecessors. That was in 1912. The record contains no document before that year suggesting that there was any right to claim service from the defendants or their predecessors-in-title. The evidence further shows that although this notice was prepared, it was not accepted by the addressees. The result is that the notice remained as a document only in the file of the Dhrangadhra State. The contents of that notice are not brought home to the defendants and the statements contained therein cannot therefore bind the defendants. The learned District Judge has thought that although the notice was not served and accepted by the defendants, this notice showed that they were bound to render service and if they refused to render service, they were liable to have their lands resumed. We are unable to agree with that conclusion of the lower appellate Court. If a document is not served on the other side and the contents thereof are not brought to the opponent's notice, merely because the claimant wrote something in his handwriting, which supported his own right or claim, and kept a copy in his file, that cannot in any way prejudice or affect the defendants' rights. We are unable to agree with the conclusion of the learned District Judge as to the effect of the copy of this notice being found in the file of the Dhrangadhra Durbar. [His Lordship then examined certain documentary evidence and concluded:]

[29] That, in substance, is the whole documentary evidence found from the Dhrangadhra Durbar files on which the learned District Judge has relied. That documentary evidence falls into two parts. It consists either of documents of the State itself to which the defendants or their predecessors were not parties. They were written behind the back of the defendants and their predecessors. It is obvious that statements found in such documents about the obligation of defendants to render service cannot be evidence against the defend-

ants. The rest of the documents are urged as admissions. As we have pointed out, the alleged admissions are made by two persons and they cannot bind the defendants as the signatories were not, in law, authorised to make any admission on behalf of the defendants. The documents relied upon can only be put forth as instances in which the right to claim service was put forth and accepted or admitted. As we have pointed out, the evidence is of a nature which does not support this contention.

[30] The plaintiffs also relied on the *sanad* which was issued to them. That, however, does not materially help the plaintiffs because by itself it is only a decision in respect of the liability to pay revenue between the plaintiffs and the Government. It does not decide the title to land, much less the liability of the defendants to render service to the plaintiffs. It was urged that no portion of the land was sold at any time by the defendants or their predecessors. That again is not evidence from which an agreement to render service could be spelt out.

[31] In our opinion, the documents relied upon by the plaintiffs do not establish the plaintiffs' claim. They do not relate to the lands in suit. Moreover, we have no evidence of the terms on which the Dhrangadhra Durbar obtained possession of these properties from the Jhalas several years ago. It appears to be arguable that on every transfer by the Jhalas, the Vaghelas are not bound to perform services claimed by the transferees. The proposition which is pressed on us is this: Suppose the Jhalas transferred one acre of land out of this *wanta* to a different party, and in that way fifty different owners residing in fifty different towns in India acquired the rights as transferees of the Jhalas, would the Vaghelas be bound to render the services claimed in these fifty different towns because the original Jhalas had transferred the land to these fifty different parties? In this case it is not necessary to decide the question, and therefore, we express no opinion on the point.

[32] We should also point out that in the present case the plaintiffs had formulated in Ex. 52 the nature of services which the defendants had to render under the terms of the grant. That is, on the face of it, a grossly exaggerated list and there is no evidence to support the contention that at any time the condition was to perform the services stated in Ex. 52. The services which as a result of the compromise the three signatories agreed to perform under Ex. 138 are of a far more limited nature. Having regard to our con-



clusion on the main point, it is not necessary to consider whether it is open to the plaintiffs to rely on proof of certain services rendered to the Dhrangadhra Durbar only to establish their claim to extract services as claimed in Ex. 52 in respect of the lands in suit and contend that the lands were granted to the defendants with the burden of rendering service and on condition that on failure to render the service, the lands were resumable. We think that the appeals should be allowed. The decree of the lower appellate Court is set aside and the decree of the trial Judge in each of the three suits is restored. The respondents will pay the costs of these appeals and the costs of the lower appellate Court.

D.S./D.H.

*Appeals allowed.*

[*Case No. 94.*]

**A. I. R. (33) 1946 Bombay 459**

STONE C. J. AND KANIA J.

*Raghunath Madhavlal — Assessee*

*v.*

*Commissioner of Income-tax*

*— Opposite party.*

Income-tax Ref. No. 5 of 1944, Decided on 26th September 1944.

(a) Income-tax Act (1922), S. 4 (1) (b) (iii) and second proviso—Applicability of second proviso to sub-cl. (iii)—Proviso does not apply to sub-cl. (iii)—Assessee not ordinary resident in British India—Income arising outside British India after April 1, 1933, but not in accounting year—Sum brought in British India in accounting year—Sum is liable to be assessed under sub-cl. (iii).

Although grammatically the second proviso to S. 4 (1) must apply to sub-cl. (iii) of S. 4 (1) (b) there can never be a case in which it in fact gives relief to any tax-payer, because under sub-cl. (iii) tax only attaches to a particular type of income, profits and gains, i. e. income, profits and gains brought into or received in British India during such, i. e., the account year, and the benefit given by the second proviso is not to operate in certain events; one of those events is that if the income, profits or gains are brought into or received in British India during such year. [P 460 C 2]

Where, therefore, the income of an assessee, who is a resident but not an ordinary resident in British India, arises outside British India after 1st April 1933, but not in the accounting year, and the sum is brought into British India in the accounting year, the sum is liable to be assessed in the assessment year under S. 4 (1) (b) (iii). [P 460 C 2]

(b) Interpretation of Statutes — Court is not concerned with policy of Legislature.

A Court is not concerned with the question of policy of the Legislature. The duty of a Court is merely to administer law as it finds. [P 462 C 1]

*Sir Jamshedji Kanga* — for the Assessee.

*M. C. Setalvad* — for the Commissioner.

**FACTS.** — The assessee, Raghunath Madhavlal, was an undivided Hindu family, represented by its manager, Raghunathdas

Anandram. The family had sources of income at Gangapur in the Hyderabad State and also at Ahmednagar and in Bombay in British India. The sources of income outside British India were agriculture, money-lending and grain business. In British India, they were similar at Ahmednagar, and cotton business in Bombay.

[2] The assessee was assessed to income-tax in British India for the charge year 1939-40 on Rs. 55,507. It included the amount of Rs. 29,310 which represented the income of the assessee in the Hyderabad State, earned after 1st April 1933, and before the accounting year. The item of Rs. 29,310 consisted of two items, Rs. 25,000 and Rs. 4,310. The first was a credit item brought into British India from the Hyderabad State in the year of account. In the other which was on account of sale of grain brought into British India from the Hyderabad State, there was an excess of Rs. 4,320 on the credit side.

[3] The Income-tax Officer included the item of Rs. 29,310 in the assessee's total income liable to tax. On appeal, the Appellate Assistant Commissioner took the same view. On further appeal, the Appellate Tribunal was of opinion that the item of Rs. 29,310 could not be included in the assessee's total income having regard to the second proviso to S. 4 (1), Income-tax Act, 1922, which governed the liability of a "not ordinarily resident" assessee, and directed that the amount of Rupees 29,310 should be excluded from the assessee's total income.

[4] At the instance of the Commissioner the Tribunal referred the following question to the High Court for opinion:

[5] "Whether, in the circumstances of the case, and on a true construction of the second proviso to sub-section (1) to Section 4, Income-tax (Amendment) Act, 1939, the amount of Rs. 29,310 was properly excluded from the respondent's total income charged to the tax in the assessment year 1939-40?"

[6] **Stone C. J.**—This is a reference under S. 66, Income-tax Act. The assessee is an undivided Hindu family. The assessment year is 1939-40 and the accounting year is S. Y. 1994. The assessee is a resident but not an ordinary resident and the total assessment was in the sum of Rs. 55,507 of which Rupees 29,310 is the amount of income in dispute. It is admitted that this arose outside British India and was brought into British India during the year of account, but the income did not accrue in the year of account but in the preceding year or years. The point is whether the second proviso of S. 4, sub-s. (1) of the Act qualifies sub-s. (3) of that



section. Section 4 is not an artistically drawn up section, and it is necessary to examine the structure of the whole of it in order to understand its full effect bearing in mind that there are three categories of persons, viz., non-residents, persons who are ordinarily residents and persons, who though residents, are not ordinarily residents. Section 4, sub-s. (1), commences by saying that the total income of any previous year of any person (i. e., all the three categories) includes all income, profits and gains from whatever sources derived which—(then there follow three alternative cases, the first alternative being) (a) are received or are deemed to be received in British India in such year by or on behalf of such person. Case (b) deals with the case in which the person is a resident in British India during such year and the income accrues or arises or is deemed to accrue or arise to him in British India during such year, or, accrues or arises to him without British India during such year. Sub-clause (iii) of that clause (viz., cl. (b) of s. 4 (1)) is relevant to the reference before us and runs as follows :

[7] "(iii) having accrued or arisen to him without British India before the beginning of such year and after the 1st day of April, 1933, are brought into or received in British India by him during such year."

[8] Clause (c) of s. 4 (1) deals with the case where such person is not resident in British India during such year and the income accrues or arises or is deemed to accrue or arise to him in British India during such year. These clauses are followed by three provisos. From the terms of the first proviso, it is clear that it does not operate either upon clause (a), cl. (b) (i) or cl. (c) because as the proviso itself shows it is to prevent tax being charged in the particular year there mentioned under sub-cl. (ii) and sub-cl. (iii) of cl. (b) at the same time. Leaving for the present the second proviso and passing to the third proviso it is also clear from its terms that that proviso cannot apply either to cl. (a) or to cl. (b) (i) or to cl. (c). Thus it is clear that although the three provisos are so arranged as to come at the end of the substantive part of sub-s. (1), the first and the third provisos apply only where they can be made to fit. With that introduction I now turn to the second proviso which is relevant to this case. It runs as follows:

[9] "Provided further that, in the case of a person not ordinarily resident in British India income, profits and gains which accrue or arise to him

without British India shall not be so included unless they are derived from a business controlled in or a profession or vocation set up in India or unless they are brought into or received in British India by him during such year.

[10] Clearly therefore this proviso applies to sub-cl. (ii) of cl. (b). The question is as to its application to sub-cl. (iii) of that clause. By sub-cl. (iii) of cl. (b) the total income there is included in the income of a resident person, profits and gains having accrued or arisen to such person without British India before the beginning of the account year and after 1st April 1933, and brought into or received in British India by him during that year. Therefore, sub-cl. (iii) catches income which is brought into or received in British India by the assessee during the year. Although grammatically the second proviso must apply to sub-cl. (iii) there can never be a case in which it in fact gives relief to any tax-payer, because under sub-cl. (iii) tax only attaches to a particular type of income, profits and gains, i. e. income, profits and gains brought into or received in British India during such, i. e. the account year, and the benefit given by the second proviso is not to operate in certain events, and one of those events is that if the income, profits and gains are brought into or received in British India during such year (the words used in sub-cl. (iii) of that clause and in the second proviso are similar so that in effect the proviso can only give relief to taxation under sub-cl. (ii) of cl. (b)). The difficulty appears to arise from a too ambitious attempt to make the same proviso to apply to totally different circumstances contained in the sub-clauses to which all three provisos are appended. In my judgment the Appellate Tribunal have not taken a correct view of the matter and the question referred to us must be answered in the negative. The assessee to pay the costs of the reference.

[11] **Kania J.**—The undisputed facts in this reference are that the assessee is an undivided Hindu family, classed as resident under S. 4A (b), but was not ordinarily resident under S. 4B (b) of the Act. It is found by the Tribunal that the sum of Rs. 29,310 in question was income which arose outside British India, but not in the accounting year. It is further found that the said sum was brought into British India in the account year. On these facts the question whether the sum of Rs. 29,310 is liable to be assessed in the assessment year is submitted for the Court's opinion.



[12] The answer depends on the true construction of S. 4. Sub-section (1) of that section provides that subject to the provisions of the Act the total income of any person in any previous year includes all income, profits or gains from whatever source derived. Then follow the three sub-heads under which different incomes are grouped. The first is income received or deemed to be received in British India in such year by or on behalf of such person. This is accepted by counsel on both sides as meaning "primarily received," i. e. received as income in the first stage. This clause will therefore cover income which is received in British India in such year, although it may or may not have arisen or accrued in that year. The second clause is material to the present discussion. It applies to a person who is "resident" in British India during such year. In that clause the income is classified under three heads: (1) which accrues or arises or is deemed to accrue or arise to him in British India during that year. That means that a resident whose income has arisen in British India during that year is to be taxed on such income. (2) Income which has accrued or which has arisen to him without British India during such year. Under this clause, all his world income for the accounting year is liable to be taxed under the Act. (3) The income having accrued or arisen to him without British India after 1st April 1933, but before the beginning of the accounting year, if it is brought into or received in British India by him during such year. Under this third clause his income prior to 1st April 1933, is not to be taxed in British India. Secondly his income of the accounting year is not taxable under this clause. It may be taxable under cl. (b), sub-cl. (ii). The third requisite is that it must be brought into British India during the accounting year.

[13] The next stage to be considered is to what relief a person who is not ordinarily resident within the meaning of S. 4B (b) is entitled. The Legislature has provided relief under the second proviso of S. 4 (1). The scheme is this. The taxing authorities ascertain the income of a resident under S. 4 (1) (b) under the three classes mentioned above, and then proceed to consider whether he is a person not ordinarily resident in British India. If the answer is in the affirmative they next proceed to consider what income, profits or gains are included in the total which accrued or arose to him without British India. Having done that, they have to delete the items of such income which arose or accrued

without British India. The next words are to show what part of that income could be roped in again thereafter. The proviso proceeds to provide that such income has to be excluded unless (1) "they" are derived from a business controlled in or profession or vocation set up in India. Therefore, if it is ascertained that the income excluded under either of the two heads, viz., 4 (1) (b) (ii) and (iii), was income derived from such business or profession or vocation, it should again come into the total income of the assessee. The second contingency is if "they" (meaning any item of the income excluded under the main part of the proviso) are brought into or received in British India by him during such year. If so, such income again becomes liable to tax. That, in my opinion, is the plain reading of the proviso.

[14] The Tribunal was pressed with the argument that if the proviso is so read, in no case covered by S. 4 (1) (b) (iii) a person not ordinarily resident can get relief. In their anxiety to believe that the Legislature contemplated the ground of relief in respect of all income which had accrued without British India, because those are the words used in the proviso—they construed the proviso to mean that if the income had accrued or arisen in the accounting year, and was brought into British India during such year, then only the income was liable to tax. This would involve reading in the proviso the words "in the year of account" at every place where the words "income accruing or arising without British India" occur. In doing so they overlooked the pitfall, that such reading would render the main proviso inapplicable to the income included under S. 4 (1) (b) (iii). The pronoun "they" occurring at two places in the proviso must be read as a substitute for "income which accrued or arose to him without British India." If the words "in the year of account" are to be read in that expression (as held by the Appellate Tribunal), it is clear that the proviso itself will not apply to the income included under S. 4 (1) (b) (iii), because in respect of income which had accrued during the year of account the sub-clause does not cover the case. In that view, the sum of Rs. 29,310, which will be included in the assessee's income under S. 4 (1) (b) (iii), will not be saved by the proviso itself and will continue to be included in his income.

[15] There is little doubt that this proviso could have been far better worded. If the intention of the Legislature was to give relief to a person not ordinarily resident in



British India in respect of income which arose without British India, only if he did not bring it within British India, nothing would have been more easy than to substitute the words "without British India" by "under S. 4 (1) (b) (ii)" in the proviso in question. Not having done so, and feeling that the words generally used were likely to cover both the income which had accrued or arisen to the person without British India (under the second sub-clause), and also under the third sub-clause, and not desiring to give relief in respect of the income which was taxable under the third sub-clause, they repeated the exact words which were used in the concluding part of the third sub-clause at the end of the proviso. The result is that a person not ordinarily resident in British India gets relief in respect of income which had accrued or arisen to him without British India only in respect of such income as he does not bring within British India. If he brought the income which had accrued after 1st April 1933, his case would be covered by S. 4 (1) (b) (iii), provided it was income which had accrued before the beginning of the accounting year. If it was the income which had accrued during the accounting year, his case would be covered by S. 4 (1) (b) (ii), and the income would be liable to be assessed only if it was brought into British India; otherwise under the main proviso it was saved.

[16] It was pointed out on behalf of the assessee that he was a non-resident altogether for four years before the year of assessment and was not liable to tax under the Act before it was amended in 1939. It was urged that the Legislature could not have intended that such a person was to be taxed because of the definition of a "person not ordinarily resident" brought in by S. 4 (1) (b) of the Act. We are not concerned with the question of policy of the Legislature. The duty of a Court is merely to administer the law as it finds and there is nothing repulsive in the conception of the Legislature thinking of giving relief to a person not ordinarily resident after the commencement of the Act only in respect of income which such person did not bring into British India. That argument under the circumstances cannot help the assessee. I, therefore, agree that the answer to the question referred to the Court for its opinion should be in the negative.

V.R./D.H.

*Reference answered  
in the negative.*

[Case No. 95.]

**A. I. R. (33) 1946 Bombay 462**

LOKUR J.

*Nathu Dhoju Gholap — Plaintiff —  
Appellant*

v.

*Ramchand Balchand and another —  
Defendants — Respondents.*

Second Appeal No. 312 of 1943, Decided on 19th November 1945, from decision of Asst. Judge, Ahmednagar, in Appeal No. 228 of 1939.

**Transfer of Property Act (1882), S. 52—Applicability—Pending suit ending in consent or compromise decree—Section applies—But consent or compromise must be honest and not fraudulent or collusive.**

The rule of *lis pendens* applies even though the pending suit ends in a consent decree or a compromise decree, but the consent or compromise must be honest and not fraudulent or collusive. A person, who takes transfer of property which is the subject-matter of a suit during its pendency, takes the risk of losing it if the result of the suit goes against the party from whom he has taken the transfer. But he takes such a risk of an adverse decision obtained in a fair and legal manner. If the final decision in the pending litigation is brought about by fraud or collusion, it cannot be said that *lis pendens* was fairly decided and that decision cannot affect the rights of the transferee *pendente lite*. [P 464 C 1]

Defendant 1, widow of defendant 2's brother, obtained a decree for possession of certain property against defendant 2, having succeeded in proving that her husband and defendant 2 were separate. During the pendency of an appeal against the decree filed by defendant 2, defendant 1 sold the property to the plaintiff who, however, did not get himself impleaded in the appeal. The plaintiff filed a suit against both the defendants to recover possession of the property purchased by him. The defendants then appeared in the appeal and put in a compromise application admitting that defendant 1's husband had died in union, that defendant 1 was entitled only to maintenance and that defendant 2 was the owner of the entire property subject to defendant 1's right of maintenance. The decree of the trial Court which was wholly in favour of defendant 1 was set aside and a decree in terms of the compromise was passed. Thereafter the defendants put in their written statement contending that defendant 1 had no title to the property in suit and that as the plaintiff's purchase was *pendente lite* it was subject to the decision in the appeal which was pending:

*Held*, that as the compromise decree in the appeal was the result of collusion and fraud, it was not binding on the plaintiff and did not affect the plaintiff's rights under the sale deed and S. 52 did not prevent him from ignoring the compromise decree and seeking to prove in spite of that decree that defendant 2 was separate from his brother and that the brother was the owner of the property in suit. [P 464 C 2]

*Held further*, that by reason of the fraud and collusion the plaintiff was at liberty to lead evidence in spite of the compromise decree to prove that his vendor had a title to the property and that the sale deed passed by her conferred that title upon him. Although the reversal of the trial



Court's decree by the appellate Court was not binding on the plaintiff yet the plaintiff could not take advantage of the decree of the trial Court which no longer subsisted. He must therefore prove independently of that litigation that defendant 1 had title to the property in suit. [P 464 C 2]

**T. P. Act—**

('45) Chitaley, S. 52, N. 38, Pts. 1 and 4.

('36) Mulla, Page 221, Pt. (t).

*G. M. Joshi*—for Appellant.

*J. G. Rele and J. N. Sambhoo* —

for Respondent 1.

**Judgment.**—The suit out of which this appeal arises was filed by the plaintiff to recover possession of certain property which he had purchased from one Sheubai, defendant 1, on 1st December 1937. Defendant 1 is the widow of defendant 2's brother Dhondiba. After Dhondiba's death defendant 1 claimed that she succeeded to his property as his heir. But defendant 2 claimed that Dhondiba had died in union with him and that the property in his possession came to him by survivorship. Defendant 1, therefore, filed Suit No. 130 of 1936 against defendant 2 to recover possession of the property which she claimed to have been allotted to her husband's share. She succeeded in proving that her husband and defendant 2 were separate and a decree for possession of the property in suit was passed in her favour on 25th September 1937. Defendant 2 filed an appeal (No. 297 of 1937) against that decree in the District Court on 5th November 1937. When that appeal was pending, defendant 1 sold the property in suit to the plaintiff on 1st December 1937. But the plaintiff did not get himself impleaded in the appeal. As defendant 1 had no longer any interest in the property she did not appear in the appeal although its notice was served on her.

[2] The plaintiff filed the present suit on 18th July 1938, against both the defendants to recover possession of the property purchased by him. Defendant 1, though served with the summons in the suit, did not first appear. Defendant 2 was served with the summons and he appeared on 7th December 1938. On that day both the defendants engaged a common pleader and asked for time to put in a written statement. They were given time till 22nd December 1938, and during the interval, both the defendants appeared in Appeal No. 297 of 1937 which was still pending and put in a compromise application wherein it was admitted that defendant 1's husband, Dhondiba, had died in union with defendant 2, that defendant 1 was entitled only to maintenance and that defendant 2 was the owner of the entire property subject to de-

fendant 1's right of maintenance. Her maintenance was made a charge on the property and she was paid Rs. 75 in cash for arrears of maintenance. The decree of the trial Court which was wholly in favour of defendant 1 was set aside and a decree in terms of the compromise was passed in the appeal on 16th December 1938.

[3] Thereafter the defendants put in their written statement in the suit on 8th March 1939, contending that defendant 1 had no title to the property in suit, that it had been decided in the previous litigation that her husband had died in union with defendant 2 and that as the plaintiff's purchase was *pendente lite*, it was subject to the decision in the appeal which was then pending. The trial Court upheld these contentions and dismissed the suit. But in appeal the learned first class Subordinate Judge with appellate powers found it necessary to decide whether the compromise decree in Appeal No. 297 of 1937 was collusive and fraudulent. He, therefore, framed an issue as to whether it was obtained by collusion and fraud by defendants 1 and 2 with a view to defeat the plaintiff's rights under his sale deed, and remanded the suit for a finding on it. The trial Court then recorded a finding on that issue in the affirmative and found that the compromise decree was not binding on the plaintiff. That finding was accepted by the lower appellate Court and as the plaintiff's suit was not affected by the previous litigation, which ended in a compromise decree, the decree of the trial Court was reversed and the plaintiff was given a decree for possession, mesne profits and costs. Defendant 2 has now appealed against that decree and it is contended that the Courts below were wrong in holding that the compromise decree was collusive and fraudulent. That is a finding of fact and it is sufficiently justified by the circumstances disclosed in the case.

[4] Defendant 1 had succeeded in her suit against defendant 2 and obtained a decree for possession. Relying on that decree the plaintiff purchased the property from her but unfortunately the decree has been appealed against and at the date of the sale deed the appeal was pending so that the decree of the trial Court was not final and the appeal was only a continuation of the suit. Hence there was a *lis pendens* at the time of the plaintiff's purchase and under S. 52, T. P. Act, 1882, he purchased the property subject to the final decision in that suit. He should have applied to the appel-



late Court to be joined as a respondent since he had by his purchase stepped into the shoes of defendant 1. But he did not do so, and as defendant 1 had no longer any interest in the property, she did not think it worth-while opposing the appeal. She did not execute the decree of the trial Court to recover possession of the property and the plaintiff had to file a fresh suit against both the defendants to enforce the sale deed.

[5] It is significant that although defendant 1 did not appear in the suit, she joined defendant 2 in engaging a common pleader after the summons in the suit was served on defendant 2 and both of them took time to put in a written statement. The appeal was still pending then and defendant 2 wanted to get it disposed of, before putting in a written statement in the plaintiff's suit. Both the defendants then put in a compromise application in the appeal, although defendant 1 had not appeared in the appeal till then. That application was put in just nine days after they took time in the suit for putting in their defence. It is, therefore, obvious that defendant 2 succeeded in persuading defendant 1 to admit that her husband had died in union with him, to give up all the contentions in the suit and be satisfied with the allowance of maintenance. She was not a loser by that compromise since she had already parted with her husband's property in favour of the plaintiff and had no longer any interest left in it.

[6] It is, therefore, clear that the defendants acted collusively and fraudulently in getting the appeal compromised, with the evident object of defeating the plaintiff's rights under the sale deed which he had obtained from defendant 1. I, therefore, accept the concurrent finding of both the Courts below that the compromise decree in Appeal No. 297 of 1937 was collusive and fraudulent and is not binding on the plaintiff. It is true that the rule of *lis pendens* applies even though the pending suit ends in a consent decree or a compromise decree, but the consent or compromise must be honest and not fraudulent or collusive. A person, who takes transfer of property which is the subject-matter of a suit during its pendency, takes the risk of losing it if the result of the suit goes against the party from whom he has taken the transfer. But he takes such a risk of an adverse decision obtained in a fair and legal manner. If the final decision in the pending litigation is brought about by fraud or collusion it cannot be said that the *lis pendens* was fairly decided and

that decision cannot affect the rights of the transferee *pendente lite*. Hence the plaintiff is not bound by the compromise decree in appeal No. 297 of 1937 although that appeal was pending when he purchased the property from defendant 1.

[7] This, however, cannot dispose of this suit finally. Had the compromise decree been fairly obtained or had it been held in the appeal that defendant 1's husband Dhondiba had died in union with defendant 2 and that defendant 1 was not the owner of the property at the date of its sale to the plaintiff, then the plaintiff would have been bound by that decree and under the doctrine of *lis pendens* it would not have been open to him to plead that Dhondiba had died separated from defendant 2. But as the compromise decree in the appeal was the result of collusion and fraud, it does not affect the plaintiff's rights under the sale deed and S. 52, T. P. Act, does not prevent him from ignoring the compromise decree and seeking to prove in spite of that decree that defendant 2 was separate from Dhondiba and that Dhondiba was the owner of the property in suit. By reason of the fraud and collusion the plaintiff is at liberty to lead evidence in spite of the compromise decree to prove that his vendor had a title to the property and that the sale deed passed by her conferred that title upon him.

[8] But this aspect of the case does not appear to have been considered by the Courts below and it was assumed that if the compromise decree of the appellate Court is not binding on the plaintiff, the plaintiff would be at once entitled to a decree in his favour on the strength of the decree of the trial Court. But that decree is no longer in existence and when the plaintiff purchased the property that decree was under appeal and in the appeal that decree was set aside. Although the reversal of the decree by the appellate Court be not binding on the plaintiff, yet the plaintiff cannot take advantage of the decree of the trial Court which no longer subsists. He must, therefore, prove independently of that litigation that defendant 1 had title to the property in suit. In his written statement defendant 2 did contend that she had no title to the property and had no right to sell it and a specific issue was raised in the trial Court regarding the plaintiff's right and title to the property. But as both the Courts below did not think it necessary for the plaintiff to prove in this suit that Dhondiba and defendant 2 were



separate by reason of the trial Court's decree in the previous litigation, no evidence was led by either party on that issue. I think that in the interest of justice both the parties should be allowed to adduce evidence to prove that defendant 1 was the owner of the property in suit when she sold it to the plaintiff. This issue will necessarily involve the question whether her husband Dhondiba had separated from defendant 2 and whether the property in suit had fallen to his share or was his self-acquisition. I, therefore, remand the suit to the trial Court for findings on these issues. Both the parties are at liberty to adduce further evidence. The findings should be certified to this Court through the District Court within three months after the record is received by the trial Court.

V.R./D.H.

*Suit remanded.*

[Case No. 96.]

\* A. I. R. (33) 1946 Bombay 465  
SPECIAL BENCH

MACKLIN, LOKUR AND RAJA-  
DHYAKSHA JJ.

*Hashmatulla Rahatulla*  
*Accused — Appellant*

v.

*Emperor.*

Criminal Appeal No. 14 of 1945, Decided on 20th December 1945, from judgment of Bhagwati J., in Case No. 10, Third Criminal Sessions of 1945.

(a) Criminal P. C. (1898), Ss. 307 and 411A — Power of interference under S. 411A — High Court's practice is not to interfere unless there is material error in charge to jury or verdict is manifestly erroneous or unreasonable.

Although the power of interference given by S. 411A is very wide, it does not necessarily follow that the High Court is bound to follow it indiscriminately in every case, and in practice the High Court will not exceed the powers which it ordinarily exercises in dealing with cases referred to it in S. 307, although both in appeals under S. 411A and in references under S. 307, the powers which it is entitled to use if it thinks fit are very much wider. In practice references under S. 307 are treated as if the test for interference were either a material error in the charge to the jury or a verdict which on the facts of the case is manifestly erroneous or unreasonable: ('45) 32 A. I. R. 1945 Bom. 277 (F. B.), *Foll.* [P 466 C 1]

Cr. P. C. —

('46) Chitaley, S. 411A, N. 3, Pts. 2 and 3.

(b) Criminal P. C. (1898), Ss. 342 and 537 — Omission to ask questions on specific points is not illegality and will not vitiate trial unless it has caused failure of justice — Whether failure of justice has been occasioned depends on particular case.

If the accused is questioned generally on the case and has made a general statement there is a for-  
1946 B/59 & 60

mal compliance with the provisions of S. 342 which is all that the law requires. But there can be no doubt that it is the duty of the Judge to examine an accused person on points which are of great importance to the case against him. But omission to question an accused person on specific points is not an illegality and it does not follow that the omission to question an accused person on specific points, even though it may be the duty of the Judge to do so, will necessarily vitiate the trial unless it has in fact caused a failure of justice and whether it has or has not occasioned a failure of justice in any particular case is a question depending on that case alone: ('33) 20 A.I.R. 1933 P.C. 124, *Rel. on.* [P 466 C 2]

Cr. P. C. —

('46) Chitaley, S. 342, N. 15, Pt. 1; N. 35.

('41) Mitra, page 1121, para. 974, page 1124, para. 975.

\* (c) Criminal P. C. (1898), Ss. 411A and 305 — Certificate to appeal on facts — Jury trial before High Court — Verdict of jury wrong in Judge's opinion but accepted being unanimous — Judge may give certificate — Verdict of jury not unanimous — Judge accepting verdict cannot grant certificate — Whether there should be appeal in such case should be left to appellate Court.

When in a case tried before a High Court the jury are unanimous in their opinion, if the Judge thinks that the verdict of the jury is wrong, but has got to be accepted by him as it is unanimous, the Judge may give a certificate to enable an appeal on facts. But when the jury are not unanimous and at least six of them are of one opinion and the Judge thinks that the verdict of the majority is not acceptable to him he is bound to discharge the jury under S. 305 (3); it is not open to him to accept the verdict and then grant a certificate under S. 411A to appeal on facts. It should be left to the appellate Court to say whether there should be an appeal or not. [P 468 C 1,2]

Cr. P. C. —

('46) Chitaley, S. 411A, N. 2.

J. D. Patel and B. D. Boovariwala and Pochaji Jamshedji — for Appellant.

K. M. Munshi and K. B. Bharucha, Public Prosecutor — for the Crown.

**Macklin J.** — This is an appeal under the amended S. 411A, Criminal P. C., 1898, against the verdict given by a majority of seven to two in a trial held before Bhagwati J. on a charge of murder. The majority of the jury convicted the accused of murder, and Bhagwati J. accepted the verdict and sentenced him to transportation for life, but at the same time gave a certificate that this was a fit case for appeal under the amended law.

[2] The powers of this Court in dealing with appeals from verdicts of a High Court jury have been laid down in 47 Bom. L. R. 363.<sup>1</sup> The effect of that decision is that although the power of interference given by

1. ('45) 32 A.I.R. 1945 Bom. 277 : 220 I.C. 1 : 47 Bom. L.R. 363 (F.B.), Government of Bombay v. Fernandez.



S. 411A is very wide, it does not necessarily follow that the High Court is bound to follow it indiscriminately in every case, and in practice the High Court will not exceed the powers which it ordinarily exercises in dealing with cases referred to it under S. 307 of the Code, although both in appeals under S. 411A and in references under S. 307 the powers which it is entitled to use if it thinks fit are very much wider. In practice references under S. 307 are treated as if the test for interference were either a material error in the charge to the jury or a verdict which on the facts of the case is manifestly erroneous or unreasonable. Here, there is no question of any error in the charge to the jury; and the principal question which we have to decide is whether it can be said that the verdict of the jury in this case is the verdict of unreasonable men, having regard to the facts of the case. A subsidiary question arises as to whether we ought in this case to exercise our power to direct a new trial in view of the fact that certain questions which might properly have been put to the accused under S. 342 of the Code and which ordinarily would have been put to the accused under that section were not put to him. [His Lordship then dealt with the facts of the case and continued :]

[3] When called upon to make a statement the accused said that at about 7 o'clock he returned from his hair cutting saloon and saw the three Pathans in his room, two of them inside and one outside. As he arrived, the two Pathans inside were coming out, and one of them aimed a blow at the accused. The accused then caught hold of the knife with his hand and was cut across the fingers. He again caught hold of the knife, and was again cut across the fingers when the Pathan pulled the knife out of his grasp. He then says that the Pathans started running away and that he chased them shouting 'thieves, thieves.' When he came out on the road he saw the deceased lying on the road, and a victoria was fetched and the deceased taken to hospital. It is to be noted that the apparent meaning of this statement is that the accused did not see the woman injured until he saw her lying on the road. The statement covers the use of the accused's knife, and it also covers his presence on the spot either at the time of the murder or almost immediately afterwards. But it does not cover certain other points upon which the prosecution relies, namely the dying declaration, the motive, the request to Abdul Rahim to tell a false story to the police

about Pathans, and the fact of the knife having been bought in a false name; nor does it cover the story of the knife having been thrown behind the *gharry*. Speaking for myself, I am not quite clear as to the meaning of the evidence on this last point; I am not altogether satisfied that the intention of the witness was to suggest that the accused had made a concealment of bringing the knife from the house.

[4] It is argued before us that the omission to ask questions on these points so as to enable the accused to explain them is either an illegality which vitiates the whole trial or an irregularity which is material in the sense that the jury must have been influenced by this part of the evidence and were probably also influenced by the omission of the accused to explain these incidents, though the omission of the accused to explain them was due to no fault of his own, he having been asked no questions about them. We are satisfied that the omission to ask specific questions on points like these is not an illegality. The accused was questioned generally on the case and made a general statement; and that we think is all that the law requires, namely, a formal compliance with the provisions of S. 342 of the Code. But there can be no doubt that it is the duty of the Judge to examine an accused person on points which are of great importance to the case against him. This is made clear from the judgment of the Privy Council in 35 Bom. L. R. 507.<sup>2</sup> But it does not follow that the omission to question an accused person on specific points, even though it may be the duty of the Judge to do so, will necessarily vitiate the trial. If the omission to question an accused person on such points is not an illegality, then the omission to do so will not vitiate the trial unless it has in fact caused a failure of justice (*see* S. 537 of the Code); and whether it has or has not occasioned a failure of justice in any particular case is a question depending on that case alone.

[5] It is argued that here the jury must have been influenced by this part of the evidence which was not specifically put to the accused for explanation. But it is very doubtful if that is so, because the learned Judge dealt with the point of the dying declaration and with the point of the alleged corruption of the witness Abdul Rahim at great length in his charge to the jury and gave the jury the strongest possible hint that they

2. ('33) 20 A.I.R. 1933 P.C. 124 : 32 S.L.R. 716 : 142 I.C. 335 : 35 Bom. L. R. 507 (P.C.), *Dwarkanath Varma v. Emperor*.



ought not to rely on that part of the evidence. He did not refer to the fact of the knife having been bought in a false name; but that, as I have said, does not seem to take the case very much further, since the accused had a friend with him and any attempt to give a false name seems pointless. In practice, therefore, it is difficult to see how the omission of the learned Judge to put specific questions to the accused on these points and the consequent failure of the accused to give an explanation of them can have had any practical effect upon the verdict of the jury. I may mention that it is difficult to imagine what explanation the accused could have given beyond saying that the evidence was false; and that in effect is what the learned Judge himself said to the jury, namely that the evidence must be accepted only with the utmost caution. I may also mention that the evidence as to the knife having been purchased in a false name has never been disputed and no questions in cross-examination were put to the witness on that point.

[6] There is, however, ample evidence in our opinion to justify the jury in reaching the verdict which they did reach, quite apart from the evidence about which the accused was asked no specific questions. It is true that immediately after this occurrence the conduct of the accused, so far as the general public could see, was that of a man who was genuinely distressed at what had happened and was doing what he could to alleviate the sufferings of the woman; and his behaviour generally was that of a person who was sincerely fond of her and had no possible reason for killing her. The learned Judge in his summing up dwelt on this point at great length and asked the jury if they thought that it was possible for the accused before them to behave in this way if he had killed the woman only a few minutes before. But I take it that the jury were prepared to think that he really was as much of an actor as all that; and it cannot be denied that for a murderer to be successful he must always be something of an actor.

[7] The real question however is whether the rest of the evidence led by the prosecution is enough to justify us in finding that the verdict of the jury was a reasonable verdict. The rest of the evidence seems to me to come to this. The accused was undoubtedly on the spot, either at the murder or immediately afterwards; from that there is no possible escape, and it is not disputed. The knife used in the murder was the accused's own knife; and that knife was not taken

away by the assailant, whoever he was; it was left in the room. As soon as the accused left the room, he told the witness Tatya that the woman had been killed, though in his own statement he suggests that he had no cause to know that she had been killed, until he found her on the road. He told the same thing to the witness Allibux before he had seen the woman lying on the road. The witness Abdul Rahim says that he saw first the woman and then the accused come out of the house but no Pathans, though on the story of the accused it was essential for the Pathans to come out between the woman and the accused; and he made contradictory statements as to where these Pathans had gone to the police constable and to the witness Mahomedali Akbar.

[8] Of course the fact of an accused person having told a false story in his statement to the Court is immaterial, because what the Court has to see is whether the evidence for the prosecution is enough to justify a conviction, and it is only when a case has been made out by the prosecution that it is necessary to examine the accused at all. But here it is admitted that the woman was killed with the accused's own knife and that the accused was present either at the murder or immediately afterwards, and therefore it would have been perfectly reasonable for the jury to come to the conclusion that the accused was the murderer, even if there had been no other evidence in the case and even if the accused had refused to make a statement at all. The accused having made a statement, they would be bound to examine his statement and see how far they thought it could be true; and when there is evidence which they are entitled to believe and which contradicts the statement of the accused in material particulars, they would be justified in rejecting the story of the accused altogether. They would not be justified, even in this simple choice between the story of the accused and the story of the prosecution, in believing the accused to be guilty because he told a false story; but they would be perfectly justified in rejecting his story and relying entirely on such evidence as was covered by the story of the accused and accepting the version which the witnesses for the prosecution gave of those incidents.

[9] As to the truth of the evidence which is not accepted by the defence as true, it is enough to describe it as such that the jury would have been justified in accepting it if in fact they did so. Even if we ignore the dying declaration, the statement of Abdul



Rahim, the false name under which the knife was bought, and any allegations or suggestions of motive that may have been made by the prosecution, the jury would still be perfectly entitled to convict upon the simple evidence which the accused has attempted to explain. We cannot therefore say that the jury was wrongly influenced by the omission of the learned Judge to examine the accused in full on specific questions; nor can we say that, even ignoring those items of the prosecution evidence, their verdict was an unreasonable verdict. We are satisfied that justice has been done in this case, and we must dismiss the appeal. For reasons to be given by Lokur J., we are of opinion that in cases such as this, where the Judge has accepted a verdict that was not unanimous, he should be slow to give a certificate. It should be left to the appellate Court to say whether there should be an appeal or not.

[10] **Lokur J.**—I concur. I wish to add a few words regarding the certificate granted in this case under S. 411A, Criminal P. C. When in a case tried before a High Court, the jury are unanimous in their opinion, the Judge is bound by their verdict and he must give judgment in accordance with it. When the jury are not unanimous and at least six of them are of one opinion, the Judge may or may not accept the verdict of the majority. If he disagrees with their verdict, he must at once discharge the jury. If he does not think it necessary to express disagreement with that verdict, he must give judgment according to it. But if there are not as many as six jurors who agree in their opinion, the jury must be discharged. This is the gist of Ss. 305 and 306, Criminal P. C., and it follows that when the Judge has accepted the verdict which is not unanimous, he must be deemed not to have thought it necessary to express disagreement with it. In all cases where the judgment is in accordance with the verdict of the jury, whether unanimous or not, a Court of appeal can interfere with it on a point of law. But an appeal on facts requires a certificate either of the Judge who tried the case or of the Court of appeal.

[11] It is now well settled by the ruling in 47 Bom. L. R. 363<sup>1</sup> that where there is no point of law and there is no misdirection or non-direction in the Judge's charge to the jury, a Court of appeal will not interfere with the verdict of the jury unless it appears to be manifestly wrong or unreasonable, and therefore a certificate to appeal on

facts should be granted only when, *prima facie*, the verdict is manifestly wrong or erroneous. When the trial Judge grants such a certificate, it obviously means that he does not agree with the verdict of the jury. If he discovers that there was some misdirection or non-direction in his charge to the jury or that there was some error of law, an appeal on such grounds does not require a certificate under S. 411A of the Code. But if he thinks that the verdict of the jury is wrong, but has got to be accepted by him as it is unanimous, the Judge may give a certificate to enable an appeal on facts. Even then the appeal Court will not interfere with the verdict unless it is manifestly wrong or unreasonable. But where the verdict is not unanimous and the Judge thinks that it is not acceptable to him, he is bound to discharge the jury under S. 305 (3), Criminal P. C.

[12] In the present case the verdict was not unanimous. We are told that the learned Judge was inclined to discharge the jury as he did not agree with their verdict, but to avoid a retrial, he accepted it and granted a certificate to appeal on facts. There is nothing on record to show that the learned Judge disagreed with the verdict of the jury. In that case the only course open to him was to discharge the jury under S. 305 (3), but as he passed judgment in accordance with the verdict of the jury, it must be taken that he did not think it necessary to disagree with it. Had he thought that the accused should not be subjected to another trial before a different jury, it was open to him to discharge the jury and then make an entry to that effect, which under S. 308 would have operated as an acquittal. It is only where the verdict is unanimous and the Judge is bound to accept it though he disagrees with it, that it would be reasonable to him to grant a certificate. But it would be meaningless to grant it when he is not only not bound to accept the verdict but is bound to discharge the jury if it is not acceptable to him. In my opinion, where the verdict is not unanimous and the Judge does not agree with it, it is not open to him to accept the verdict and then grant a certificate under S. 411A, Criminal P. C., to appeal on facts. On the merits of this appeal I have nothing to add to what my learned brother has said, and I agree that it should be dismissed.

[13] **Rajadhyaksha J.** — I agree and have nothing to add.

V.R./D.H.

Appeal dismissed.



[Case No. 97.]

**A. I. R. (33) 1946 Bombay 469****CHAGLA J.***Phoenix Mills, Ltd. — Plaintiffs*

v.

*M. H. Dinshaw & Co. — Defendants.*

Suit No. 1078 of 1942, Decided on 4th July 1945.

(a) Contract—C.I.F. contract—Incidents of.

Under a C. I. F. contract, the seller can give symbolical delivery of the goods by tendering to the buyer three documents, viz., a bill of lading, an invoice, and a policy of insurance. In law the tendering of these documents is tantamount to giving delivery of the goods covered by these documents and the buyer is bound to accept these documents and pay the price : (1911) 1 K. B. 214, *Rel. on.* [P 470 C 2]

(b) Contract — C. I. F. contract—Invoice—Requisites of — To what invoice buyer is entitled, stated.

Where an invoice under a C. I. F. contract mentions and identifies the goods which the buyer has purchased; gives the price; and states what amount is due and payable by the buyer, it satisfies all the requisite conditions of an invoice. [P 473 C 1]

The invoice to which the buyer is entitled is the invoice relating to the contract between him and his seller and not to an invoice relating to a different contract, viz., the contract between the seller and the firm from which the seller purchases the goods. [P 473 C 1]

(c) Contract — C. I. F. contract — Policy of insurance under — Nature of.

The policy of insurance which a seller is under an obligation to tender to the buyer under a C. I. F. contract must be such a document as would enable the buyer to sue on the policy. Unless there is an express stipulation to the contrary, nothing short of an actual policy of insurance properly stamped is a good tender under a C. I. F. contract. For instance, no broker's cover note, or certificate of insurance, or other document which does not include all the terms of the usual contract of insurance is good tender under the ordinary C. I. F. contract. [P 474 C 1]

(d) Contract — Policy of insurance—Policy should be for sufficient and adequate amount.

The object of a seller having to insure the goods under a C. I. F. contract is clearly to afford a reasonable protection and indemnity to the buyer against the risk of the goods being lost at sea and whether the amount for which the goods are insured is proper or not can only be determined by considering whether the amount for which the policy is insured does or does not in fact afford a reasonable protection and indemnity to the buyer. The buyer is entitled to have his full interest in the goods insured and what the seller is bound to insure is the value the buyer has to pay under the contract and not the value of the goods at the place of shipment : (1861) 1 B. & S. 185, *Expl. and Disting.* [P 474 C 1, 2]

(e) Contract Act (1872), S. 63 — For waiver or dispensation an agreement or consideration is not necessary.

The law with regard to waiver is to be found in S. 63, Contract Act. Under that section neither consideration nor an agreement is necessary to

constitute a waiver or a dispensation of a promise. But a promisee can only dispense with the performance of the promise by a voluntary conscious Act. It must be an affirmative act on his part. A mere omission to assert his right, cannot amount to a dispensation within the meaning of the section. Even negligence to assert his rights, although it might in certain cases result in an estoppel, cannot possibly amount to a dispensation within the meaning of the section: *Observations in* ('35) 22 A. I. R. 1935 P. C. 79, *held obiter*; ('28) 15 A.I.R. 1928 P. C. 99, *Rel. on.* [P 476 C 1, 2]

(f) Precedents — Privy Council — Obiter deserve respect.

Even *obiters* of the Privy Council deserve the highest respect. [P 475 C 2]

(g) Estoppel — Estoppel when comes into play, stated.

Estoppel can only come into play, if by a party's conduct the other party has changed his position in any way to his prejudice or detriment. [P 477 C 1]

*M. V. Desai and N. A. Mody* — for Plaintiffs.  
*J. C. Bhatt and A. A. Peerbhoy* — for Defendants.

**Judgment.** — On 29th August 1941, the plaintiffs and the defendants entered into a contract whereby the defendants agreed to supply to the plaintiffs certain dyeing and bleaching machinery consisting of one scutcher, one piler and one six-bowls water mangle at certain rates and on certain terms and conditions. The contract is expressed to be a c. i. f. contract, and it is important to note this because most of the controversy between the parties in this suit has turned round the rights and obligations of the contracting parties under a c. i. f. contract. On 15th September 1941, the plaintiffs paid to the defendants a sum of Rs. 3500 being approximately the one-third price of the machinery. The plaintiffs after that wrote several letters to the defendants making inquiries as to the arrival of the goods. On 11th February 1942, the defendants replied to the plaintiffs stating that they had received the shipping documents of the articles contracted to be sold. They asked the plaintiffs to send the cheque so as to enable them to deliver to the plaintiffs the bill of lading. They also enclosed with this letter their bill. The bill sets out with some particularity the description of the goods, the rate, the price, the full amount payable under the contract, and the part-payment of Rs. 3500 which had been received by the defendants and the final amount due and payable by the plaintiffs. On 16th February 1942, the plaintiffs wrote to the defendants pointing out that the balance of the price was to be paid on intimation by the bank that the shipping documents had arrived. That is one of the terms of the contract. The plaintiffs point out



that so far they had not received any intimation from any bank; then they go on to state that as, according to the defendants, the shipping documents had arrived, they would be prepared to pay the balance against the defendants handing over all the necessary documents. It is common ground that on 16th February 1942, the plaintiffs paid the balance, viz., Rs. 7046 to a representative of the defendants and it is also common ground that the only document which was delivered by the defendants to the plaintiffs on that day was the bill of lading. The plaintiffs have filed this suit for a refund of the full price paid by them on the ground that the defendants failed to perform their obligations under the contract and also there was a failure of consideration. The plaintiffs' contention is in brief that the defendants merely gave them the bill of lading but failed to deliver to them the original invoice and a proper policy of insurance. The defendants' answer to the suit is that the documents delivered by them were the proper documents which they were bound to deliver under a c. i. f. contract. In any event the defendants say the plaintiffs have waived their right to the original invoice and what according to them is a proper policy of insurance. In the alternative the defendants contend that the plaintiffs have dispensed with the performance of those obligations on the part of the defendants under S. 63, Contract Act, 1872; and finally they also base their defence on an estoppel operating against the plaintiffs.

[2] The incidents of a c. i. f. contract have been very clearly and precisely defined by Hamilton J. in (1911) 1 K. B. 214.<sup>1</sup> He defines these incidents as follows (p. 220):

[3] "A seller under a contract of sale containing such terms has firstly to ship at the port of shipment goods of the description contained in the contract; secondly to procure a contract of affreightment, under which the goods will be delivered at the destination contemplated by the contract; thirdly to arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer; fourthly to make out an invoice as described by Blackburn J. in (1872) 5 H. L. 395<sup>2</sup> at p. 406 or in some similar form; and finally to tender these documents to the buyer so that he may know what freight he has to pay and obtain delivery of the goods, if they arrive or recover for their loss if they are lost on the voyage. Such terms constitute an agreement that the delivery of the goods, provided they are in conformity with the contract, shall be delivery on board ship at the port of shipment. It follows that against tender of

these documents, the bill of lading, invoice, and policy of insurance, which completes delivery in accordance with that agreement, the buyer must be ready and willing to pay the price."

[4] Therefore, under a c. i. f. contract, the seller can give symbolic delivery of the goods by tendering to the buyer three documents, viz., a bill of lading, an invoice and a policy of insurance. In law the tendering of these documents is tantamount to giving delivery of the goods covered by these documents and the buyer is bound to accept these documents and pay the price. As pointed out by Halsbury's Laws of England, Hailsham Edition, vol. 29, p. 210, the commercial reason for the evolution of the "c. i. f." contract lies in the length of time taken in the carriage of goods by sea. The contract which has been ultimately evolved is both for the benefit of the seller and the buyer. It is to the seller's interest to receive the money equivalent of the goods as soon as possible after the date of the contract of sale; on the other hand, it is to the interest of the buyer to be able to deal with the goods for resale or finance as soon as possible.

[5] As I have pointed out, the only documents that were delivered to the plaintiffs by the defendants by 16th February 1942, were the bill of lading and the defendants' bill upon the plaintiffs. There is some dispute with which I shall presently deal as to whether the defendants' bill constituted a proper invoice under a c. i. f. contract; but there is no dispute and there can be no dispute—that as far as the defendants were concerned, they did not deliver a very essential document under the c. i. f. contract, namely, the policy of insurance, on 16th February 1942, when they received the price from the plaintiffs. If the plaintiffs had paid the price without more, then clearly the defendants could have contended that they had waived their rights to receiving any further documents under the contract. But the plaintiffs' case is that they did not make the payment on 16th February unequivocally or unconditionally. Their case is that they made this payment only on the assurance given by the defendants' representative that the remaining documents would be delivered in a day or two. Whether this is so or not is a question of fact to be determined by oral evidence and also in the light of correspondence that has passed between the parties.

[6] Keshavdev Fatechand Ruia, who was the stores purchaser of the plaintiff mills during the material period and who is

1. (1911) 1 K. B. 214, Biddell Brothers v. E. Clemens Horst Co.

2. (1872) 5 H. L. 395; 41 L.J.Q.B. 201; 27 L. T. 79, Ireland v. Livingston.



no longer in the employ of the plaintiffs and has no connection with them whatsoever has given evidence on this point. He has stated that after the plaintiffs had sent their letter of 16th February 1942, to which I have referred, someone on behalf of the defendants, whose name he did not know, came to him with a bill of lading. Keshavdev told him that the documents were not complete and the plaintiffs wanted the policy of insurance and the original invoice. To that the reply of the defendants' agent was that these documents would be sent in a day or two. Thereupon Keshavdev took the bill of lading and gave him a cheque for the balance of the price. Keshavdev has told me that he (Keshavdev) knew that the goods could not be cleared from the customs without the original invoice; and Framroz Shapurji Homavazir, the manager of S. D. Engineer and Son, the plaintiffs' clearing agents, has also told me that usually when his clients wanted the goods to be cleared, the documents that were sent were the bill of lading, the original invoice and the insurance policy. Keshavdev further stated that a day or two after this interview he telephoned to the office of the defendants and told them that the plaintiffs had not yet received the documents.

[7] The evidence of Keshavdev has been very strongly attacked by Mr. Bhatt on behalf of the defendants. There is no doubt that there are discrepancies in his evidence and the strongest discrepancy is the fact that in subsequent correspondence this particular interview of 16th February 1942, is not referred to. I shall presently consider the correspondence, and to my mind it is quite apparent, looking at the correspondence as a whole, that the plaintiffs made it perfectly clear to the defendants that they insisted upon the performance of all the defendants' obligations under the contract; and the defendants equally clearly realised that they were under an obligation to perform whatever duties they had to under the contract. Neither party in this correspondence even suggested that the plaintiffs had waived their rights under the contract and that the defendants were no longer bound to perform their obligations. It seems that the plaintiffs forwarded the bill of lading to their clearing agents, Messrs. S. D. Engineer and Son, on 16th February 1942, asking them to clear the goods. On 17th February Messrs S. D. Engineer and Son replied stating that they understood that the ship by which the goods

were arriving was not coming to Bombay on account of causes arising out of the war and therefore they returned the bill of lading. Then we have, according to Keshavdev, the telephonic conversation to which I have referred. Nothing further happens till 19th March 1942 when the plaintiffs address a letter to the defendants. In this letter they specifically mention that they had handed over the balance of the price on the defendants having given to the plaintiffs all the shipping documents except the insurance policy and the original invoice; then they go on to state that when they reminded the defendants on the telephone, the defendants assured the plaintiffs that the same would be sent in a day or two. Then the plaintiffs make a complaint of the fact that although a month had passed, they had not received the insurance policy and the original invoice; they even accuse a reputable firm like the defendants of dilly-dallying. The reply to this letter is sent by the defendants on 25th March 1942. There is no denial of the telephonic conversation nor of the assurance given by the defendants to the plaintiffs; on the contrary there is an explanation as to why these documents have not yet been sent to the plaintiffs. The defendants point out that the insurance policy had not yet been received by them and they had asked for the policy to be sent by air mail and that it would be sent to the plaintiffs as soon as it was received. With regard to the invoice, the defendants said that they had sent it to the customs authorities for verification. The plaintiffs wrote another letter on 25th March apparently before they received the defendants' letter of the same date where they again make a complaint of their not having received the insurance policy and the invoice and charge the defendants with delaying the matter and not giving a straightforward reply. Then on 1st April 1942, the defendants acknowledge the plaintiffs' letter of 25th March 1942, and forward an insurance certificate which they had received. It is to be noted that even in this letter of 1st April which refers to the plaintiffs' letter of 25th March there is no denial of the fact that the defendants had given certain assurances to the plaintiffs with regard to the remaining documents. On 9th April 1942, the defendants inform the plaintiffs that they had received a cablegram from their principals in England that the steamer carrying the machinery sold to the plaintiffs had been sunk by enemy action. Then on 14th April 1942, the plaintiffs



approach their attorneys, and a letter is written on that day by their solicitors. Then further correspondence follows.

[8] It is difficult to believe in the first instance that a man like Keshavdev who was an experienced man would have paid the balance of the price against the receipt of merely the bill of lading. Whatever the position with regard to the invoice might be, it is incredible that any business people, especially in times of war, with constant danger to all ships on the high seas, would have paid the full amount without receiving any policy and without their interest in the goods being properly safeguarded and they being indemnified against the risk of the ship being lost at sea. Further, if it be true that Keshavdev telephoned to the defendants two days after this interview and reminded them of the assurance given, it cannot be that he would have done this for the first time if nothing had transpired on 16th February itself. If the payment by the plaintiffs was an unequivocal payment in satisfaction of their rights under the contract, it is difficult to understand why the plaintiffs' man should telephone to the defendants and remind them that the documents had not been received nor is any explanation forthcoming why the defendants should have not contradicted these statements which occur in the letters of 19th March 1942 and 25th March 1942. The only explanation that Hormusji Dinshaw, the sole proprietor of the defendant firm, has given to me in the witness-box is that he wanted to be polite and courteous and did not want to alienate the plaintiffs. But in my opinion, there is a limit beyond which politeness and courtesy cannot go and the limit is certainly reached when the other side is alleging something which is totally opposed to the truth.

[9] Finally I see no reason why I should disbelieve Keshavdev. He has no interest in telling something which is not the truth. He is no longer in the employ of the plaintiffs. It is not suggested that he is a biased witness. Mr. Dinshaw, who is the sole proprietor of the defendant firm, who has gone into the witness-box, unfortunately has no knowledge of what transpired on 16th February 1942, between his representative and Keshavdev. Mr. Dinshaw has admitted that he had sent his clerk by the name of Darasha with the bill of lading to be handed over to the plaintiffs. The defendants are not in a position to call Darasha because, according to Mr. Dinshaw, Darasha is

not on good terms with him. He has started a rival business and they are trade rivals. That may be rather unfortunate for Mr. Dinshaw, but the fact remains that I have the uncontradicted oath of Keshavdev as to what transpired at the interview of 16th February 1942, and I see no reason why I should disbelieve this witness. I therefore hold that on 16th February the plaintiffs paid the balance of the price on their being assured that the remaining documents under the contract would be given to them within a day or two, and therefore, as far as the payment of 16th February was concerned, it cannot act as a waiver or an estoppel or a dispensation under S. 63, Contract Act. Therefore the payment of the balance of the price by the plaintiffs on 16th February did not relieve the defendants of their obligation under the contract to tender to the plaintiffs all the three necessary documents. As I have already pointed out, the defendants did hand over to the plaintiffs the bill of lading. It is common ground that the policy of insurance was not handed over on 16th February. The defendants did hand over a bill to the plaintiffs on 11th February and what I have now to consider is whether that bill was the invoice which the defendants were under an obligation to tender to the plaintiffs under a c. i. f. contract or if it was not a proper invoice as contended by the plaintiffs. In order fully to appreciate this controversy, it is necessary to state a few facts. The contract goods were purchased by the defendants from William Bates, Son & Company, Limited, and the invoice sent by William Bates, Son & Company, Limited, was received by the defendants. The bill of lading shows that the goods were put on board the ship, which was ultimately sunk, on 8th October 1941, that is, some time after the contract in suit was entered into. Mr. M. V. Desai's contention for the plaintiffs is that the proper invoice which the defendants should have tendered to the plaintiffs was the invoice sent to the defendants by William Bates, Son & Co., Ltd.

[10] What an invoice is was defined by Blackburn J. as far back as 1872 in (1872) 5 H. L. 395<sup>2</sup> at p. 406 and that definition still holds good. Blackburn J. defined an invoice as debiting the consignee with an agreed price (or the actual cost and commission, with the premiums of insurance, and the freight, as the case may be), and giving him credit for the amount of the freight which he would have to pay to the shipowner on



actual delivery ; and as pointed out in Halsbury's Laws of England, Hailsham Edn., vol. 29, p. 211, the reason why an invoice is required is, firstly, to identify the goods sold with the goods shipped and insured and so to complete the record of the transaction, and, secondly, in order to show on the face of the documents the price of the goods and thereby to enable the buyer the more easily to raise money upon their security.

[11] Now if one looks at the bill which was sent by the defendants to the plaintiffs on 11th February 1942, in my opinion, it satisfies all the requisite conditions of an invoice. It mentions and identifies the goods which the plaintiffs had purchased ; it gives the price ; and it states what amount is due and payable by the plaintiffs. I fail to see what right the plaintiffs have to demand from the defendants the invoice which their sellers William Bates, Son & Co., Ltd., had sent to them. When the goods were shipped from England, the goods already belonged to the defendants. The defendants had purchased them from William Bates, Son & Co., Ltd. There is no privity between the plaintiffs and William Bates, Son & Co., Ltd., and it does not stand to reason that under a c. i. f. contract the defendants should be compelled to disclose to the plaintiffs the name of their sellers and at what price they had bought the goods from the sellers. The invoice which the plaintiffs are entitled to demand is the invoice relating to the contract goods and setting out the price for which those goods were sold. The invoice of William Bates, Son & Co., Ltd., does not satisfy those requisites. It is an invoice which relates to an entirely different contract—the contract between William Bates, Son & Co., Ltd., and the defendants, and not an invoice which relates to the contract between the defendants and the plaintiffs. No authority has been cited before me by Mr. M. V. Desai which lays down the proposition that under a c. i. f. contract a party is entitled to an invoice which is not an invoice relating to the specific contract but an invoice which relates to an entirely different contract. How curious the results would be if Mr. Desai's contention was sound is apparent if one looks at the invoice of William Bates, Son & Co., Ltd. That invoice does not merely mention the contract goods and the prices at which William Bates, Son & Co., Ltd., sold them to the defendants, but it also contains items which are not at all germane to the contract in suit. Therefore, according to Mr. M. V. Desai, if he was en-

titled to this invoice, he would not only know at what price William Bates, Son & Co., Ltd., sold the goods to the defendants but he would also know something about other transactions with which the plaintiffs had no concern whatsoever. At one time, it was contended by Mr. M. V. Desai that the original invoice was necessary because the plaintiffs could not clear the goods from the customs without such an invoice. If that had been the true position, I could have understood the necessity for the plaintiffs obtaining such an invoice because under a c. i. f. contract there is an obligation upon the seller to do everything in his power to see that the buyer is in a position to obtain delivery of the goods shipped. Although Mr. Homavazir, the manager of S. D. Engineer & Son, the plaintiffs' clearing agents, did state in the witness-box that the original invoice was necessary for the customs authorities, Mr. M. V. Desai has now conceded very fairly and frankly that in view of the provisions of ss. 29 and 30, Sea Customs Act, what the customs authorities have to know for the purpose of imposing duty is not the price as found in the original invoice but the price of the goods as indicated in the bill sent by the defendants to the plaintiffs. Therefore, in my opinion, the defendants did deliver the proper document when they submitted their bill to the plaintiffs on 11th February 1942.

[12] The next and the final question that remains to be determined is with regard to the policy of insurance. As I have already pointed out, no policy of insurance was tendered on 16th February 1942. On 1st April 1942, the defendants wrote to the plaintiffs stating that they had received the original insurance certificate from their bank and they forwarded that certificate with that letter to the plaintiffs, and the first question that falls to be determined is whether this insurance certificate was a policy of insurance which the defendants were bound to tender to the plaintiffs. This certificate is given by one C. R. Harland on behalf of J. S. Holt & Moseley, Ltd., who are ship and insurance brokers, and he certifies that J. S. Holt & Moseley, Ltd., have effected a marine insurance with the Western Assurance Co., Ltd., for the account of themselves. C. R. Harland also states that the goods are insured against war risks with the War Risks Insurance Office, London. Now, this document does not contain all the terms and conditions of the original policy. It is merely a statement of fact vouchsafed by



J. S. Holt & Moseley, Ltd., that a marine insurance has been effected with the Western Assurance Co., Ltd., and a War Risks Insurance with the Government in England. The policy of insurance which a seller is under an obligation to tender to the buyer under a c. i. f. contract must be such a document as would enable the buyer to sue on the policy. It is clear that on this document the plaintiffs could not enforce their claim either against the Western Assurance Co., Ltd., in respect of the marine insurance or against Government in respect of the war risks. As stated in Halsbury's Laws of England, Hailsham Edition, vol. 29, p. 217, unless there is an express stipulation to the contrary, nothing short of an actual policy of insurance properly stamped is a good tender under a c. i. f. contract. For instance, no broker's cover note, or certificate of insurance, or other document which does not include all the terms of the usual contract of insurance is good tender under the ordinary c. i. f. contract. This document, it is clear, can have no pretensions whatever to be a policy of insurance, and even Mr. Bhatt's clients could not bring themselves to say that what they had tendered was a policy of insurance. Therefore, it is clear to my mind that the document which the defendants ultimately tendered to the plaintiffs on 1st April 1942, was not a policy of insurance.

[13] The next question — and which is a more interesting question — is whether assuming that this was a proper policy it was a policy for a sufficient and adequate amount. The certificate shows that the goods were insured under a marine policy for £ 705 and against War Risks for £ 578. The ship was sunk by enemy action and the grievance of the plaintiffs in the plaint is that the war risks insurance was not proper and was only partial. The object of a seller having to insure the goods under a c. i. f. contract is clearly to afford a reasonable protection and indemnity to the buyer against the risk of the goods being lost at sea, and whether the amount for which the goods are insured is proper or not is a question of fact and can only be determined by considering whether the amount for which the policy is insured does or does not in fact afford a reasonable protection and indemnity to the buyer. In this case the price which the plaintiffs had to pay for the contract goods was Rs. 10,546 and the parties are agreed that the amount realized under this war risks insurance was only rupees

7554-2-0 exclusive of Rs. 150 paid by the plaintiffs as collecting charges. To my mind it is impossible to contend that when a seller insures the goods which he has sold to the buyer for about Rs. 10,500 for only about Rs. 7500 or Rs. 7600, that insurance affords a reasonable protection and indemnity to the buyer. Under a c. i. f. contract, a buyer either gets the actual goods under the bill of lading, or if the goods are lost, he must under the policy of insurance get the equivalent of the goods in money. As this case clearly demonstrates, the buyer did not get the goods, and as far as the policy was concerned, all that he could get was a sum of Rs. 7554-2-0 as against what he had paid for the price of the goods, namely Rs. 10,546. Mr. Bhatt on behalf of the defendants has strongly relied on a decision reported in (1861) 1 B. & S. 185.<sup>3</sup> According to him, this decision lays down that the buyer is not entitled to have his full interest in the goods insured and that what the seller is bound to insure is the value of the goods in England and not what the buyer has to pay under the contract. In my opinion this decision does not lay down the proposition for which Mr. Bhatt contends. The facts of that case were that there was a contract for the sale of a cargo of wheat to any safe port in the United Kingdom. The seller tendered a provisional invoice which estimated the cargo of wheat calculated at the price of fifty shillings per quarter, at £ 4626 which included freight at £ 1001-10-0. The goods were insured at £ 8600. The buyer claimed to be entitled to reject the tenders because the policy was for an insufficient amount. Now if one looks at the decision, the main question with which the Court was concerned was whether the seller was bound to insure the amount which had been paid for freight, and the Court came to the conclusion that the seller was not because the buyer would be liable to pay the freight only if the goods arrived at the port of destination and he would not be so liable if the goods were lost. It was then contended by the buyer that even so the amount insured fell short by about £ 24-10-0; and the learned Chief Justice in delivering the judgment in that case expressly pointed out that the deficiency between the cost price and the amount for which the goods were insured was so small and so comparatively insignificant that it did not justify the buyer to treat it as a pretext

3. (1861) 1 B. & S. 185 : 30 L. J. Q. B. 234 : 4 L. T. (N. S.) 400, *Tamvaco v. Lucas*.



for a departure from the contract when substantial and *bona fide* protection was afforded to the buyer by means of the policy. The Court came to the conclusion that whether a particular policy afforded a proper protection to the buyer or not was not a question of law and each case must be determined on the facts of that particular case. In that case the Court came to the conclusion that notwithstanding the small deficiency the buyer had obtained a substantial and *bona fide* protection. In my opinion, in this case a deficiency of about Rs. 4000 on a cost price of about Rs. 10,500 cannot and does not afford a substantial and *bona fide* protection to the buyer against his risk. Mr. Bhatt has further argued that the obligation of the buyer is merely to tender the policy for which the goods were originally insured by William Bates, Son & Co., Ltd. Mr. Bhatt argues that as a c. i. f. contract may pass from hand to hand, it is not contemplated that the amount of the policy should also be varied according to the price which different buyers might have to pay for the same goods. I am not concerned with hypothetical cases; but in this particular case, as the correspondence shows, the goods were sold by William Bates, Son & Co., Ltd., to the defendants before they entered into the contract in suit, and as I have already pointed out, they were put on board the ship only on 8th October 1941. Therefore, if the defendants were so minded they had sufficient opportunity to increase the amount of the policy after they had contracted to sell the goods to the plaintiffs for a much larger amount than the amount for which they had purchased them from William Bates, Son & Co., Ltd. The policy which William Bates, Son & Co., Ltd., had taken out was sufficient protection to the defendants under their contract with the firm, but I do not see why the plaintiffs should be compelled to accept the same policy when their risk under their contract with the defendants was much larger. In my opinion, therefore, neither in form nor as far as the amount of the insurance was concerned the document tendered by the defendants to the plaintiffs on 1st April 1942, was a proper policy of insurance as required under a c. i. f. contract.

[14] The last and final contention of the defendants is that the plaintiffs have waived their right to obtain a proper policy, that they accepted this certificate of insurance on 1st April 1942, as a proper document under the contract and that, therefore, they are not

now entitled to contend that the defendants did not discharge their obligation to tender a proper policy of insurance. The law with regard to waiver in India is very different from the law in England. In England waiver is contractual and there must be an agreement to waive either supported by consideration or it must be by contract under seal. The only other kind of waiver known to English law is the waiver which is based on an estoppel. In India the law with regard to waiver is to be found in S. 63, Indian Contract Act, which entitles the promisee to dispense with or remit, wholly or in part, the performance of the promise made to him or entitles him to accept instead of that promise any satisfaction which he thinks fit. My attention was drawn by Mr. M. V. Desai to a decision of the Privy Council in 37 Bom. L. R. 544<sup>4</sup> where their Lordships, while drawing a distinction between estoppel and waiver, point out that waiver is contractual and that it may constitute a cause of action; it is an agreement to release or not to assert a right. Now, with great respect to their Lordships, this particular observation of theirs is an *obiter* because the decision ultimately turns on the question of estoppel. But I am conscious of the fact that even *obiters* of the Privy Council deserve the highest respect. I must observe again, with very great respect, that their Lordships completely overlooked S. 63, Indian Contract Act and also their earlier decision reported in 55 I. A. 154.<sup>5</sup> The proposition that their Lordships were laying down was perfectly sound as far as the English law was concerned; but, as I have just pointed out, there is a wide and material difference between the provisions of the English and Indian law on this subject. In 55 I. A. 154<sup>6</sup> their Lordships strongly dissented from the observation of Sir Lawrence Jenkins, C. J., in 28 Bom. 66<sup>6</sup> where the learned Chief Justice took the view that a dispensation or remission under S. 63 involved an agreement as defined by S. 2, sub-s. (e), Contract Act. Dealing with this view of the learned Chief Justice, their Lordships of the Privy Council in 55 I. A. 154<sup>5</sup> say (p. 160):

[15] "The language of the section does not refer to any such agreement and ought not to be en-

4. ('35) 22 A. I. R. 1935 P. C. 79 : 13 Rang. 256 : 62 I. A. 100 : 155 I. C. 1 : 37 Bom. L. R. 544 (P. C.), *Dawsons Bank v. Nippon Menkwa*.

5. ('28) 15 A. I. R. 1928 P. C. 99 : 9 Lah. 510 : 55 I. A. 154 : 108 I. C. 678 (P. C.), *Chunna Mal-Ram Nath v. Mool Chand-Ram Bhagat*.

6. ('03) 28 Bom. 66, *Abaji Sitaram v. Trimbak Municipality*.



larged by any implication of English doctrines."

[16] In my opinion in order to constitute a waiver or a dispensation of a promise under S. 63, Contract Act, neither consideration nor an agreement is necessary. Mr. M. V. Desai drew my attention to a judgment I have recently delivered sitting with the learned Chief Justice in 47 Bom. L. R. 719<sup>7</sup> and where I expressed the opinion that time cannot be extended by the promisee under S. 63, Contract Act, by a unilateral act of his, and in order to extend time there must be an agreement between the promisor and the promisee. Now, as I have pointed out in that judgment, S. 63 provides that the promisee may make certain concessions to the promisor which are advantageous to the promisor, and one of these concessions is the extension of time for the performance of the contract; but time can only be extended provided the promisor wants it, and when he applies for the extension of time and the promisee agrees to it, an agreement is formed. It would be no advantage to the promisor if the promisee unilaterally extended the time and altered the date of the performance of the contract and, therefore, also the date of the breach at his own sweet will. That, as far as I can see, was the reasoning of the judgment that I had delivered in that case. But I do not think it follows from that judgment that every dispensation made by the promisee under S. 63, Contract Act, necessarily requires an agreement between the promisor and the promisee. The very illustrations to the section, which though they cannot control the language of the section are certainly a good guide as to its construction, clearly show that no agreement is necessary for the purpose of attracting the application of S. 63 of the Act. Now let us see what the facts are in this case and whether the defendants have succeeded in making out a case of dispensation by the buyer of the obligation of the seller to tender to him the policy of insurance. The strongest fact on which Mr. Bhatt relies is that although this document was tendered on 1st April 1942, the plaintiffs did nothing till 14th April 1942, when they merely objected to the insufficiency of the amount covered by the policy, and it was only when the suit was filed that they objected to the form of the policy. According to Mr. Bhatt, this conduct is tantamount to the acceptance by the buyer of the certificate of insurance in place of the proper

policy of insurance to which he was entitled under the contract. Now although an agreement may not be necessary under S. 63, Contract Act, it is clear that a promisee can only dispense with the performance of the promise by a voluntary conscious act. It must be an affirmative act on his part. A mere omission to assert his rights or insist upon his rights cannot amount to a dispensation within the meaning of S. 63 of the Act. Even negligence to assert his rights, although it might in certain cases result in an estoppel, cannot possibly amount to a dispensation within the meaning of the section. Now it is clear on the correspondence that right up to 25th March 1942, the plaintiffs were insisting upon an insurance policy and an invoice. When the certificate of insurance was sent to the plaintiffs on 1st April 1942, all that they did was that they did not return it nor did they say anything about it; and Keshavdev Fatechand Ruia in his evidence has said that he did not even peruse the contents of the certificate. It can only be contended that this certificate was accepted if it is shown that the plaintiffs with the knowledge that the certificate was defective or not proper consciously and voluntarily accepted this defective document in place of the one they were entitled to. Now there is no evidence that any time between 1st April 1942, and 14th April 1942, the plaintiffs knew that the certificate was defective or that they had applied their mind to it. The most that the plaintiffs can be taxed with is that they were negligent in not going straightway to their solicitors and putting the document before them; but, as I have already said, that by itself cannot lead the Court to hold that the plaintiffs had voluntarily given up their rights to obtain the proper documents. I think it would be placing an intolerable burden upon every promisee if the Court were lightly to infer from his omission or negligence that he had given up a valuable right under S. 63, Contract Act. The position is the same with regard to not taking objection to the form of the certificate till the suit was filed because it may be that the legal advisers of the plaintiffs did not realize that particular defect till the suit came to be filed. That again does not establish a conscious voluntary act on the part of the plaintiffs to give up their rights to have a policy in the proper form. In my opinion, therefore, there was no waiver or no dispensation under S. 63 of the Act as contended for by the defendants.

7. (146) 33 A.I.R. 1946 Bom. 1: 47 Bom.L.R. 719: 222 I. C. 337, Anandram v. Bhola Ram.



[17] The last question that arises is : are the plaintiffs estopped from denying that the policy which they had received was not the proper document? Now estoppel can only come into play if by the plaintiffs' conduct the defendants had changed their position in any way to their prejudice. The only suggestion made by Mr. Bhatt is that if the plaintiffs had rejected the document straightway and had not led the defendants by their conduct to believe that they had accepted the document, the defendants could have had the goods insured for the full amount and could have obtained a proper policy. Unfortunately for the defendants on the very day that they sent the certificate of insurance to the plaintiffs they received a cablegram from William Bates, Son & Co., Ltd., that the ship with the machinery which it was carrying—and which was the subject-matter of the contract—had been lost. The cablegram shows that it was received in Bombay on 1st April 1942, at 9-12 P. M. Now, it cannot be suggested that even by the strictest standard the plaintiffs should not be given a day or two to consider the matter, and even if they had given intimation to the defendants on 3rd or 4th April it was much too late for the defendants to take out another policy and insure the goods for the full amount. The ship was already sunk and the defendants had that information either on 1st or 2nd April. Therefore the conduct of the plaintiffs in not intimating to the defendants earlier about their rejection of the insurance certificate did not in any way make the defendants change their position to their prejudice or detriment. In my opinion, therefore, there is nothing in the contention of the defendants that an estoppel operates against the plaintiffs. Therefore the plaintiffs' suit must succeed, the defendants having failed to deliver one of the three essential documents, namely the policy of insurance. The defendants have committed a breach of the contract, and in any event there is a failure of consideration. The plaintiffs are, therefore, entitled to the refund of the price they paid for the goods of which they never received delivery either physically or symbolically. There will, therefore, be a decree for the plaintiffs for Rs. 2841-14-0 with interest at six per cent. on Rs. 10,546 from 23rd April 1942, till 24th December 1943, and thereafter interest on Rs. 2841-14-0 at six per cent. till judgment, costs of the suit and interest on judgment at six per cent.

G.M./D.H.

*Suit decreed.*

[ Case No. 98. ]

**A. I. R. (33) 1946 Bombay 477**

STONE C. J. AND CHAGLA J.

*Shantilal Chunilal — Plaintiff — Appellant*

v.

*Versatile Traders Ltd.—Defendants Respondents.*

Appeal No. 15 of 1945, Decided on 7th November 1945, from judgment of Kania J., D/- 25th January 1945.

Defence of India Rules (1939) — Notification under, prohibiting selling, storing for sale or carrying on business in cotton yarn except under license—"Sell" does not include agreement to sell—"Carry on business" connotes series of transactions.

In the Notification No. 24/3 issued by the Government of Bombay on 31st July 1942, under the Defence of India Rules, prohibiting selling, storing for sale, or carrying on business in cotton yarn except under a license, the word "sell" means actual sale when the property in the goods passes and does not include an agreement for sale and the expression "carry on business" means series of transactions and not isolated transactions.

[P 479 C 2 ; P 480 C 2]

The plaintiff who was dealing in cotton yarn without a license contracted to sell to defendant certain quantity of yarn at Rs. 3-1-0 per lb. in April 1943, for June 1943 delivery. The time for the performance of the contract was by mutual agreement extended to 22nd December 1943. On that date the defendant refused to take delivery. Meanwhile on 24th September 1943, the plaintiff obtained the license. On 11th April 1944, the plaintiff sued to recover damages for the breach by the defendant. The defendant contended that the contract sued upon was against the law as the plaintiff had not obtained a license to sell and that in any event damages should be assessed at the controlled rate on the date of the breach, which was Re. 1-11-0 per lb.

*Held* that the contract did not contravene the notification as it was an isolated transaction and was not a 'sale' but was only an 'agreement for sale.' The making of the contract did not fall within any of the words used in R. 121, Defence of India Rules.

[P 480 C 2]

*Held further* that the damages should be assessed on the basis of the controlled rate on the date of the breach.

[P 480 C 2]

*M. C. Setalvad and M. V. Desai —*

for Appellant.

*S. R. Tendolkar and I. G. Thakor —*

for Respondents.

**FACTS.** — On 31st July 1942, the Government of Bombay issued a notification under the Defence of India Rules, 1939, prohibiting the sale of cotton yarn except under a license.

The plaintiff Shantilal, who was dealing in cotton yarn but who had no license to sell the yarn, contracted to sell to the defendants, Versatile Traders, Ltd., 5000 lbs. of cotton yarn at Rs. 3-1-0 per lb. on 22nd April 1943, for June 1943 delivery. Again, on 24th



idem he agreed to sell another 5000 lbs. of the yarn for May delivery, and delivered 3107 lbs. of yarn to the defendants on 22nd May 1943. The time for performance of the two contracts was by mutual agreement extended from time to time, the last extension being to 22nd December 1943. On that date, the defendants refused to take delivery and committed breach of the contracts. Meanwhile, on 24th September 1943, the plaintiff obtained the licence from Government.

On 11th April 1944, the plaintiff sued to recover damages for the breach by the defendants. The defendants contended *inter alia* that the contracts sued upon were against the law as the plaintiff had not obtained the license to sell, and that in any event the damages should be assessed on the basis of the controlled rate of yarn on the date of the breach, which was Re. 1-11-0 per lb.

The trial Judge (Kania J.) held that the contracts were not against law and awarded Re. 1 as damages.

The plaintiff appealed against the quantum of damages; the defendants appealed on the question of validity of the contracts.

**Stone C. J.**—This is an appeal from the judgment of Kania J. dated 25th January 1945. The matter arises out of two contracts for the sale of yarn, dated respectively 22nd and 24th April 1943. In the trial Court a number of points were taken, but these have dropped out or have been given up, leaving two main issues which we have to consider. The issue which comes first is with regard to the validity of the contract. On that issue the appellant in this Court succeeded in the Court below. The other issue concerns the quantum of damages for the breach of contract, and on that issue the respondents succeeded and the appellant filed this appeal. Thereupon the respondents cross-appealed on the issue of validity. The cross-appeal has been argued first in this Court, since, if it succeeds, the appeal with regard to the quantum of damages would not arise.

[2] Mr. Tendolkar for the respondents on the cross-appeal submits that the transactions by the appellant (the vendor) were illegal and void as being in contravention of Notification No. 24/3 of the Government of Bombay dated 31st July 1942, which is as follows :

[3] "With effect from 1st September 1942 (that date was subsequently extended to the 1st of November 1942) no person in the Province of Bombay shall sell, store for sale, or carry on business in cotton yarn except under and in accordance with

the conditions of a license in the form in Sch. B granted by the Yarn Commissioner for the Province of Bombay."

[4] Then there is R. 121, Defence of India Rules, upon which Mr. Tendolkar also relies, and that is in these terms :

[5] "Any person who attempts to contravene, or abets, or attempts to abet, or does any act preparatory to a contravention of any of the provisions of these rules or of any order made thereunder, shall be deemed to have contravened that provision, or as the case may be, that order."

[6] Before proceeding further, it is necessary to mention certain dates and facts. The two contracts for the sale by the appellant to the respondents were each for 5000 lbs. of cotton yarn and are dated 22nd and 24th April 1943. The original dates for delivery were respectively in June and in May of that year. But it is common ground that these dates were extended by mutual agreement to 22nd December 1943, and that that is the date in each case on which a breach of contract took place. The contracts are in the name of the appellant and are his personal contracts, although in fact he was a partner in a firm of wholesale and retail cotton merchants called the Ruby Thread Co., the only other partner in that firm being Shridhar Balkrishna Antarkar. On 21st August 1942, an application for a license under the notification of 31st July 1942, was made by "Shridhar Balkrishna Antarkar, partner Ruby Thread Co." and on 1st November 1942, a license was in fact granted by the Yarn Commissioner for the Province of Bombay, the licensee being Shridhar Balkrishna Antarkar without the qualification of his being a partner in the firm of Ruby Thread Co. Accordingly on 23rd November 1942, a letter was written to the Commissioner which said :

[7] "We hereby wish to point out that the licenses in question were required to be brought out in the name of this firm, i.e. 'the Ruby Thread Co.,' and not in the individual name of the undersigned."

[8] "We shall therefore thank you to make the necessary amendment in your registers and oblige."

[9] That letter was sent by Mr. Antarkar "for the Ruby Thread Co." It does not appear that any acknowledgment, far less a reply, was ever received to that letter. The appellant in fact himself obtained a license on 24th September 1943, that is to say, long after the date of the two contracts, but before the extended date for delivery. By his evidence the appellant says that he has been doing business in yarn for the last three years and he continues :

[10] "In 1942 I was doing business in the name of Ruby Thread Co., in partnership with S. B.



Antarkar. He was a working partner. Antarkar applied for a license in the name of Ruby Thread Co. He had signed the application in his name for the partnership. The authority issued a license in the name of Antarkar."

[11] Then later in his evidence :

[12] "Ruby Thread Company was not a registered partnership. There was no written partnership agreement. Exs. B and C (those in fact are the two contracts) were my personal contracts with the defendants."

[13] "I sold yarn to the defendants only and that was because they came with a recommendation from the Controller. Otherwise my business is of Government contracts."

[14] That being the position, Mr. Tendolkar for the respondents makes the following submissions on the question of validity : first, that both contracts are illegal, because they are transactions of the appellant who must have been carrying on business in breach of the notification; secondly, that both contracts are void, because they are sales by the appellant who had no license. With regard to the first contention, Mr. Setalvad for the respondents suggests that it is not open to the appellant to take this point as it is not raised on the pleadings. The learned Judge in the Court below has accepted that view of the matter. What he says is this :

[15] "The second ground of attack based on the same notification was that the plaintiff could not carry on business in yarn except in accordance with the conditions of the license. It is clear that the burden of proof for the contention that the transactions in question are void is on the defendants. It is first necessary for them to allege on what grounds the transactions are contended to be void and plead the necessary facts in that connection. In my opinion para. 2 of the written statement does not aver that the transactions are void because the plaintiff carried on business in yarn without a licence. Reading that paragraph as a whole the contention appears to be that as the plaintiff had no license he could not enter into an agreement for sale."

[16] Paragraph 2 of the written statement is in these terms :

[17] "Referring to paras. 2 and 3 of the plaint the defendants say that as they subsequently learnt the plaintiff had no licence to sell, store for sale or carry on business in cotton yarn at the date or dates when the plaintiff purported to enter into the contracts referred to therein with the defendants. The defendants say that the plaintiff appears to have obtained the requisite license for the first time on or about 24th September 1943. The defendants under the circumstances submit that the plaintiff was not entitled to enter into the said contract for the sale of yarn and purported to enter into the same under the false pretences that he was the holder of the requisite license and was in a position to sell the said yarn to the defendants. The defendants also submit that the plaintiff, not being competent to enter into the said contracts, is not entitled to maintain the suit based upon the said contracts. The defendants put in the following

written statement without prejudice to the above contention."

[18] Now it is clear that although that averment states that the defendants "learnt" that the appellant had no license, what is submitted is that the appellant was not entitled to enter into the contracts of sale, so that any one reading this plea would think that the complaint of illegality comes under the prohibition against selling and not the prohibition against carrying on a business. There is no averment to the effect that the appellant carried on a business in breach of the notification or that these contracts were entered into as part of any such business. In my judgment, the learned Judge in the Court below was quite right in the view which he took ; but apart from this, there is no evidence that, except as a partner in the Ruby Thread Company, the plaintiff personally had ever carried on business. To carry on a business connotes a series of transactions. In this case, the evidence is that the two contracts were exceptions, having been made under the recommendation of the Controller and that they were isolated transactions. Accordingly in my judgment the respondents cannot succeed on this submission.

[19] This brings me to the second point, viz. whether these two transactions were sales within the meaning of the notification. It is to be observed in the first place that what is prohibited is selling, storing for sale or carrying on business. The more usual form of words found in Orders and Ordinances of this nature of dealing in or of offering for sale are not to be found in this case. Now with regard to the meaning of the word "sell," we have been referred to four cases of which it is necessary to say something. The first of those cases to which I desire to refer, it being under war time emergency legislation of this war, is the case in (1942) 2 K. B. 331.<sup>1</sup> That case under the English emergency legislation dealt with the meaning of the word "sell" and at p. 336 Tucker J. said this :

[20] "We have to determine what is the meaning of 'sell' in Art. 2, Canned Sardines (Maximum Prices) Order, 1941. It is conceded that no offence has been committed in this case unless the completing into a sale, after the order came into force, of what was a perfectly legitimate agreement to sell, constitutes an offence. In my view, in a commercial transaction of this kind the word 'sell' or 'sale' must be given the meaning which it bears in the Sale of Goods Act, and it is clear that in the Sale of Goods Act the word 'sale' necessarily implies something under which the property in the

1. (1942) 2 K.B. 331; 111 L.J.K.B. 690 : 167 L.T. 402 : 1942-2 All E. R. 349, *Mischeff v. Springett*.



goods has passed and includes a contract under which the goods have passed."

[21] Before referring to the other cases it is only necessary to say that under the Sale of Goods Act the position is similar. Sub-section (13) of S. 2 defines "seller" as meaning "a person who sells or agrees to sell goods"; thereby in that definition drawing a distinction. But the matter is made abundantly plain when S. 4 is looked at, sub-s. (3) of which provides that where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell. The other three cases which are relied on for the opposite point of view are, first, (1914) 1 K.B. 38.<sup>2</sup> That was a case under the Markets and Fairs Clauses Act, 1847, which provided that any person who shall 'sell' tollable articles at any place within the prescribed limits of a market except in his own dwelling place or shop is guilty of an offence. At page 49 Scrutton J. as he then was, said :

[22] "I think the reasoning of that is that, whereas generally people are assumed to know the law, this Act has been passed upon the supposition that they do not, and that when the Legislature is dealing with farmers and tolls in market towns it forbids them to sell in a sense that they will understand, as when an agreement for a sale is spoken of as a sale, and not in a sense that they never heard of, as when the existence of the sale is made to depend upon minute distinctions about the property passing."

[23] I think that case is a very special one which is concerned with an Act of Parliament nearly 100 years old and directed to a particular class of community. The next case that we have been referred to is a case from the Calcutta High Court, A. I. R. 1944 Cal. 121.<sup>3</sup> That was under one of the Calcutta Price Control Orders, the terms of which are unfortunately not set out in the report, but from the judgment of the learned Chief Justice it appears that the words "offer for sale" must have been contained in such order. If that be so the case is clearly distinguishable. The fourth and last case is A. I. R. 1945 ALL. 135,<sup>4</sup> in which Braund J. based his judgment, which was under a similar Ordinance, being the Cotton Cloth

and Yarn Control Order of the United Provinces, on the case in (1914) 1 K. B. 38<sup>2</sup> and it appears that the case in (1942) 2 K. B. 331<sup>1</sup> was not referred to either by the learned Judge or in the arguments before him. I prefer to follow the case in (1942) 2 K.B. 331<sup>1</sup> the reasoning of which I respectfully concur.

[24] In this case, however, not only have we the meaning of "sale" and "sell" in the Sale of Goods Act, but in the schedule to the notification itself is the form of license. To this are annexed certain conditions which the licensee has to fulfil. He has to submit statements of what stocks he has, what he has disposed of and what remains, and it is clear from the use of the word "sold" in those conditions that what is being dealt with are actual sales in the sense of the property in the goods passing to some other owner. In my judgment "sell" in this Notification means an actual sale when the property in the goods passes and does not include an agreement for sale. That brings me to R. 121. With regard to that rule the learned Judge has said this :

[25] "On the footing that the word 'sell' in the notification does not cover an agreement to sell, the making of the contracts does not fall under R. 121 of the Defence of India Rules. The making of a contract does not itself contravene or abet, or attempt to abet a contravention. A sale takes place when a person delivers property to another for a consideration and on receipt of the consideration the ownership of the property is transferred to the other party. If that is accepted as the correct description of a sale, the making of a contract for future delivery is not itself an act preparatory to contravention. After making such a contract and realising that the performance of it without a license would be a contravention the seller may not take any further steps. Therefore in my opinion the making of a contract does not fall within any of the words used in R. 121."

[26] I respectfully agree with the view expressed by the learned Judge on this point and it follows that the cross-appeal in my opinion fails. Next comes the substance of the appeal, which is the question of damages. The learned Judge in the Court below has dealt with this matter under the Cotton Cloth and Yarn Contracts Ordinance, 1944, which raises a somewhat difficult problem. But in this Court, although it was mentioned in the Court below, what have been relied on are cls. 10 and 12, Cotton Cloth and Yarn Control Order, 1943, from the terms of which it is clear that no manufacturer or dealer could have sold on 22nd December 1943 yarn at more than the controlled price which was Re. 1-11-0 per lb. That is an end of the appeal on that point. The result is that the appellant fails in his appeal and

2. (1914) 1 K.B. 38 : 83 L.J. K.B. 274 : 109 L.T. 939, *Lambert v. Rowe*.

3. ('44) 31 A. I. R. 1944 Cal. 121 : 212 I. C. 104, *Emperor v. Jayram Pathak*.

4. ('45) 32 A. I. R. 1945 All. 135 : I. L. R. 1945 All. 207 : 219 I. C. 301, *Pyare Lal v. Emperor*.



the respondents fail on their cross-appeal. With regard to costs, we have invited the observations of counsel on the question of costs, and, in my view, the proper order in the circumstances will be that the costs as directed by the learned Judge in the Court below will remain undisturbed and that there will be no order as to costs in this Court either of the appeal or of the cross-appeal.

**Chagla J.**—I agree.

G.M./D.H.

*Order accordingly.*

[ *Case No. 99.* ]

**A. I. R. (33) 1946 Bombay 481**

BHAGWATI J.

*Attar Hussein—Plaintiff*

v.

*Fazli Brothers, Ltd.—Defendants.*

Suit No. 1140 of 1945, Decided on 4th December 1945.

(a) Bombay High Court Rules (Original Side), R. 199—Trader—Word imports buying and selling of commodities—Business of film producer or distributor is not that of trader.

The word "trader" in R. 199 imports buying and selling of commodities and is not to be understood in the wide sense of manufacturer. Therefore, the business of the film producer which is that of a manufacturer of films or that of a distributor of films cannot be said to be that of buying and selling within the definition of the word "trader": (1900) 1 Q. B. 725, *Foll.*; (1872) 7 Ex. 127 and (1888) 22 Q. B. D. 279, *Ref.* [P 482 C 1]

(b) Bombay High Court Rules (Original Side), R. 199—Ordinary transaction—Sale of distribution rights of films within particular territories for particular period is not ordinary transaction (*Obiter*).

The sale of distribution rights of films within particular territories for a particular period would not be an ordinary transaction between the producers on the one hand and distributors on the other or between distributors *inter se*. [P 482 C 1]

*R. J. Kolah*—for Plaintiff.

*M. V. Desai*—for Defendants.

**Order.**—The plaintiff is a distributor of cinema films. The defendants are producers and distributors of cinema films, this being one of the objects for which they have been incorporated. The plaintiff entered into an agreement with the defendants for the purchase from the defendants of the distribution rights of their social pictures "Fashion", "Bhai Behen" and "College" for certain territories therein mentioned for a period of six years. The suit is filed by the plaintiff to recover damages from the defendants for a breach of this agreement. The plaintiff has taken out this summons for a transfer of this suit to the list of commercial causes. This

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summons is contested by the defendants who have contended before me that the cause of action in this suit does not arise out of the ordinary transactions of merchants and traders and that therefore this suit should not be transferred to the list of commercial causes.

[2] Counsel for the plaintiff has urged that the business which the plaintiff as well as the defendants are carrying on comes within the wide definition of "trade" to be found in Halsbury's Laws of England, vol. 32, p. 303 and (1888) 22 Q. B. D. 279.<sup>1</sup> He also drew my attention to a statement to be found in Halsbury's Laws of England, vol. 32, p. 303, in the notes, where the word "trade" is in some cases also taken to include manufacture. Arguing on this, he has contended that the plaintiff and the defendants being traders, the transaction which was entered into between them and which is the subject-matter of this suit is an ordinary transaction between traders and therefore within the definition of a "commercial cause" in R. 199 of the High Court Rules. The defendants being producers as well as distributors in the course of their business as distributors would also enter into transactions by way of selling their distribution rights for particular territories and for particular periods with persons like the plaintiff and the transaction in suit is thus an ordinary transaction which would be entered into by them as the distributors and thus the cause of action in the suit would be one arising out of the ordinary transactions between traders.

[3] Counsel for the defendants on the other hand pointed out that the word "trade" was not to be understood in the sense contended for by the plaintiff. According to the authority of (1900) 1 Q. B. 725<sup>2</sup> at p. 727 "trade" is buying and selling, and is not to be understood in the wide sense contended for by the plaintiff. He also contended that even if contrary to his submission the business of the distributors of films be called a "trade" this was not an ordinary transaction between the plaintiff and the defendants, and therefore the suit should not be transferred to the list of commercial causes. At the earlier hearing of this summons, counsel for the defendants had contended that his clients were producers of films and

1. (1888) 22 Q. B. D. 279 : 58 L. J. Q. B. 90 : 60 L. T. 505 : 37 W. R. 382, In re Incorporated Council of Law Reporting.

2. (1900) 1 Q. B. 725 : 69 L. J. Q. B. 356 : 82 L. T. 199 : 48 W. R. 351, *Palmer v. Snow*.



therefore could not be called merchants within the definition of that term which has been laid down in (1872) 7 Ex. 127<sup>3</sup> at p. 129, where Bramwell B. observed that "a merchant of or in an article is one who buys and sells it, and not the manufacturer selling." This proposition was not contested by counsel for the plaintiff and I need not say anything more about it. The argument which has been advanced by counsel for the plaintiff is only on the word "traders" appearing in the definition of "commercial causes" in R. 199 of the High Court Rules, and I have got to determine whether the parties fall within the category of "traders."

[4] Even though in certain cases the word "trade" has been given an extended meaning, I have got to determine for the purpose of the transfer of this suit to the list of commercial causes what definition of "trader" I shall adopt for the purpose. I am inclined to accept the observations of Channel J. in (1900) 1 Q. B. 725<sup>2</sup> where the learned Judge observed (page 727):

[5] "Now, although 'tradesman' may be sometimes used to describe something different from a gentleman, or in contradistinction to other kinds of persons, I do not think the word is used in that sense in this Act. It seems to denote a person carrying on trade—buying and selling—and a barber does not come within that description."

[6] The word "trader" in my opinion as used in R. 199 of the High Court Rules imports buying and selling of commodities and is not to be understood in the wide sense contended for by counsel for the plaintiff. It can hardly be said that the business of the film producer which is that of a manufacturer of films or that of a distributor of films is that of buying and selling within the definition of the word "trader" which I have adopted above. Under the circumstances, the plaintiff as well as the defendants not satisfying the category of either merchants or traders,—and certainly they are not bankers within the definition of a commercial cause in R. 199 of the High Court Rules,—I need not pause to consider whether the sale of these distribution rights within particular territories for this particular period of six years would be an ordinary transaction between the parties. If it were necessary to do so, I would say that it is not an ordinary transaction between the producers on the one hand and distributors on the other or between distributors *inter se*. I do not, however, base my decision on that aspect of the question. The

summons will, therefore, be dismissed with costs. Counsel certified.

V.R./D.H.

*Summons dismissed.*

[Case No. 100.]

**A. I. R. (33) 1946 Bombay 482**

CHAGLA J.

*Bapulal Premchand—Plaintiff*

v.

*Nath Bank Ltd.—Defendants.*

Suit No. 770 of 1945, Decided on 20th November 1945.

(a) Negotiable Instruments Act (1881), S. 131—Liability of banker for conversion of cheque—Meaning and test of negligence stated—Failure of bank to make enquiries about respectability of new customer whether constitutes negligence—References about new customer given and no suspicious circumstances attendant upon opening account—Bank held not guilty of negligence for failing to make any further enquiries and hence entitled to protection under S. 131.

In order to escape the liability which the general law imposes upon a person or party who converts the goods belonging to the true owner thereof the banker must discharge the burden of establishing that he received payment on behalf of a customer of a cheque not belonging to the customer but to some one else, in good faith and without negligence. The expression "without negligence", means without reasonable care in reference to the interests of the true owner of the cheque, the principal whose authority the customer purports to have. Negligence is essentially a question of fact and it must depend upon the circumstances of each case whether negligence has been proved or not. The test of negligence is whether the transaction of paying in any given cheque coupled with the circumstances antecedent and present was so out of the ordinary course that it ought to have aroused doubts in the banker's mind and caused him to make enquiries.

[P 483 C 2; P 484 C 1, 2]

Primarily enquiry as to negligence must be directed in order to find out whether there is negligence in collecting the cheque and not in opening the account; but if there is any antecedent or present circumstance which aroused the suspicion of the banker then it would be his duty before he collects the cheque to make the necessary enquiry and undoubtedly one of the antecedent circumstance would be the opening of the account. In certain cases failure to make enquiries as to the integrity of the proposed customer would constitute negligence. But it would depend upon the facts and circumstances attendant upon the opening of an account by the new customer whether an enquiry about him was necessary and called for or not. There is no absolute and unqualified obligation on the bank to make enquiries about the respectability of the proposed customer. It is true that modern banking practice requires that a customer should be properly introduced and it would be wiser and more prudent for a bank not to accept a customer without some reference. But it cannot be suggested that after a bank has been given a proper reference with regard to the proposed customer and although there are no suspicious circumstances attendant upon the opening of the account it is

3. (1872) 7 Ex. 127 : 41 L. J. Ex. 60 : 25 L. T. 912 ; 20 W. R. 316, *Josselyn v. Parson*.



still incumbent upon the bank to make further enquiries with regard to the customer, and the bank cannot be held to be guilty of negligence in having failed to make any such further enquiries so as to disentitle it to the protection given by S. 131 : ('20) 7 AIR 1920 P.C. 88, *Discussed and Applied*; (1914) 111 L. T. 43, *Doubted*; *Case law referred*.  
[P 487 C 2; P 489 C 1; P 491 C 1, 2; P 492 C 1]

(b) *Precedents* — Observations of Judges should not be torn from context or read without reference to facts.

It is always dangerous to rely on observations of Judges torn from their context or read without reference to the facts of the case which necessitated the particular observation.  
[P 489 C 2]

C. P. C. —

('44) Chitale, Pre. N. 15, Pts. 10, 11.

(c) *Tort—Negligence* — Contributory negligence—Person converting article belonging to true owner cannot plead contributory negligence by true owner.

A person who converts an article belonging to the true owner cannot take the plea of contributory negligence. However negligent the true owner may be, it can be no answer by the person who converts the article that he should be let off from his liability because of the negligence of the true owner.  
[P 492 C 1]

S. R. Tendolkar—for Plaintiff.

V. F. Taraporewalla and I. G. Thakor  
—for Defendants.

**Judgment.** — The plaintiff as the true owner of a cheque for Rs. 4000 has filed this suit against the defendant bank for conversion of the said cheque and claiming Rs. 4000. The material facts are really not in dispute. On 5th February 1945, Messrs. Ramchandra Ramgopal, a firm of merchants at Akola, drew a cheque upon the Laxmi Bank, Limited, for the sum of Rs. 4000 payable to the plaintiff or bearer. The cheque was crossed generally by Messrs. Ramchandra Ramgopal before delivery to the plaintiff. On the same day, the plaintiff despatched this cheque by post from Akola to his commission agents Messrs. Chimanlal Mohanlal Suratvala for presentment and collection. This cheque never reached Messrs. Chimanlal Mohanlal Suratvala and apparently it was stolen during transit. On 25th January 1945, the defendant bank opened a branch in Bombay, and on 26th January 1945, one Nemchand Amichand Gandhi opened an account by paying to the credit of that account Rs. 300 in cash. Although the name of the depositor was Gandhi, he signed his application form as "N. A. Gandhi." On 30th January 1945, Gandhi withdrew from his account by a cheque written in Gujarati the sum of Rs. 225. On 7th February 1945, Gandhi drew a further sum of Rs. 50 by drawing another cheque this time in English. Therefore the position was that on 7th

February 1945, there was only a sum of Rs. 25 to the credit of Gandhi's account. On 7th February 1945, Gandhi paid in into his account the cheque for Rs. 4000 which had been drawn in favour of the plaintiff and of which the plaintiff claims to be the true owner. This cheque was collected by the defendant bank and the amount credited to Gandhi's account. On 8th February 1945, Gandhi drew a cheque for Rs. 3800 on his account. The cheque was drawn in favour of Kantilal Maganlal Shah or bearer and has been endorsed by R. H. Desai. Bapulal Premchand, the plaintiff, has given evidence and also Chimanlal Nagindas Suratvala bearing out the facts as to the cheque being given to the plaintiff by the firm of Ramchandra Ramgopal and the cheque being stolen while in transit. On this evidence there can be no doubt and it has not been disputed by Mr. Taraporewalla that the plaintiff is the true owner of the cheque; nor can there be any doubt that Gandhi who paid in this cheque to the credit of his account had no title to this cheque.

[2] It is, therefore, clear that as against the true owner the defendant bank is guilty of conversion. Under the ordinary law the bank would have no answer to the plaintiff's claim. But S. 131, Negotiable Instruments Act, 1881, affords the defendant bank a statutory protection against the true owner in cases of conversion provided certain conditions mentioned in that section are complied with. If a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself he shall not, in case the title to the cheque proves defective, incur any liability to the true owner of the cheque by reason only of having received such payment. In order, therefore, to escape the liability which the general law imposes upon a person or a party who converts the goods belonging to the true owner thereof, the banker must discharge the burden of establishing that he received payment on behalf of a customer of his of a cheque not belonging to the customer but to someone else in good faith and without negligence. In this case it is not suggested that the bank acted without good faith, but the plaintiff's allegation is that the bank acted with negligence in collecting the cheque and thereby has lost the protection afforded to a bank by S. 131, Negotiable Instruments Act; and the short point that I have to determine in this case is whether on the facts established the defendants have dis.



charged their burden of proving that they acted without negligence. Now negligence is essentially a question of fact and it must depend upon the circumstances of each case whether negligence has been proved or not. It is difficult to define "negligence," but an attempt was made by Scrutton L. J. in (1932) 2 K. B. 122.<sup>1</sup> (This case ultimately went to the House of Lords and is reported in 1933 A.C. 201.<sup>2</sup> Scrutton L. J. says (p. 130) :

[3] "A question at once arises, as there is no 'negligence' without a legal duty, what was the exact duty imposed on the bank, and to whom? Before the Acts, the bank, of course, owed a duty to every owner of property not to convert it but that duty was absolute, and independent of reasonable care. In my view, S. 82 lessened the duty of the bank by limiting it to an obligation only to use reasonable care in dealing with the cheque, or by providing that if the bank proved that it had used reasonable care in discharging its obligation to the true owner not to convert his property, it was discharged from liability though it had converted that property."

[4] Then Scrutton L. J. cites with approval the observations of Kennedy J. in (1900) 5 Com. Cas. 188<sup>3</sup> (p. 191):

[5] "The only question is, did they act without negligence? What does 'without negligence' mean? It means, I take it, without want of reasonable care in reference to the interests of the true owner, the principal whose authority the customer purports to have."

[6] Therefore what I have to determine in this case is whether in collecting the cheque belonging to customer Gandhi the bank acted without reasonable care in reference to the interest of the plaintiff, the true owner of the cheque. The Privy Council in (1920) A. C. 683<sup>4</sup> laid down the principle which ought to guide the Courts in considering the question whether a bank is guilty of conversion in having been negligent in collecting a cheque on behalf of a customer which in fact did not belong to him. In that case one A. Friend of Sydney, put a cheque drawn by himself on the Australian Bank of Commerce for £786.18.3 into an envelope, along with some other cheques drawn by other members of his family, and addressed the envelope to the Commissioners of Taxation, George Street North, Sydney. This cheque was in payment of an assessment for income-tax. It was crossed with the word

"Bank", that is to say, generally not specially. This cheque was stolen by some person unknown and was never cashed by the Commissioners of Taxation. On the following day a man who gave his name as Stewart Thallon entered the head office of the respondents' bank at Sydney and stated that he wished to open an account. The accountant took his name and address which this man gave at certain well-known residential chambers in Sydney. He then handed in a sum of £20.<sup>5</sup> The Accountant filled up the "paid-in" slip and the account was duly opened and a cheque book issued to Thallon. On the following day the stolen cheque was handed in by Thallon; and on the next day Thallon withdrew three sums of £483.16.6, £260.10.0 and £50 12.6 by cheques drawn by himself. Thallon was never seen again and it was found that no person of that name lived at the address he had given. The Commissioners of Taxation then filed an action from which the appeal went to the Privy Council against the bank for conversion of the cheque. The Supreme Court for New South Wales held that the bank was not guilty of negligence. In discussing the question of negligence, their Lordships of the Privy Council are at pains to point out that the negligence with which the Court was concerned was not in opening the account but "in collecting the cheque" though the circumstances connected with the opening of an account may shed light on the question of whether there was negligence in collecting the cheque, and the test of negligence which their Lordships adopted was whether the transaction of paying in any given cheque coupled with the circumstances antecedent and present was so out of the ordinary course that it ought to have aroused doubts in the bankers' mind and caused them to make inquiry. Their Lordships emphasized that negligence was a question of fact and they rejected the argument of the learned Chief Justice of the Supreme Court that the care that the bankers should take should not be less than a man invited to purchase or cash such a cheque for himself might reasonably be expected to take. Their Lordships thought that that was an inapposite standard for the simple reason that it was no part of the business or ordinary practice of individuals to cash cheques which were offered to them, whereas it was part of the ordinary business or practice of a bank to collect cheques for their customers. The argument that was presented to the Board was that the bank was negli-

1. (1932) 2 K. B. 122 : 101 L.J. K.B. 499, Savory & Co. v. Lloyds Bank, Ltd.

2. (1933) 1933 A. C. 201 : 102 L. J. K. B. 224 : 148 L. T. 291, Lloyds Bank Ltd. v. Savory & Co.

3. (1900) 5 Com. Cas. 188, Hannan's Lake View Central, Ltd v. Armstrong & Co.

4. (1920) 7 A. I. R. 1920 P. C. 88 : 1920 A. C. 683 : 89 L. J. P. C. 181 : 123 L. T. 34, Commissioners of Taxation v. English, Scottish and Australian Bank Ltd.



gent in collecting the cheque for a customer who was of recent introduction and about whom the bank knew nothing. Their Lordships then pointed out that there was nothing suspicious about the way the account was opened; they were of the opinion that there was nothing suspicious in the fact that a cheque was paid into that account for collection one day after the account had been opened; they further pointed out that if it was laid down that no cheque should be collected without a thorough inquiry as to the history of the cheque, it would render banking business as ordinarily carried on impossible; customers would often be left for long periods without available money. But their Lordships do say that if the cheque had been for some unusually large sum, perhaps suspicion might have been aroused; but whether the cheque is or is not for an unusually large sum is really a question of degree. Their Lordships finally point out that in the cheque presented by Thallon there was no note of alarm or of warning which could have aroused the suspicion of the bank. Under the circumstances their Lordships dismissed the appeal and held that the bank was not negligent. I have taken some pains to reproduce at some length the reasons of the Privy Council in coming to the conclusion they did because both the decision and the observations of their Lordships are of considerable assistance in deciding the case before me and also of applying the test which the Privy Council did in the case before them.

[7] The first contention of the plaintiff is that no individual of the name of Gandhi in fact existed and that the identity of Gandhi has not been established by evidence in this case. I accept Modi's testimony that he did know Gandhi as a broker before Gandhi came to him for the purpose of opening an account on 26th January 1945. I have also got the evidence of Gupte, the accountant of the defendant bank, on this point. Gupte says that when the cheque for Rs. 225 came to him in the ordinary course, he noticed that although the name of the drawer was Gandhi, he was signing as "Gandi" and he therefore sent for Gandhi and inquired of him about this. This man who said he was Gandhi told Gupte that he did this because his signature should not be forged. The next question I have got to consider is whether Modi was negligent in recommending Gandhi to the defendant bank as a customer. It is true that even taking Modi's evidence at its best, Modi had

a rather casual acquaintance with Gandhi. But it is difficult for me to see why Modi did anything wrong in giving a reference if Gandhi went to him with actual cash and wanted to open an account in the bank after he had met Gandhi before at the *pedhi* of his friend Dave and had known him as a broker. Assuming that Modi was negligent in introducing Gandhi to the defendant bank, the next question is whether the negligence of Modi can be imputed to the bank. Now it is not suggested and it cannot be suggested on the record as it stands that it was any part of the duty of Modi and the cashier to introduce customers. It is true that Modi has said that before he was employed he told the Manager that he would be able to introduce a few customers. That perhaps improved his chance of his being taken on as a cashier, but that does not mean that it was incumbent upon him in the performance of his duties to introduce customers. Modi gave a reference for Gandhi to the bank just as any other outsider would have done. The reference was not given in the performance of his duties as a cashier and therefore the negligence, if any, of Modi cannot be imputed to the bank. In order that the plaintiff should succeed, he must establish that the bank was negligent in accepting Gandhi as a customer if such negligence is sufficient to disentitle the defendant bank from the protection given to it under S. 131, Negotiable Instruments Act.

[8] It is next urged by the plaintiff that the bank was negligent in accepting Gandhi as a customer. On this point the practice as to accepting customers is deposed to by Gangooli, the manager of the defendant bank, and he says that the bank opened accounts only of such persons as were known to any member of its staff or to any outsider who was known to the bank. Gangooli further says that when a customer was introduced by a person other than a member of the staff, the bank made no reference to him about the customer either in writing or orally; but when a customer was introduced by the members of the staff, he always sent for that member of the staff and questioned him about the credentials of the customer. Gangooli also pointed out one of the rules of the bank which was that the proposed customer should be properly introduced and his interpretation of the word "properly" was that it must be by one whom he could trust; and in the ordinary course he would trust every officer and ser-



vant in the bank if he introduced a customer. Gangooli, the manager, has further told me that when he saw the application form for opening the account of Gandhi and he saw that Gandhi was introduced by Modi he sent for Modi and asked him about Gandhi and Modi told Gangooli that he knew Gandhi well, that he was a broker and also knew that he had effected transaction with Dave. The manager stated that after he had this discussion with Modi he passed the form and initialled it in red ink. The manager further said that he followed the same practice with regard to the other customers introduced by Modi. On 26th January 1945, there were nine applications for opening new current accounts. Of these nine, three were introduced by Modi; three by the manager himself; and the remaining three by an outsider. In respect of all the three persons introduced by Modi the manager made personal inquiries of Modi. Mr. Tendolkar has commented on the fact that the manager did not tell Sub-Inspector Paltonwalla about what Modi had told him about Gandhi before his application was sanctioned. In my opinion, that fact by itself is not sufficient to make me come to the conclusion that the manager's testimony on this point should be disbelieved. I accept the evidence of Gangooli, the manager of the defendant bank, that when he received the application form of Gandhi, he sent for Modi and made the inquiries to which he has deposed here.

[9] In the next place, a great deal of emphasis was laid by the plaintiff on the fact that the address given by Gandhi, namely, 103, Kavarana Street, Fort, in his application form was a non-existent address. Now the position with regard to this address is that I have the evidence of Desai, Road Inspector, "A" Ward, Bombay Municipality, who has stated that the Municipality keeps a record of all the public streets and of such private streets as the public have access to; and no street, public or private, by the name of Kavarana Street appears in this record. But he admitted to Mr. Taraporewalla that the Post and Telegraph Office Directory did mention this street as being near the Bombay General Post Office. Sub-Inspector Paltonwalla also said that he could not find any such street as Kavarana Street in the Fort. But the Road Inspector of the Bombay Municipality did admit that there was a building known in Frere Road called Kavarana Building; next to this building there was a bye-lane off Frere Road; that

bye-lane was not named; and the address of Kavarana Building was No. 103, Frere Road. There is no evidence before me whether any man by the name of Gandhi was living in this Kavarana Building, the address of which is No. 103, Frere Road.

[10] It is further contended that there were suspicious circumstances attendant upon the opening of the account by Gandhi. In the first place, it is pointed out that whereas the name of the customer was Gandhi, he signed his application form and his specimen signature card as "Gandi." Gangooli, the manager, has stated that it was not uncommon for a man to give his specimen signature which was differently spelt from his own name; and as I have already pointed out, both Gupte and Modi have stated that in answer to inquiries by them Gandhi told them that he signed his name differently from the way in which it was spelt in order that his signature should not be copied. Then it is pointed out that it is very unusual for Modi, the cashier of the bank, to have filled in on behalf of Gandhi the paying-in slip in respect of the deposit of Rs. 200 and also the application form for opening an account with the bank. It is true that the manager says that it is not customary for the cashier to do these things; but Modi has stated in the witness-box that he did this because Gandhi did not know English and he did it as a friendly act. Modi also said that he filled in the application forms of other customers besides Gandhi whom he had introduced. The important fact to remember in connexion with the opening of Gandhi's account is that the account was opened with cash and not with any cheque paid in by Gandhi. When a customer opens an account with a cheque, certain inquiries may become necessary as to the cheque; but when an account is opened with cash, obviously the position is very different. I am stressing this point because when I come to deal with the authorities cited at the bar, its importance and relevance will become clear.

[11] It is further urged that the bank's suspicions should have been aroused before they collected the cheque from Gandhi by the manner in which Gandhi's account was operated. A great deal of emphasis was placed on the fact that by 7th February 1945, the credit to Gandhi's account only stood at Rs. 25 and that on that very day a cheque for Rs. 4000 was paid in. Now the rules relating to current accounts of the



bank provide that accounts should be opened with a minimum sum of Rs. 500; but as far as the Bombay branch was concerned, the evidence is borne out by the subsequent amendment of the rule itself that the managing director had given his sanction to opening accounts in Bombay with a minimum sum of Rs. 300 and in Bombay the minimum balance required to be maintained was Rs. 50. If the balance of Rs. 50 is not maintained, then a fee of Re. 1 is charged to the customer. The manager stated that it was not unusual for a customer to deposit the minimum amount necessary and then to withdraw within four or five days the maximum amount permissible and leave just the balance required. It is true that Gupte, the accountant in the defendant bank, did not quite agree with this view of the manager because he said that he knew of two or three cases where a customer had opened an account with the minimum deposit required and withdrawn practically the whole of the amount within a few days. He would consider such a thing as unusual. But Gupte went on to say that he did not think that that circumstance would put the bank on inquiry. It is difficult to see why a customer who opens an account with the minimum permissible, namely, Rs. 300 should not operate upon it so as to reduce it to an amount less than required under the rules to maintain the account and when he finds that he has gone below the minimum necessary, pay in a sum of Rs. 4000 so that the balance goes up to a much larger sum than required. It cannot be suggested that the payment of a cheque for Rs. 4000 was for such a large sum or such a disproportionate sum that it should have aroused the suspicion of the bank. Gupte, the accountant, has stated in his evidence that in the course of one day sums aggregating to rupees four lakhs are paid into the bank. If one were to look at the proportion between the original deposit, namely Rs. 300, and the payment of Rs. 4000, it is less striking than the proportion between the £20 deposited by Thallon in the Privy Council case and the deposit on the subsequent day of a cheque for £786. The Privy Council there did not think that the cheque for £786 was for an unusually large sum. There is less reason to think here that the paying-in of a cheque for Rs. 4000 by Gandhi was of so unusually a large sum that the suspicion of the bank should have been aroused. A further point was sought to be made that cheques were drawn by Gandhi in Gujarati

and in English; but Gupte, the accountant, produced two cheques of another customer, one written in Gujarati and the other in English. Thus there is nothing in this fact by itself which was sufficient to put the bank on inquiry with regard to its customers.

[12] Having considered the various contentions of the plaintiff and having reviewed the evidence on the various points, I should now like to consider, in view of the authorities, what is the true and correct approach to the facts of this case. Primarily, inquiry as to negligence must be directed in order to find out whether there is negligence in collecting the cheque and not in opening the account. If there was anything suspicious about the cheque of Rs. 4000 which Gandhi paid in to the credit of his account, there can be no doubt that it would have been the duty of the bank to make the necessary inquiries before they cashed the cheque. To use the language of the Privy Council, if there had been any note of warning or alarm on the cheque itself, then if the bank had collected it disregarding the note of warning or alarm it would have done so at its own peril. But in this case the cheque is a perfectly innocuous document. It is made out in the name of the plaintiff or bearer and, as I have said, it is generally crossed and it is drawn by two partners of the firm of Ramchandra Ramgopal; and it is not seriously disputed by Mr. Tendolkar that there is nothing on the face of the cheque which should put the bank on inquiry. Therefore, *prima facie*, the bank was not negligent in collecting this cheque which on the face of it did not in any way arouse its suspicion. But it is not sufficient that the cheque itself should not arouse the suspicion of the bank. If there is any antecedent or present circumstance, again to use the language of the Privy Council, which aroused the suspicion of the bank, then it would be the duty of the bank before it collected the cheque to make the necessary inquiry and undoubtedly one of the antecedent circumstance would be the opening of the account. Now it is important to bear in mind that there is no connection whatever in this case between the opening of the account and the stealing of the cheque. The cheque did not come into existence till 5th February 1945, and the account was opened on 26th January 1945. It is impossible to believe that Gandhi or whoever opened the account on 26th January had the remotest idea that on 5th February Messrs. Ramchandra Ramgopal



would make out a cheque in favour of the plaintiff on 5th February and that the plaintiff would post it to his commission agent Suratvala and he would get an opportunity to steal the cheque and get his bank to collect it. But apart from there being no connection whatever between the stealing of the cheque and the opening of the account, was there any suspicious circumstance at all about the opening of the account? As I have pointed out, the account was opened with cash. There was a reference by the cashier and that reference was sufficient according to the practice followed by the bank. The manager made the necessary inquiries and the account was opened. But what Mr. Tendolkar contends for is that it is the duty of the bank to make inquiries about the respectability of an intended customer in every case although there may not be the least suspicious circumstance attendant upon the opening of the account and, according to Mr. Tendolkar, proper and sufficient inquiries were not made in this case by the bank about the respectability or the integrity of Gandhi, their customer.

[13] For this proposition reliance was particularly placed on (1914) 111 L. T. 43.<sup>5</sup> In that case the plaintiffs, who were a firm of bookmakers, had as one of their clients an undergraduate at Oxford University by the name of Robert Howard Jobson. This undergraduate won some money on a bet and the plaintiffs, intending to pay him, drew a cheque for £75-11s-3d upon the National Bank, Limited. This cheque was stolen and the young man who stole it went to the defendant's bank and said that he wanted to open an account with the assistance of that cheque. He gave his name as Richard Henry Jobson and his address at the University College, Oxford. The defendant accepted the cheque and opened the account. After the cheque was cleared, this customer drew a cheque for £65. On that, the defendant was held liable for conversion to the plaintiffs. Now two important facts with regard to this case must be borne in mind. The first is that no reference was taken of any sort whatever with regard to the customer by the defendant and, secondly, the account was opened with a stolen cheque and no inquiry was made about the cheque at all. Strong reliance is laid on an observation of Bailhache J. who decided this case to the effect that (p. 44) it is true that banks are willing to take cheques, but

before they allow them to be operated upon they must be satisfied as to the respectability of the intended customer. A little before he made this observation in the judgment, Bailhache J. expressed his own opinion that if he had been left without any evidence on the point he should have been disposed to think that the defendant was under no obligation to make any inquiries in the absence of anything to make him suspicious; but he relied on the evidence on the practice of banks, namely, that it is usual to make inquiries. He further adds that inquiries as to the respectability of the intended customer can be done by references and sometimes by an introduction through a customer. In the Privy Council case, (1920) A. C. 683,<sup>4</sup> curiously enough the case was cited at the bar by Mr. Romer K. C. on behalf of the appellants not on the question of negligence but on the question of what is sufficient to constitute a person a customer of the bank, and in the judgment of their Lordships this case is not referred to at all; and when one turns to the facts of the Privy Council case, which I have already set out in some detail above, it will be remembered that Thallon, the customer of the bank in that case, was given no reference. The bank knew nothing about him and yet the Privy Council, far from imposing upon the bank any necessity for making an inquiry about this customer, held that the bank was not negligent because there was nothing suspicious about the way the account was opened. It is true that in *Ladbroke & Co. v. Todd*, at least in the judgment as reported in (1914) 111 L. T. 43,<sup>5</sup> Bailhache J. does say that there was nothing suspicious in the opening of the account by Jobson and yet he took the view that it was incumbent upon the bank to make the inquiries about the respectability of the customer. In view of the Privy Council decision, it is difficult for me to hold that the principle of law enunciated in (1914) 111 L. T. 43<sup>5</sup> is the correct law. According to the Privy Council, as I read the judgment, if a customer opens an account with cash and there is nothing suspicious about the manner in which the account is opened, the fact that the bank made no inquiries about the customer would not disentitle the bank to the protection given to it by S. 131, Negotiable Instruments Act. Of course on the facts before me there was actually a reference given by Modi to Gandhi and I have also held that the manager of the defendant bank did

5. (1914) 111 L. T. 43, *Ladbroke & Co. v. Todd*.



make inquiries about the position and status of Gandhi.

[14] (1914) 111 L. T. 43<sup>5</sup> is referred to in (1929) 1 K. B. 40.<sup>6</sup> Sankey L. J. at p. 69 refers to (1914) 111 L. T. 43<sup>5</sup> and (1920) A. C. 683<sup>4</sup> for the proposition that a bank may be negligent in not making inquiries as to a customer on opening an account. With great respect to the learned Lord Justice, it is impossible to understand how the Privy Council case can be an authority for the proposition for which the learned Lord Justice had made use of it. If anything, the Privy Council decides the contrary of the proposition which Sankey L. J. enunciates in that judgment. With regard to (1914) 111 L. T. 43<sup>5</sup> it is true that it does lay down the necessity for an inquiry; but Sankey L. J. has worded the proposition in a cautious manner because what he says is that a bank may be negligent in not making inquiries as to a customer on opening an account. It would depend on the facts of each case and the circumstances attendant upon the opening of the account whether an inquiry as to a customer was necessary and called for or not. Sankey L. J. does not say, as Mr. Tendolkar contends for, that in every case it is obligatory upon a bank to make inquiries as to the respectability of a customer in order that it should avail itself of the protection given to it under S. 131, Negotiable Instruments Act. In that case the plaintiffs were bankers having a branch office in Bombay. One Lawson, their Chief Accountant at the Bombay Branch, had express authority to draw cheques on other bankers with whom the plaintiffs had an account. He had an account with the defendants, who were bankers in Bombay, and another account with the plaintiffs' Bombay branch. The plaintiffs paid his salary by crediting his account with their Bombay branch. In 1922 Lawson began fraudulently drawing cheques on the plaintiffs' bankers in favour of the defendants, to whom he sent written instructions to place the cheques to the credit of his account with them. These frauds were continued for two years by means of false entries in the books of the plaintiffs' Bombay branch. When these fraudulent cheques had been cleared and the amounts credited to Lawson's account by the defendants, Lawson immediately drew cheques against the balance standing to his

credit. Some of these cheques were in favour of stockbrokers with whom Lawson had speculative dealings; the others he paid to the plaintiffs, either to the credit of his account with them or in respect of special services to be rendered by them. The plaintiffs brought an action against the defendants for conversion. The Court held that the defendants could not claim the protection of S. 131, Negotiable Instruments Act. The Court also held that the defendants were negligent on the ground that they were put upon inquiry by various facts. Scrutton L. J. in delivering the judgment, at p. 59 accepted the measure of duty owed by the defendant bank to the true owner as laid down by Lord Dunedin in 1920 A. C. 683.<sup>4</sup> Scrutton L. J. further observes :

[15] "Lord Dunedin adds to it the qualification, which I entirely accept, that to require a thorough inquiry into the history of each cheque would render banking business impracticable, and that therefore there must be something markedly irregular in the transaction."

[16] (1914) 111 L. T. 43<sup>5</sup> is also referred to in 1933 A. C. 201.<sup>2</sup> Lord Wright states (p. 231):

[17] "It is now recognized to be the usual practice of bankers not to open an account for a customer without obtaining a reference and without inquiry as to the customer's standing; a failure to do so at the opening of the account might well prevent the banker from establishing his defence under S. 82 if a cheque were converted subsequently in the history of the account: this rule was applied by Bailhache J. in (1914) 111 L. T. 43,<sup>5</sup> who on that ground held that the banker had not made out his defence under S. 82."

[18] Mr. Tendolkar relies on this passage as indicating that a mere reference to a customer is not sufficient but there must also be an inquiry as to the customer's standing. But it may be observed that what Lord Wright says is that the absence to do both these things might "well prevent" the banker from establishing his defence. Lord Wright does not say that the absence to take these precautions must in all cases be tantamount to negligence on the part of the banker. Further it is always dangerous to rely on observations of Judges torn from their context or read without reference to the facts of the case which necessitated the particular observation. The facts of the case in 1933 A. C. 201<sup>2</sup> were very peculiar. A firm of London stockbrokers had in their employment two clerks, Perkins and Smith. Perkins had an account at one country branch of the bank. The wife of Smith had an account at another country branch. Perkins stole many cheques signed by the stockbrokers in payment of jobbers'

6. (1929) 1 K. B. 40 : 97 L. J. K. B. 609 : 139 L. T. 126, *Lloyds Bank v. The Chartered Bank of India, Australia and China*.



accounts and handed them in at one or other of the bankers' London branches. Smith also stole many of the cheques and handed them in at the bankers' head office, making out paying in slips directing payments to be made to the account of his wife which was at a country branch. The stolen cheques in each case were received by the London office and sent to the clearing house. The House of Lords, in coming to the conclusion that the bankers were negligent and were deprived of the protection of s. 82, Bills of Exchange Act, particularly took into consideration the rules framed by the bank and the negligence of the bank in not giving effect to those rules. One of the rules of the bank was that no cheques or other documents made payable to a firm, company, or any one in the capacity of a principal, should be accepted for credit of the private account of a partner, agent, or clerk, or other person closely connected with the principal, or negotiated for such person, without the principal's written authority; and the other rule was that no new current account should be opened without the knowledge of, or full inquiry into, the circumstances and character of the customer. In this case although inquiry was made as to the occupation of P and information elicited that he was a stockbroker's clerk, the bank did not take the precaution of finding out what the names of the stockbrokers were. If the bank had done so, it would have immediately put on inquiry because it would have realized that P was paying to the credit of his account cheques drawn by his employers. When an employee credits to his account cheques drawn by his employer, it is always a question of suspicion or at least a matter calling for inquiry and, therefore, as a banking practice banks safeguard themselves against employees cheating their employers and rules are framed so that the bank should know whether their customers are employed by any one; and if so, by whom? In the case of the account of Mrs. Smith very perfunctory inquiry was made, and here again if a proper inquiry had been made, the bank would have known that Mrs. Smith was the wife of Smith who was employed with a particular firm of stockbrokers and that she was crediting to her account cheques drawn by the employers of her husband. The observations of Lord Buckmaster at p. 214 must be read in the setting of the facts I have just stated. This is what Lord Buckmaster says:

[19] "... I regard the result of this evidence as meaning that a prudent bank manager, opening an account with a stock-broker's clerk, would ascertain who his employer was, unless the character of the reference was so satisfactory, or given by a customer so highly valued that the quality of the reference might be taken as dispensing with the need for the inquiry."

[20] Therefore, in the case of a stock-broker's clerk, a mere reference, unless the quality of the reference was very high, would not permit the bank to dispense with the elementary precaution of finding out what the names of the stockbrokers were. A further passage relied on is in the judgment of Lord Russell who delivered the dissenting judgment taking the view that the bank was not negligent. At p. 226 the learned Law Lord says:

[21] "They must make sufficient inquiries to satisfy themselves of the integrity of the proposed customer and of the desirability of having his account on their books."

[22] The learned Law Lord took the view that there was no justification for adding to the obligation of the banker the burden of making inquiries as to the names of the employers of his customer. It is difficult to say, with respect, why it was incumbent upon the bank to make sufficient inquiries to satisfy themselves of the integrity of the proposed customer if in this very case the learned Law Lord took the view that there were no circumstances calculated to arouse suspicion in the bank's mind which would have necessitated an inquiry as to the names of Perkin's employers. (1914) 111 L. T. 43<sup>5</sup> is also referred to in two leading and well-known text books. Byles on Bills, Edn. 19, p. 39, lays down the proposition that it is negligence not to make inquiries as to the respectability of a proposed customer, and (1914) 111 L. T. 43<sup>5</sup> is cited in support of that proposition; but in Edn. 20, p. 40, the proposition is toned down and is worded as follows: "Failure to make inquiries as to the respectability of a proposed customer may be sufficient to constitute negligence." The change from "is" to "may be" is noteworthy. There can be no doubt that in certain cases failure to make inquiries would constitute negligence. Halsbury, Vol. I, p. 811, states the proposition in the same emphatic form as the earlier edition of Byles on Bills, and (1914) 111 L. T. 43<sup>5</sup> is cited in the foot-note in support of the proposition. But curiously enough 1920 A. C. 683<sup>4</sup> at p. 688 is also cited in support of this proposition. How the assistance of the Privy Council can be requisitioned in support of



this statement of the law it is not possible to understand.

[23] It is further urged that it was incumbent upon the defendant bank, Gandhi having given his address as 103, Kavarana Street, to ascertain whether in fact such an address existed and whether Gandhi lived at such an address; and in support of that proposition, (1923) 67 S. J. 440<sup>7</sup> is relied upon. In that case a man describing himself as Donald Stewart opened an account at a bank and paid in a small sum, stating that he expected to pay in larger sums shortly. On the following day he paid in two stolen orders for large sums made out to "D. S. and Company" stating that he carried on business under that name. A reference was given by the customer which the bank found satisfactory, but that reference ultimately turned out to be a forgery. Acton J. held that the bank was guilty of negligence in collecting the orders on the ground that the bank failed to investigate the genuineness of the name D. S. & Co. as to which a reference to a directory would have shown that no such firm existed at the address given. Acton J. although he referred to the Privy Council case, 1920 A. C. 683<sup>4</sup> at p. 688,<sup>4</sup> still came to the conclusion that the bank should have made a reference to a directory which would have given them the information that Donald Stewart did not carry on business at the address given by him. I frankly confess that I find it very difficult to understand this judgment of Acton J. because it does not appear from the judgment that there were any suspicious circumstances attendant upon the opening of the account by Donald Stewart which would have put the bank on suspicion. The case is not reported in any authorised reports, and the judgment given in the Solicitors' Journal is rather sketchy and incomplete.

[24] In my opinion, there is no absolute and unqualified obligation on a bank to make inquiries about a proposed customer. I agree that modern banking practice requires that a customer should be properly introduced or, in other words, that the bank should act on the reference of some one whom it could trust. Therefore, perhaps in most cases it would be wiser and more prudent for a bank not to accept a customer without some reference. But I am not prepared to go so far as to suggest that after a bank has been given a proper reference with

7. (1923) 67 S. J. 440, *Hampstead Guardians v. Barclays Bank Limited*.

regard to a proposed customer and although there are no suspicious circumstances attendant upon the opening of the account, it is still incumbent upon the bank to make further inquiries with regard to the customer. In this case, of course, as I have already pointed out, the manager of the defendant bank accepted the reference of the cashier Modi and also in fact made certain inquiries of Modi as to the position and status of Gandhi. In my opinion, it was not obligatory upon the defendant bank to make any further inquiries about this customer, and in having failed to make any such further inquiries, in my judgment, they are not guilty of negligence.

[25] It is further urged that it is the duty of a bank to notice the account of a customer from time to time and in failing to notice the account the bank is guilty of negligence. Reliance is placed on an observation of Sankey L. J. in (1929) 1 K. B. 40<sup>6</sup> for this proposition. This is what the learned Lord Justice says (p. 70) :

[26] "... and there may be negligence in not noticing the account of the customer from time to time and considering whether it is a proper or a suspicious one."

[27] Again the language used suggests that it is not obligatory, but in certain cases it may become necessary. But even for this limited proposition, Sankey L. J. relies on (1914) 3 K. B. 356.<sup>8</sup> When one turns to that judgment, it is difficult to find anything in the judgment of Lord Reading, Lord Chief Justice, to warrant the proposition laid down by Sankey L. J. In (1914) 109 L. T. 856,<sup>9</sup> Pickford J. observed that if the account had been opened with a very small sum to credit or with a sum that was very soon drawn down practically to nothing, and then large sums were paid in by cheques in quick succession, he would have no hesitation in coming to the conclusion that that fact ought to have put the banker upon inquiry and he ought to have seen that the matter was right. But in this particular case the learned Judge came to the conclusion that as the cheques paid in were for comparatively small amounts and the cheques were paid at long intervals, there was no negligence on the part of the bankers to make any inquiry. It is true that in the case before me the account was opened with a very small sum and had been brought

8. (1914) 3 K. B. 356 : 83 L. J. K. B. 1202 : 111 L. T. 114, *Morison v. London County and Westminster Bank, Ltd.*

9. (1914) 109 L. T. 856, *Crumplin v. London Joint Stock Bank, Ltd.*



down practically to nothing. But I have not the case where after that large sums had been brought in by cheques in quick succession. All that happened was that when the account was reduced to Rs. 25, a cheque for Rs. 4000 was paid in. In my opinion that was not sufficient to put the bank on inquiry and the bank was not negligent in not having made any inquiries when they discovered the state of the account on 7th February 1945. Under all the circumstances of the case, the bank has established that there was no negligence on its part in collecting the cheque of Gandhi and crediting it to his account and, therefore, the bank is protected by S. 131, Negotiable Instruments Act, and is not liable to the plaintiff for conversion.

[28] I should like to mention one further contention on which an issue has been raised and which has been very rightly not pressed by Mr. Taraporewalla and that is the issue of contributory negligence. In their written statement, the defendants have alleged that the plaintiff was guilty of contributory negligence. It is difficult to see how a person who converts an article belonging to the true owner can turn upon the true owner and say: "I am not guilty of conversion because you showed negligence in relation to your own article." However negligent the true owner may be, it can be no answer by the person who converts the article that he should be let off from his liability because of the negligence of the true owner. But for the protection afforded to the bank by S. 131, Negotiable Instruments Act, the bank would have no defence whatever to the claim of the plaintiff. Suit dismissed with costs. I fix the costs at Rs. 2500 including costs for summons for directions.

N.S./D.H.

*Suit dismissed.*[ *Case No. 101.* ]**A. I. R. (33) 1946 Bombay 492**

DIVATIA AND RAJADHYAKSHA JJ.

*Purshottam Harjivan Shah and another*  
*Accused—Applicants*

v.

*Emperor.*

Criminal Revn. Appln. No. 191 of 1945, Decided on 20th November 1945, from convictions and sentences passed by Presidency Magistrate, 6th Addl. Court, Bombay.

(a) Evidence Act (1872), S. 114, illust. (e) — Presumption under, is as to regularity of official acts done and not as to acts themselves being done — Hoarding and Profiteering Prevention Ordinance (35 [XXXV] of 1943), S. 14 — Notification under, empowering Deputy

Controller General to grant sanction — No presumption that notification was issued according to terms of S. 14 can be raised.

The presumption under S. 114, illust. (e), is that of the regularity of the official acts, whether judicial or executive, and not that of the acts themselves being done. If, for instance, a notification is issued under the powers given by law, there is a presumption that it was regularly published and promulgated in the manner in which it was required to be done. But there is no presumption that it was issued according to the terms of the section which empowers it.

[P 494 C 1]

Where, therefore, a notification under S. 14, Hoarding and Profiteering Prevention Ordinance 1943, empowering the Deputy Controller General of Civil Supplies to grant sanction in respect of offences under the Ordinance has been issued, it must be proved by the prosecution that the officer empowered held a rank not below that of a District Magistrate as required by S. 14. When no such proof is given, no presumption can be drawn under S. 114, illust. (e) that the officer mentioned in the notification must be deemed to have been given a rank not below that of a District Magistrate in accordance with S. 14 of the Ordinance: ('45) 32 A. I. R. 1945 Bom. 368; ('45) 32 A. I. R. 1945 Pat. 307; 32 Cal. 1107 and ('34) 21 A. I. R. 1934 Rang. 207, *Rel. on.*

[P 494 C 1]

(b) Hoarding and Profiteering Prevention Ordinance, (35 [XXXV] of 1943), S. 14—Notification under, empowering Deputy Controller General of Civil Supplies to grant sanction—Notification is invalid and sanction granted in pursuance of it is also invalid.

Under S. 14 a sanction to prosecute can be granted by any officer not below the rank of a District Magistrate empowered by the Central or Provincial Government. The term "rank" as used in the section does not mean social rank as in the warrant of precedence.

[P 494 C 1, 2]

A notification issued under S. 14 empowering the Deputy Controller General of Civil Supplies to grant sanction in respect of offences under the Ordinance is *ultra vires* and invalid in absence of proof that the officer empowered to grant sanction holds a rank not below that of a District Magistrate. Consequently a sanction granted by such authority in pursuance of the notification will also be illegal and the prosecution based on such sanction cannot stand. The fact that the person empowered was holding at one time the powers of District Magistrate will not affect the question.

[P 494 C 2]

*G. N. Thakore and K. M. Desai —*

for Applicants.

*C. K. Daphtary, Advocate General and S. G. Patwardhan, Government Pleader —*

for the Crown.

**Divatia J.** — This is an application in revision by accused 1 and 2 against their convictions and sentences under S. 13 (1) read with S. 6, Hoarding and Profiteering Prevention Ordinance. The case for the prosecution was that accused 1 was the proprietor, and accused 2 was a salesman of P. H. Shah, Silk Merchants, in Bombay, and that on 1st September 1944, accused 2 on behalf of accused 1 sold nine yards of artificial silk dress fabric at a price of



Rs. 11 per yard when the landed cost as certified by the Assistant Controller General was Rs. 4-8-0 per yard. The defence of accused 1 was that he had purchased the articles at Rs. 9-8-0 per yard from K. Manilal and Company and hence the profit earned by him was less than twenty per cent. It was also urged that the landed costs certificate was not duly proved because Mr. Kedarnath the Assistant Controller General who had given the certificate had not been examined to prove that the articles in respect of which he gave the certificate were the very articles which were the subject-matter of this offence.

[2] The sanction required under S. 14 was granted by Mr. S. N. Mehta, the Deputy Controller General of Civil Supplies in Bombay. It does not seem to have been contended in the lower Court that the sanction was invalid; but it was urged in this Court that it was illegal on the ground that the officer who granted the sanction, Mr. S. N. Mehta, the Deputy Controller General, was not lawfully empowered to grant it, as the notification of the Government of India under which he purported to grant the sanction was *ultra vires*, inasmuch as it was not issued according to the provisions of S. 14 of the Ordinance.

[3] As the point about sanction goes to the root of the whole case, we propose to examine that point first. The sanction Ex. II in this case is signed by Mr. S. N. Mehta, Deputy Controller General of Civil Supplies, and it purports to be issued under S. 14, Hoarding and Profiteering Prevention Ordinance read with Government of India Notification No. F. 22 (7) C. S. (C.)/43 dated 19th February 1944. This notification empowers the Controller General of Civil Supplies to grant sanction in respect of any offence committed under the Ordinance in any Province in British India and among other officers, the Deputy Controller General of Civil Supplies (Western Region), Bombay, is empowered to grant sanction in respect of any such offence committed in the Provinces of Bombay, Madras, etc. Under S. 14 no prosecution for any offence punishable under the Ordinance shall be instituted except with the previous sanction of the Central or the Provincial Government, or of an officer not below the rank of a District Magistrate empowered by the Central or the Provincial Government, to grant such sanction. It is clear therefore that the sanction can be granted by three authorities, firstly the Central Government, secondly the Provincial Government and thirdly by any officer not

below the rank of a District Magistrate empowered by the Central or the Provincial Government. In this case the sanction cannot be deemed to have been given either by the Central Government or the Provincial Government because it purports to have been granted under the terms of the notification by which certain classes of officers are specially empowered under the last part of the section. The question, therefore, is whether the Deputy Controller General—whoever may be the person holding that post—is an officer not below the rank of a District Magistrate. The notification itself is silent on the question as to whether these particular officers are holding such a rank. So also the definition of "Controller General" in S. 2 (c) of the Ordinance is silent as to such rank. It merely says that "Controller General" means the Controller General of Civil Supplies appointed by the Central Government and includes the Deputy Controller General or Assistant Controller General of Civil Supplies so appointed.

[4] It is the contention on behalf of the petitioner that a District Magistrate is a creature of the Criminal Procedure Code and apart from that Code there is no test to find out whether any person is an officer not below the rank of a District Magistrate. There is nothing in the Code to determine the rank of a Deputy Controller General in the hierarchy of Magistrates. These officers are also not invested with powers as District Magistrates under the notification, and it is therefore urged that the notification is illegal and *ultra vires*. We think there is considerable force in this contention. Under S. 10, Criminal P. C., in every district outside a presidency town a first class Magistrate may be appointed by the local Government as a District Magistrate for a particular district. Section 11 says that any officer who is in charge of the chief executive administration of a district shall have all the powers of the District Magistrate. There is no provision of law pointed out to us or which we have been able to find, other than the Criminal Procedure Code which creates either the powers or the rank of a District Magistrate. The learned Advocate General has contended that when the Central Government issued the notification, it must be taken that it had the provisions of S. 14 of the Ordinance in mind and it must, therefore, be presumed under S. 114, *illustr. (e)*, Evidence Act, that judicial and official acts have been regularly performed which means, according to him, that the officers



mentioned in the notification must be deemed to have been given a rank not below that of a District Magistrate. It is further urged that the burden of showing that this presumption cannot apply to the present case is on the accused, and as that burden cannot be discharged the presumption is practically conclusive.

[5] In our opinion it is not correct to say that such a presumption applies in the present case. The presumption under S. 114, illust. (e), is that of the regularity of the official acts, whether judicial or executive, and not that of the acts themselves being done. If, for instance, a notification is issued under the powers given by law, there is a presumption that it was regularly published and promulgated in the manner in which it was required to be done. But there is no presumption that it was issued according to the terms of the section which empowers it. In a very recent decision in 47 Bom. L. R. 431<sup>1</sup> it has been held by this Court that :

[6] "the meaning of S. 114, Illust. (e), is that if an official act is proved to have been done, it will be presumed to have been regularly done. It does not raise a presumption that an act was done of which there is no evidence and the proof of which is essential to the case."

[7] And that is also the principle underlying the decisions of the other High Courts, for instance, 24 Pat. 29,<sup>2</sup> 32 Cal. 1107<sup>3</sup> and A.I.R. 1934 Rang. 207.<sup>4</sup> In the present case the act required to be proved is the empowering of an officer not below the rank of a District Magistrate to grant sanction. It must be proved by the prosecution that the officer empowered held a rank not below that of a District Magistrate. No such proof has been given. Such a rank, as I said before, has not been created either in the definition of the Controller General or in S. 14 itself. Assuming that the rank of a District Magistrate can be created without investment of powers of a District Magistrate, it must be created lawfully before the empowerment can take place. A rank may be created or recognised statutorily, as for example, in ss. 14, 166 and 167, Criminal P. C., and S. 35, Bombay Civil Courts Act. The term "rank" as used in S. 14 does not, in our opinion, mean

social rank as in the warrant of precedence. As the prosecution has not thus proved that the officers mentioned in the notification hold a rank not below that of a District Magistrate, the notification issued by the Government is, in our opinion, invalid and *ultra vires*, with the result that the sanction is also of the same nature. As regards the individual officer, Mr. S. N. Mehta, it appears that before he was appointed as Deputy Controller General he was at one time a Deputy Commissioner in the Central Provinces and it is said that as such he was holding a rank not below that of a District Magistrate. Even assuming it is so, the sanction is given by him under the powers conferred on him by the notification, and if the notification is bad, the sanction granted by him is also illegal, even if he enjoyed at one time the powers of a District Magistrate. For these reasons we are of opinion that the sanction granted is invalid, and as a valid sanction is a condition precedent for prosecution under the Hoarding and Profiteering Prevention Ordinance, the prosecution fails, with the result that the convictions and the sentences of the accused must be set aside.

[8] I may add that sitting with Baydekar J., for hearing Criminal Appeals Nos. 105 and 198 of 1946, both he and I had come to the same conclusion which we have reached in the present application. The delivery of the judgments in those appeals was withheld as we had already heard the present application partially before it was adjourned to enable the learned Advocate-General to appear.

[9] It is not, therefore, necessary to deal with the other points as to the validity of the certificate, etc. As the whole prosecution fails on account of the invalidity of the sanction, even assuming that the certificate of the landed costs was valid, the conviction is bad in law.

[10] Accordingly the rule is made absolute, the convictions and the sentences of both the accused are set aside, and the fines, if paid, are ordered to be refunded. Bail bonds to be cancelled.

K.S.

*Convictions and  
sentences set aside.*

1. ('45) 32 A. I. R. 1945 Bom. 368 : I.L.R. (1945) Bom. 681 : 221 I. C. 239 : 47 Bom. L. R. 431, Emperor v. Gwilt.

2. ('45) 32 A. I. R. 1945 Pat. 307 : 24 Pat. 29, Jagarnath v. Emperor.

3. ('05) 32 Cal. 1107, Narendra Lal Khan v. Jogi Hari.

4. ('34) 21 A.I.R. 1934 Rang. 207 : 151 I. C. 337, Kumari v. Raj Kumar Ghose.



[Case No. 102.]

**A. I. R. (33) 1946 Bombay 495****BLAGDEN J.***Fakirji Edulji Bharucha — Plaintiff*  
v.*Bomanji Munchershaw Jhaveri and*  
*others—Defendants.*

Suit No. 611 of 1945, Decided on 11th July 1945.

(a) Will—Construction—Trust or gift—Testator directing trustees to invest residue of his estate in gilt-edged securities and to transfer them to certain community to be utilised in furtherance of its aims and objects—Held no trust for preservation of capital in perpetuity was created—Will held to create absolute gift with power to spend income as well as corpus in furtherance of aims and objects of community.

A testator by his will appointed certain persons as executors and trustees and then devised and bequeathed the whole of his estate to his trustees on trust for conversion into money and payment of his debts, etc. He then provided as follows: "My trustees shall invest the residue of my estate in their names in or upon any of the investments authorised by law in the case of trust moneys and transfer and hand over the same at their absolute discretion to the Teacher or Recorder for the time being or any other responsible office-bearer or office-bearers of 'Es'ean community of Vind'yu (India) in his or their official capacity as such office-bearer or bearers wherever he or they may be located as my trustees shall decide to be utilised for the purposes of the Es'ean Community of Vind'yu (India) and for promoting and advancing its aims and objects subject to the rules and regulations, if any, for the time being of the said community :

*Held*, that there was no trust created for the preservation, in perpetuity, of the capital but that there was an absolute gift of the investments into which the testator directed his estate to be converted, to the office bearer selected by the trustees, in their discretion, on trust to expend the money in advancing the aims and objects of the community. There was nothing in the trust which imposed on the recipients of the gift any legal obligation to preserve the gilt-edged securities in the form of gilt-edged securities. The recipients could very well spend not only the whole income but the whole of the corpus at any moment provided it was spent on the aims and objects of the community : 1917 A. C. 406, *Rel. on : Case law referred.*  
[P 496 C 1; P 497 C 1, 2]

(b) Gift—Bequest to charity—Charity, meaning of—Held on facts that Es'ean community being good charity bequest made to it was valid.

A purely religious body is not, as such, a charity. For example, a nunnery, which does not indulge in either teaching or nursing, or, in some way, helping external humanity along its thorny path, is not a charitable institution. If the members are merely engaged in working out their own salvation, they are not within the conception of charity. If, however, they do good works of a charitable nature, such as nursing the sick or teaching the ignorant, they are charities even if their motive in

doing those good works may be to further their own salvation. Where a community is a teaching organisation, then, unless it is teaching something unlawful, it is a good charity:

*Held* that the Es'ean community though a religious sect or body having most curious doctrines of its own, being a teaching organisation was a good charity and therefore the bequest to it was a good charitable gift. The mere fact that one could not understand its teachings which were not unlawful or did not agree with its teaching, though understanding it, could not make it any the less 'charity.'  
[P 498 C 1, 2]

*Murzbhan J. Mistree* — for Plaintiff.

*M. L. Maneksha and J. A. Shah* for Advocates General — for Defendants 1, 3, 4 and 2, respectively.

**Judgment.**—This was an originating summons taken out by the plaintiff, who is one of the two executors of a Mr. Framroz Burjorji Spencer, who died on 30th July 1940. Defendant 1 is the other of the proving executors who is still alive; defendant 2 is the Advocate General, representing charity, and defendants 3 and 4 are prominent members of a body called "Es'ean Community of Vind'yu," the name by which, apparently, they know India.

[2] The deceased gentleman, Mr. Spencer, by his will dated 7th August 1939, revoked all previous wills, appointed certain persons, including the plaintiff and defendant 1 executors and trustees, and then devised and bequeathed the whole of his estate to his trustees on trust for conversion into money and payment of his debts and funeral and testamentary expenses. He then provided as follows :

[3] "My Trustees shall invest the residue of my estate in their names in or upon any of the investments authorised by law in the case of trust moneys and transfer and hand over the same at their absolute discretion to the Teacher or Recorder for the time being or any other responsible office-bearer or office-bearers of Es'ean Community of Vind'yu (India) in his or their official capacity as such office-bearer or bearers wherever he or they may be located as my trustees shall decide to be utilised for the purposes of the Es'ean Community of Vind'yu (India) and for promoting and advancing its aims and objects subject to the rules and regulations, if any, for the time being of the said community, and I declare that the receipt of the person who professes to be the Teacher or Recorder or any other responsible office-bearer of the said Es'ean Community of Vind'yu (India) shall be a sufficient discharge to my Trustees for such transfer, handing over and payment. The opinion of the majority of my Trustees shall prevail."

[4] It appears that the deceased was a member of this body, calling itself the Es'ean Community of Vind'yu (India), which consists of members in India, and particularly in Bombay, of a religious body or sect, of whom, I must confess, I have never heard at



all till this case was brought before me. It is necessary to say a word or two about their aims and objects, but before doing so, the question arises whether from this gift one can see, by the form of words he has used, that the testator has created any trust for the preservation of capital and the expenditure of income only. If there is not such a trust, then the gift is an out and out gift and is therefore good, whatever the objects of the Es'ean Community are, so long as they are not illegal objects. If, on the other hand, he has created a trust for the preservation, in perpetuity, of the capital of his gift, then the gift cannot be supported unless the Es'ean Community of Vind'yu (India) is a charitable organisation.

[5] A peculiar feature of the case, to my mind, is that the society is not given the money into which the trustees are to convert the estate, but, for some reason or other, the estate is to be converted into money, the money to be converted into gilt-edged securities, and the gilt-edged securities and not the money, are to be given to the society. I can only draw an inference that what the testator hoped was that the trustees would treat the gift as one of capital and would use only the income derived from the gilt-edged securities. But to hope that something will occur is one thing and to impose a trust to that effect is quite a different thing, and I can see nothing in this trust which imposes on the recipients of the gift any legal obligation to preserve the gilt-edged securities in the form of gilt-edged securities. Provided that they spend the money on the aims and objects of the community, the recipients could, in my opinion, perfectly well spend not only the income, but the whole of the corpus at any moment. They might, for example, well desire to expend the corpus on establishing a church or other sacred building, by whatever name called, for the purpose of holding their meetings. Their ability to spend the money, even though they might spend it on the acquisition of some more or less permanent structure, shows, in my opinion, that the gift is not a perpetuity. No more was the case (1901) 2 Ch. 110,<sup>1</sup> where money was given to a non-charitable body, doubtless in the hope that it would be spent on the building of barracks to house the Commissionaires, but equally and clearly with power to spend the money for any other of the corps' objects. The Court there pointed

out that even if the donor had confined his gift to the acquisition of barracks, that would not be a perpetuity. Reference has been made in this connection to a case, (1912) 81 L. J. Ch. 220,<sup>2</sup> where the Court used the expression "continuing trust" in relation to capital, and it is true that there is, in a sense, here a continuing trust. There is a trust to use the money in promoting and advancing certain aims and objects. But what the Court obviously meant there by a "continuing trust" was a trust only to use the income by way of expenditure and to preserve the capital in perpetuity. In that case in which the testator bequeathed a small sum of money to a laudable but not charitable institution, namely, the Oxford Angling and Preservation Society, with a definite trust that the capital should be preserved and only the income expended, and though learned counsel for the society ingeniously argued that the society was a charity, because by putting the fish into its own waters for its members to take out it would cause a certain number of fish to wander away to other waters, where the public were entitled to the fish, and therefore it was a benefit to the public in general. This argument did not (if I may use that expression) hold water, and the Court had little difficulty in saying that it was not a charity, and consequently that the gift was bad.

[6] To my mind, the present case resembles (1871) 12 Eq. 574<sup>3</sup> and even more closely (1886) 19 L. R. Ir. Eq. 531.<sup>4</sup> I have also been referred, among other cases, to (1870) 5 L. R. Ir. Eq. 470.<sup>5</sup> It is not altogether easy to reconcile (1870) 5 L. R. Ir. Eq. 470<sup>5</sup> with (1871) 12 Eq. 574<sup>3</sup> and I think that (1870) 5 L. R. Ir. Eq. 470<sup>5</sup> is an unsatisfactory decision. Only one point apparently was taken in the appeal, and only one point decided. The argument turned entirely on the question "charity or no charity," and it was assumed, I think, quite erroneously, that the gift was a perpetuity after the death of the immediate donee Miss Burke. The case is commented upon very scathingly, but not too harshly, in (1886) 19 L. R. Ir. Eq. 531.<sup>4</sup> One of the learned Judges, in a masterly and forceful judgment, characteristic of the

1. (1901) 2 Ch. 110 : 70 L. J. Ch. 631 : 84 L. T. 811 : 49 W. R. 628, *Clarke v. Clarke*.

2. (1912) 1 Ch. 29 : 81 L. J. Ch. 220 : 105 L. T. 14, *Mallan v. Mc. Fie*.

3. (1871) 12 Eq. 574 : 40 L. J. Ch. 640 : 24 L. T. 869 : 19 W. R. 1053, *Cocks v. Manners*.

4. (1886) 19 L. R. Ir. Eq. 531, *In re Wilkinson's Trusts*.

5. (1870) 5 L. R. Ir. Eq. 470, *Stewart v. Green*.



island in which it was delivered, says (page 543) :

[7] "However, it is unnecessary for me to say more than that (1871) 12 Eq. 574<sup>3</sup> decides that such an institution as this is a charity. (1871) 12 Eq. 574<sup>3</sup> is an authority that this institution is a charity, and every barrister in Ireland knows that if (1871) 12 Eq. 574<sup>3</sup> had been decided by the English Vice-Chancellor before (1870) 5 L. R. Ir. 470,<sup>5</sup> (1870) 5 L. R. Ir. 470<sup>5</sup> would have been decided the other way."

[8] Another case, rather similar to the present, I think, is (1914) 1 Ch. 937<sup>6</sup> where, in reality, there was no question of charity or no charity because there was held to be no trust for preserving the corpus for an indefinite period. As far as perpetuity is concerned, the present case is even stronger than (1917) A. C. 406,<sup>7</sup> in this respect; there it was argued that because the money was given to an incorporated body for expenditure in support of its objects, it must have been the testator's intention to create a trust for the preservation of the corpus. Of that argument, Lord Parker said (page 440) :

[9] "This argument is, in my opinion, quite fallacious. The fact that a donor has certain objects in view in making a gift does not, whether he gives them expression or otherwise, make the donee a trustee for those objects. If I give property to a limited company to be applied at its discretion for any of the purposes authorized by its memorandum and articles, the company takes the gift absolutely as would a natural person to whom I gave a gift to be applied by him at his discretion for any lawful purpose. The case of *Attorney-General v. Haberdashers Co.*<sup>8</sup> is an express authority on this point. A gift of a fund on trust to pay the income thereof in perpetuity to a society, whether corporate or otherwise, might possibly, if the objects of the society were charitable, be established as a charitable gift, exempt from objection on the ground that it created a perpetuity. But it is one thing to establish a gift (which would otherwise fail) on the ground that it is charitable, and quite another thing to avoid a gift which would otherwise be good on the ground that it creates an unenforceable trust. If a gift to a corporation expressed to be made for its corporate purposes is nevertheless as absolute gift to the corporation, it would be quite illogical to hold that any implication as to the donor's object in making a gift to the corporation could create a trust."

[10] So, here, an implication from the fact that he directed his trustees to hand over, not cash, but gilt-edged securities, cannot be held to create a trust. I cannot do better than adopt Lord Parker's observations that to impose a trust is one thing and to express a wish is totally a different thing.

6. (1914) 1 Ch. 937 : 83 L. J. Ch. 687 : 110 L. T. 898, *In re Smith*.

7. (1917) 1917 A. C. 406 : 86 L. J. Ch. 568 : 117 L. T. 161, *Bouman v. Secular Society, Ltd.*

8. (1834) 1 My. & K. 420.

[11] Another thing which had caused doubt in my mind, and, I have no doubt, in the plaintiff's — but I think it has now satisfactorily been cleared up,—is the curious use by the testator of the expression "to transfer and hand over the same at their absolute discretion to the Teacher or Recorder, etc." I thought at first that what the testator meant was that after converting his estate into money and then investing the money in gilt-edged securities, the trustees should hold the gilt-edged securities in their hands, giving them piecemeal as and when they, in their absolute discretion, thought fit, to responsible officers of the Community; the trustees, therefore, being, as it were, caretakers of the Community's investments. I do not think that this was what he meant. Mr. Maneksha has quite convinced me that what he really meant was that they had an absolute discretion as to the individual or individuals amongst the society's officers to whom they were to hand over the securities. No doubt the will is somewhat ambiguous, but as the one construction produces a perfectly sensible result, and the other, a somewhat fantastic one, I have no doubt that what the testator meant was the sensible, and not the insensible, meaning. I think, therefore, there is an absolute gift of the investments into which the testator directed his estate to be converted to the office bearer or bearers selected by the trustees, in their discretion on trust to expend the money in advancing the aims and objects of the community. Such a trust, as I say, is not a perpetuity, but it is quite possible for the trustees, consistently with that trust, to spend the whole of the capital as well as the whole of the income.

[12] In case I am wrong in the view I have taken about this, I had better express an opinion, on such material as I have, on the nature of the Community, because, if it were necessary to decide the question, I should be prepared to hold that it is a charity, so that even if I am wrong in thinking that there is no perpetuity here, the bequest is innocuous. I have been asked to form an opinion about the society, chiefly on the strength of a Pamphlet setting out its aims and objects, printed in 1939, and a very large volume, which is, I gather, its sacred book, called "Oahspe." The pamphlet, I must confess, I find mainly incomprehensible, but the mere fact that the thing is incomprehensible to one person does not necessarily mean that the doctrine it expounds is erroneous, still less that it



is an illegal doctrine. But it does appear from this pamphlet that what are described as "the corporeal activities of the community" are three-fold in number:

[13] "Primarily, it labours to disseminate knowledge on the Science of Being to students who express a desire to affiliate for the purpose.

[14] Secondly, where a real need exists, it labours for the same end through the medium of correspondence, lectures and publications.

[15] Thirdly, whenever and wherever sufficiently advanced students are so located and conditioned as to admit of centres being established, it aids, as far as able, in creating conditions directed to make possible a greater measure of response to Organic Light in terms of function."

[16] I do not profess to understand the whole of that statement, but it is at least clear, assuming that it correctly describes the activities of the community—and it has not been suggested that it does not—that the community, to some extent, is a teaching body, aiming to disseminate what it considers to be knowledge. As I understand the law about this matter, a purely religious body is not, as such, a charity. For example, a nunnery which does not indulge in either teaching or nursing, or, in some way, helping external humanity along its thorny path, is not a charitable institution. If the members are merely engaged in working out their own salvation, they are not within the conception of charity. If, however, they do good works of a charitable nature, such as nursing the sick or teaching the ignorant, they are charities even if their motive in doing those good works may be to further their own salvation. If I rightly infer that the Es'ean community is a teaching organisation, then, unless it is teaching something unlawful, it is, in my opinion, a good charity. The mere fact that one cannot understand its teaching, or does not agree with its teaching, though understanding it, does not make it any the less "charity." If one found that what the organisation in question was teaching was some such subject like burglary—suppose for instance, there was a gift to a body called "Fagin College" which appeared to exist for furthering the professional education of thieves—then, of course, the gift would be bad; but there is nothing of that sort here. The society is clearly a body of persons who believe in a religion of some sort, and when the House of Lords has held that a gift to a body, which might be briefly described as the society for the propagation of atheism is good, I cannot see why the gift to this society is not a good charitable gift. Its doctrines

are most curious; they seem to be a fusion of all manners and kinds of religions. The sect seems largely to indulge in the curious habit of calling existing or historical persons and things by new and extraordinary names. America, for example, is called "Gautama." I do not know why—that was, in fact, the personal name of the Lord Buddha. Again for some reason, Jesus Christ is known as "Looeamong;" and the God worshipped is, for some reason, known by the name of "Jehovih." The title page says that it is "A Kosmon Revelation in the words of Jehovih and His Angel Ambassadors. A Sacred History of the Dominions of the Higher and Lower Heavens of the Earth for the past Twenty-four thousand years, being from the submersion of the Continent of Pan in the Pacific Ocean, commonly called the Flood or Deluge, to the Koson Era," together with, as the title modestly says, "A Brief History of the Preceding Forty-five thousand Years."

[17] The book was copy-righted in 1882, and as far as I can gather, was compiled in America in the course of the last century by somebody who was, I should think, almost certainly a Christian by upbringing, because there is strong internal evidence that he has modelled his work upon the Christian Bible; who was obviously—for reasons which I am not at liberty to divulge—a Freemason: and who was, I should have said, equally obviously, a lunatic—probably a perfectly harmless one. However, it is extremely dangerous for Courts of Justice to speculate as to the sanity of prophets; and the opinion I have just expressed is, as it happens, exactly that expressed by Felix about St. Paul 1900 or 2000 years ago. Though it is quite inconsistent with any other religion known of in its doctrines, the ethical teaching of this fantastic creed seems to be perfectly consistent with good morals as conceived by all decent creeds and philosophies. It enjoins, for example, total abstinence, vegetarianism, and pacifism, but none of these things is in itself immoral. In these circumstances, as the society is apparently engaged in teaching those principles and tenets in which it believes, I think it is a good charity. I should add this, as regards uncertainty, that a meeting of this community has been held and certain *personae designatae* have been expressly authorised to receive the gift. There can be therefore no difficulty in making the gift or in expending it on the aims and objects of the society.



[18] It has been argued that the plaintiff was acting improperly in coming before me at all, or, alternatively, in doing so without the previous consent of his co-executor. As far as I can judge from the correspondence and the will, his doubts as to the effect of the gift were, reasonable doubts, though, in the light of the arguments addressed to me, I have personally, now, no doubt as to its effect. He could hardly expect his co-executor to share his doubts because he was apparently a keen member of the community, while the plaintiff is either not a keen member of the community or actually retired from it many years ago. In the circumstances, the costs of the parties appearing before me, as between attorney and client, will come out of the estate.

K.S.

*Order accordingly.*

[Case No. 103.]

**A. I. R. (33) 1946 Bombay 499****BHAGWATI J.***Fozmal Bhutaji and others—Plaintiffs.*

v.

*Shridhar Vithal and others—Defendants.*

Suit No. 166 of 1941, Decided on 6-9-1945.

(a) Transfer of Property Act (1882), S. 58 (e) —English mortgage—Absolute transfer—Stipulations in mortgage as to mortgagor's retaining possession of property until default was committed and being liable to pay rates and taxes—Stipulations do not detract from absolute nature of transfer.

Where the provision in the indenture of mortgage shows that there was an absolute conveyance and transfer of all the interest of the mortgagor in the mortgaged property to the mortgagee only subject to the proviso for redemption, which however is allowed by the very terms of S. 58 (e), the stipulation in the indenture that the mortgagor would, until he committed default in payment of the principal or the interest, remain in possession of the mortgaged property and the stipulation that the mortgagor would be in receipt of the rents and profits of the mortgaged property and would pay rates and taxes of the property, would not detract from the absolute nature of the transfer and would not make any difference in the position that the mortgage is an English mortgage within the meaning of S. 58 (e): ('35) 22 A. I. R. 1935 Cal. 659, *Disting.* ('27) 14 A.I.R. 1927 Cal. 725 and ('32) 19 A.I.R. 1932 Cal. 775 *Ref.* [P 504 C 2; P 505 C 1; P 506 C 1, 2]

**T.P. Act.—**

('45) Chitale, S. 58, N: 38.

('36) Mulla, page 345, Note "English mortgage."

(b) Limitation Act (1908), Arts. 132 and 147 —English mortgage executed before 1st April 1930 —Suit thereon—Art. 147 and not Art. 132 applies.

The right of an English mortgagee to file a suit for foreclosure or sale which had vested in him in the case of an English mortgage executed before 1st April, 1930 was not taken away or affected by the amending Act 20 (XX) of 1929 and by the amendment of s. 57 (a), T. P. Act, enacted therein and Art. 147, Limitation Act, continues to be the Article applicable to suits filed by English mort-

gagees where these mortgages have been executed prior to 1st April 1930 : 30 Mad. 426 (P. C.) and ('42) 29 A.I.R. 1942 Cal. 153 *Rel. on.* [P 508 C 1] **Lim. Act. —**

('42) Chitale, Art. 147 N. 1.

('38) Rustomji, Page 1520.

(c) Limitation Act (1908), Arts. 120 and 147 —Hindu father executing mortgage of joint family property to secure antecedent debt—Mortgage executed not as manager of joint family nor for family necessity—Suit upon mortgage against sons after father's death—Suit is not barred by three years or six years period of limitation—Suit brought within sixty years of due date is within time.

Where the debt due by a Hindu father is a simple money debt, the liability of the sons by reason of the pious obligation to pay the debt incurred by the father, not being illegal or immoral, is co-terminous or co-extensive with the liability of the father. The debt would be barred so far as the father is concerned if more than three years have elapsed. The recovery of the debt so far as it is sought to be recovered from the sons would be barred if the suit in respect thereof is filed beyond that period of three years or taking it to be a suit to recover monies due by the son to the creditor by reason of the pious obligation to discharge the debts of the father not being illegal or immoral it would be covered by Art. 120, Limitation Act. [P 508 C 2]

In the case of a debt which is secured by a mortgage but is a present advance and not an antecedent debt the position of the sons is not at all different as far as the recovery of the debt from their right, title and interest in other joint family properties is concerned, from what obtains in the case of a simple money debt incurred by the father. A decree obtained against the right, title and interest of the father in such a mortgage suit filed against the father during his life time can be executed even against the right, title and interest of the sons in the joint family property and the property would be liable to be sold in execution of that decree, unless the sons were successful in proving before the Court that the debt was not binding on them by reason of its being illegal or immoral. Where, however, no such decree is obtained, the creditor would be entitled, by reason of the pious obligation of the sons to pay the father's debts not being illegal or immoral, to proceed against the sons but he cannot succeed against them unless he filed a suit against them either within the six years period or three years period as held by the Allahabad and Madras High Courts. [P 509 C 1, 2]

Where, however, the alienation made by the father of the joint family property is for securing an antecedent debt, the sons under the pious obligation to pay the father's debts, have, by virtue of the debt being an antecedent debt, their right, title and interest in the joint family property also alienated by the very terms of the indenture of mortgage executed by the father. In the case of such antecedent debts, it is not open to the sons to contend that the father did not contract these debts as the manager of the joint family or for the purpose of family necessity. The alienation made by the father being deemed in law to be an alienation not only of the father's right, title and interest in the property but also of the sons, the subject-matter of the mortgage is the whole of the joint family property including the right, title and interest of the sons therein and the same is the subject-matter of the suit filed by the mortgagee



for the realisation of that mortgage. It makes not the slightest difference to the position that when the suit is filed by the mortgagee the father is dead and that according to the strict position in Hindu law the right, title and interest of the father in the property has survived over to the other members of the joint family viz., the sons. [P 509 C 2]

Where, therefore, a mortgagee files a suit upon an English mortgage executed by the father before 1st April 1930 to secure an antecedent debt, not as manager of the joint family nor for the purposes of family necessity, against the sons after the father's death, the suit is not barred, if it is filed within sixty years of the due date under Art. 147.

[P 510 C 1]

**Lim. Act —**

(42) Chitaley, Art. 120, N.49 and Art. 147, No. 1

(38) Rustomji, page 1045, Note "Son's pious obligation" and page 1520.

(d) **Precedent**—Construction of document by one Court is not necessarily guide for construction of similar document by another Court.

Each decision which is arrived at on the construction of a particular document before the Court has got to be dealt with on its own merits and no construction of a particular document before the Court is necessarily a guide for another Court when a similar document comes to be considered by the other Court. [P 504 C 1]

*J. A. Shah and S. M. Shah* — for Plaintiffs.

*S. A. Desai and Y.B. Rege; and S.V. Gupte*—for Defendants Nos. 1; and 3 and 4 respectively.

**Judgment.** — Two brothers one Vithal Ramchandra Parulkar and another Vishnu Ramchandra Parulkar, had monetary dealing with a firm of money lenders by name Himmatmal Manji & Co., commencing from some time prior to 17-11-1922. The account in respect of these monetary dealings was maintained in the joint names of Vithal Ramchandra Parulkar and Vishnu Ramchandra Parulkar in the books of account of Messrs. Himmatmal Manji & Co. This account was adjusted on or about 17th November 1922, when a sum of Rs. 25,150 was found due and owing by the two brothers to the firm of Messrs Himmatmal Manji & Co. as of that date. On the same date the adjustment was recorded in the books of account of Messrs Himmatmal Manji & Co. showing the said sum of Rs. 25,150 as due by both of them "Personal debts to the account of both till today, 17th November 1922." Signatures of both of them were appended at the foot of this adjustment. On the same day it was agreed between the firm of Messrs. Himmatmal Manji & Co. and the two brothers that they should execute in consideration of a sum of Rs. 17,500 being part of the said sum of Rs. 25,150 found due by them to the firm at the foot of that adjustment, a mortgage of their immovable property situate at Bassein and as a part and parcel of that adjustment an indenture of mortgage was executed by the two brothers in favour of the three partners of the firm of Messrs. Himmat-

mal Manji & Co., viz. Fojmal Bhutaji, Joharmal Fuaji and Pokhraj Himmatmal, mortgaging their property situate at Bassein to secure repayment of the said sum of Rs. 17,500 with interest thereon as stipulated therein.

[2] As regards the balance of Rs. 7,650 which remained over out of the said sum of Rs. 25,150, the two brothers executed on 17th November 1922 an agreement whereby they agreed to pay the said sum in the manner therein mentioned. A post-dated cheque for the said sum of Rs. 7,650 was given by the two brothers to the firm of Messrs. Himmatmal Manji & Co., and in default of their honouring the cheque on the due date thereof, the two brothers agreed to execute in favour of Messrs. Himmatmal Manji & Co., a mortgage of another property belonging to them and situate at Ratnagiri. I may state that the said cheque was not honoured, the two brothers executed in favour of Messrs. Himmatmal Manji & Co., a mortgage of their property at Ratnagiri and the said amount was recovered by Messrs. Himmatmal Manji & Co., by subsequently selling that property.

[3] The due date for repayment of the amount under the indenture of mortgage dated 17-11-1922, was 16-11-1923. The two brothers failed and neglected to pay the amount on the due date for repayment thereof and failed and neglected to make any payment of interest either. The family consisted of four brothers, Vithal and Vishnu, the two brothers who had executed this mortgage and two others Shankar Ramchandra Parulkar and Bhaskar Ramchandra Parulkar who were at their native place. In year 1929 a suit was filed by Shankar being suit No. 299 of 1929 in the Court at Deogad for a partition of the property, the subject-matter of the mortgage. The firm of Messrs. Himmatmal Manji & Co., were made co-defendants in that suit inasmuch as it was sought to be declared in that suit that the mortgage which had been executed of this property by Vithal and Vishnu in Bombay in favour of Messrs. Himmatmal Manji & Co., was not binding on Shankar and the other brother Bhaskar.

[4] This suit was contested *inter alia* by Messrs. Himmatmal Manji & Co. Owing, however, to insufficiency of evidence put forward on behalf of Messrs. Himmatmal Manji & Co., the Court came to a conclusion adverse to their contention. It was declared in the decree which was passed in that suit No. 299 of 1929 in the Deogad Court on 10-2-1931, that Vithal and Vishnu were each of them entitled to a one-fourth share in the property, the subject-matter of the mortgage dated 17th November



1922 and that the mortgage executed by Vithal and Vishnu did not bind the interest of the other members of the family, viz. Shankar and Bhaskar. Messrs. Himmatmal Manji & Co. filed an appeal against this decree which was dismissed by the Appeal Court on 17th June 1933. They filed a second appeal in the High Court here which also was dismissed by High Court on 12th April 1937, thus confirming the decree which was passed by the Court at Deogad on 10th February 1931.

[5] Vishnu was adjudicated an insolvent on 21st December 1934, and defendant No. 6 herein is the official Assignee of the estate of Vishnu. Vithal died in about 1936 leaving him surviving his five sons, defendants Nos. 1, 2, 2 A, 3 and 4, and his widow, defendant No. 5, herein. Defendants Nos. 1 to 5 were members of a joint and undivided Hindu family along with the deceased Vithal and they have been impleaded in this suit as the surviving members of the joint family constituted by Vithal and his branch. On the death of Vithal whatever right, title and interest he had in the immoveable property, the subject-matter of the mortgage dated 17th November 1922, survived over to the surviving members of the joint family. The fact that defendant No. 5 is the widow makes no difference to this position, because she would be entitled ordinarily to a right of residence and maintenance out of the joint family properties or under Deshmukh's Act to a share equal to that of a son out of the property belonging to the family. Nothing has been suggested in the arguments on behalf of defendant 1 that there is anything wrong in the plaintiff asking for a decree against the one-fourth share in the said immoveable property which belonged to the branch of Vithal.

[6] The monies due under the indenture of mortgage dated 17-11-1922, were not paid either wholly or in part, with the result that in the year 1935 a suit was filed by the then partners of the firm of Messrs. Himmatmal Manji & Co. against *inter alia* Vithal Ramchandra Parulkar and Vishnu Ramchandra Parulkar for the recovery of the moneys due at the foot thereof. In so far as the second appeal which had been filed in the High Court against the decree passed by the Court at Deogad in suit No. 299 of 1929 was pending, no steps seem to have been taken to prosecute that suit. When ultimately the High Court confirmed the decree of the Deogad Court dismissing the second appeal on 12-4-1937, the plaintiffs in suit No. 1938 of 1935 seem to have applied their mind to the position. They took about two years and a quarter to arrive at a decision, but ultimately they made an application to withdraw from that suit

with liberty to file a fresh suit on the same cause of action against such parties as they might be advised.

[7] The result was the present suit which was filed by the surviving partners of Messrs. Himmatmal Manji & Co., viz. Fozmal Bhutaji and Pokhraj Himmatmal as plaintiffs Nos. 1 and 2 respectively, against defendants Nos. 1 to 5 the surviving members of the joint family constituted by Vithal and his branch and defendant No. 6, the Official Assignee, the assignee of the estate of Vishnu Ramchandra Parulkar, to realise the mortgage security. As Rs. 17,500 only was the principal secured by this indenture of mortgage, the plaintiffs could not recover, having regard to the rule of Damduppat which applied, any more than Rs. 17,500 as and by way of interest, with the result that the mortgage decree which was asked for in this suit was for an aggregate sum of Rs. 35,000 made up of the principal sum of Rs. 17,500 and interest in the like amount.

[8] When the plaint came to be filed, not much attention seems to have been devoted to the question whether the right, title and interest of the surviving members of the joint family belonging to Vithal's branch could be made liable for the payment of the debt due under this indenture of mortgage. Nothing was stated in the plaint as to how the whole of the one-fourth share in this property belonging to Vithal's branch could be made liable for the payment of this debt, the only allegation which was made in para. 11 of the plaint being that the shares of the said Vithal Ramchandra and Vishnu Ramchandra which are one-fourth each in the said property were and are validly mortgaged to the plaintiffs for repayment of the said sum; and the prayers of the plaint prayed *inter alia* for a declaration that the right, title and interest of the said Vithal Ramchandra and Vishnu Ramchandra are validly mortgaged to the plaintiffs as security for the said sum; and that the usual preliminary mortgage decree should be passed in respect of the right, title and interest of the said Vithal Ramchandra and Vishnu Ramchandra in the said mortgaged property. It was on this position that at the hearing two issues were raised on behalf of defendant No. 1. viz. :

[9] (1) Whether the plaint discloses any cause of action against the first defendant? and

(2) Whether the suit was maintainable against the first defendant?

[10] On the death of Vithal, as I have already stated, his right, title and interest in that immoveable property survived over to the



surviving members of the joint family and there was nothing left as Vithal's right, title and interest which could ever be the subject-matter of any decree as prayed for in prayers (b) and (c) of the plaint. In spite of strenuous arguments of Mr. S. M. Shah to justify the plaint as it then stood, I ruled that the plaintiffs would not be entitled to any relief as prayed for by them in the plaint, and that if any relief was asked for by the plaintiffs against the share of Vithal's branch in that property, it should be supported by proper averments in that behalf contained in the body of the plaint. It was after that ruling was given by the Court that Mr. S. M. Shah ultimately applied for the amendment of the plaint, which amendment I did grant.

[11] The plaint was accordingly amended and as it now stands it seeks to hold the right, title and interest of the surviving members of the joint family constituted by Vithal and the members of his branch of the family as liable by reason of the fact that the debt which was secured by the indenture of mortgage dated 17th November 1922, was an antecedent debt having been incurred by Vithal Ramchandra prior to the execution of the said indenture of mortgage and that therefore the right, title and interest of the sons, defendants Nos 1, 2, 2A, 3 and 4 and also of the widow, who as I have already stated is in the same position as the sons, would be bound by the alienation of the immoveable property belonging to that branch of the family for the antecedent debt of Vithal Ramchandra Parulkar.

[12] Even though in the body of the plaint it had been mentioned that Vithal Ramchandra and Vishnu Ramchandra borrowed the monies from Messrs. Himmatmal Manji & Co. as members of the joint family and that the said monies were borrowed for the necessities of the said joint family, and issues Nos. 4 and 5 were raised by defendant No. 1 on the basis of those contentions, it was conceded by Mr. S. M. Shah for the plaintiffs at the hearing that he did not rely upon these allegations in support of his claim. He accepted the finding of the Court at Deogad that there was no joint family constituted by the four brothers and that Vithal and Vishnu had borrowed these monies not on behalf of any joint family but on behalf of themselves and that only their right, title and interest in the property, the subject-matter of the indenture of the mortgage dated 17th November 1922, stood mortgaged to secure the repayment of the said sum of Rs. 17,500 and

interest. Mr. S. M. Shah also did not contend nor lead any evidence before me to prove that the monies which Vithal Ramchandra Parulkar had borrowed were required by him for the purpose of the joint family constituted by himself, his sons and the widow, or that he borrowed these monies for the necessities of his joint family. He merely relied upon the fact that the debt of Rs. 17,500 which was secured by this indenture of mortgage was an antecedent debt in respect of which the right, title and interest of all the members of the joint family, viz. defendants Nos. 1 to 5, would be liable. The two main questions which I have to decide in this suit are:

[13] (1) whether the debt secured by this indenture of mortgage dated 17th November 1922, was an antecedent debt? and (2) whether the suit is barred by the law of limitation?

[14] As regards the first question, whether the debt secured by this indenture of mortgage dated 17th November 1922, was an antecedent debt, the position is quite clear on the evidence as it has been led before me. [After discussing the evidence on this point, his Lordship arrived at the following conclusion.]

[15] On this evidence before me, therefore, I have come to the conclusion that this debt of Rs. 17,500 was an antecedent debt, a debt which had been incurred by Vithal Ramchandra Parulkar and Vishnu Ramchandra Parulkar prior to 17th November 1922, and was, therefore, within the meaning of the authorities which have been cited before me, viz. 51 I A 129<sup>1</sup> and the observations of Lord Dunedin at p. 189 thereof, a debt antecedent in fact as well as in time. If that was so, the right, title and interest of the sons in that property and consequently of defendants Nos. 1 to 5 herein was validly mortgaged by Vithal Ramchandra Parulkar to secure the antecedent debt of Rs. 17,500 which he owed to Messrs. Himmatmal Manji & Co. I therefore, hold on this question that the debt which was secured by this indenture of mortgage dated 17th November 1922, was an antecedent debt and the alienation of the one-fourth share right, title and interest of his branch in the family property at Bassein which was the subject-matter of this indenture of mortgage was binding on the right, title and interest of defendants Nos. 1 to 5 herein.

[16] The next question which I have to consider is whether the suit is barred by the law of limitation. In that connection I have

1. ('24) 11 A. I. R. 1924 P C 50 : 46 All. 95 : 51 I A 129 : 77 I. C. 689 (P. C.) Brij Narain v. Mangla Prasad.



got to consider first what is this mortgage. Is it an English mortgage as is contended by the plaintiffs or is it a mortgage by conditional sale as is contended by defendant No. 1? Mr. S. M. Shah for the plaintiffs, after referring me to definition of an English mortgage which is to be found in S. 58 (e), T. P. Act, which lays down that there are three essential ingredients in an English mortgage, viz. (1) that the mortgagor binds himself to repay the mortgage-money on a certain date, (2) that the mortgagor transfers the mortgaged property absolutely to the mortgagee, and (3) that such absolute transfer is made subject to a proviso that the mortgagee will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed on the date on which the mortgagor binds himself to pay the sum, drew my attention to the relevant terms of the indenture of mortgage, Ex. C herein.

[17] He pointed out that there was a covenant for repayment of the sum of Rs. 17,500 and interest due thereupon, in that the mortgagors covenanted that they the mortgagors, on 16th November 1923, called the due date, would pay to the mortgagees in Bombay the said sum of Rs. 17,500 with interest for the same in the meantime at the rate therein stipulated. He further pointed out that there was an absolute transfer of the mortgaged property by the mortgagors to the mortgagees in that in pursuance of the agreement and for the consideration therein mentioned the mortgagors did thereby grant, release, convey and assure unto the mortgagees all that piece or parcel of land etc. being the particular description of the property mortgaged thereby, and to hold the said hereditaments and premises thereby granted or expressed so to be unto and to the use of the mortgagees subject to the proviso for redemption next therein contained. He lastly pointed out that there was in the indenture of mortgage a proviso that the mortgagees should reconvey the property to the mortgagors upon payment of the said mortgage-moneys, in that if the mortgagors pursuant to the covenant in that behalf paid to the mortgagees the said sum of Rs. 17,500 with interest for the same etc., then and in such case the mortgagees should upon the request and at the costs, charges and expenses of the mortgagors reconvey the hereditaments and premises thereto granted or expressed so to be unto and to the use of the mortgagors or as they should direct. These were, Mr. S. M. Shah contended, enough to satisfy the requirements of S. 58 (e),

T. P. Act and they went to show that the indenture of mortgage dated 17th November 1922, was an English mortgage executed by the mortgagors in favour of the mortgagees.

[18] *Prima facie*, this is the position. It was however, urged by Mr. Desai that there was no absolute transfer of the property by the mortgagors to the mortgagees in that possession of the property was not given by the mortgagors to the mortgagees, and that the possession was to remain with the mortgagors until they committed default, and in exercise of the power to enter into possession reserved to the mortgagees in that behalf, the mortgagees entered into possession of the property. He further pointed out that the mortgagors covenanted under the terms of this indenture of mortgage to pay the rates and taxes as and when they accrued due in respect of this property which the mortgagees would be bound to pay in the event of there being an absolute transfer of property from the mortgagors to the mortgagees. He relied upon these two provisions contained in the indenture of mortgage in support of his contention that there was no absolute transfer of this property from the mortgagors to the mortgagees but that there was some transfer of property which not being absolute would not satisfy the requirements of S. 58 (e) of the T. P. Act and would therefore not constitute an English mortgage as contended by the plaintiff.

[19] In support of this contention of his, he relied upon the decision of the Calcutta High Court reported in A. I. R. 1935 Cal. 659<sup>2</sup>. The facts of that case were that a suit had been filed by the lessor of certain collieries against the mortgagee thereof from the lessee. The lessee was *prima facie* bound to pay the rent and royalties to the lessor. In so far, however, as the assignment from the lessee to the mortgagee was an assignment by way of mortgage and contended to be one in the English form of mortgage, it was contended on behalf of the lessor that the mortgagee having taken an assignment of the lessee's interest therein by way of an English mortgage, he, the mortgagee, would be bound to pay the rent and royalties to the lessor, he having acquired the whole of the right, title and interest of the lessee in the property which was the subject-matter of the lease. In both these assignments, however, it was expressly stipulated that the mortgagor, i. e. the lessee, would continue to be liable to pay the rent and royalties to the lessor. The

2. ('35) 22 A. I. R. 1935 Cal. 659 : 159 I. C. 1001, *Satya Charan v. Ramkinkar*.



possession also was stipulated under the terms of the assignments to continue with the lessee.

[20] On the strength of these provisions in the indenture of assignment it was sought to be argued that the assignments were not by way of English mortgages but were something which not being absolute transfers of the whole of the interest of the lessee in the subject-matter of the lease did not constitute the mortgagee the absolute owner thereof, with the result that the mortgagee could not be said to have become liable by reason of those assignments to pay the rents and royalties to the lessor. It was, having regard to these contentions of the parties in that suit, that the terms of these two assignments which were the subject-matter of the construction by the Court there came to be considered by the Court. There were two decisions of the Calcutta High Court which had been cited in the course of the arguments in that suit. The one was 54 Cal. 813<sup>3</sup> where it has been held that a mortgagee in an English form of mortgage, in whom the entire interest of the mortgagor is transferred, and who becomes the owner of the mortgaged property, to all intents and purposes, takes upon himself the liability for rent. The other was 59 Cal 1314<sup>4</sup> where the Court consisted of Mukerji and Guha JJ., and Mukerji J. who was a party to this decision expressed an opinion that the mortgagee under similar circumstances even though the form of the assignment was an assignment by way of an English mortgage was not liable to the lessor for the rent, the decision therein having been reached on the ground that, at least for the purposes of that contention it could not be stated that an English mortgagee was an absolute transferee of all the interest of the mortgagor in the mortgaged property.

[21] I do not feel inclined to discuss all these decisions at any particular length. It suffices for me here to say that each decision which is arrived at on the construction of a particular document before the Court has got to be dealt with on its own merits, and no construction of a particular document before the Court is necessarily a guide for another Court when a similar document comes to be considered by the other Court. I do not feel therefore at all fettered in the consideration of the document before me and

the construction thereof by any observations that might have been made by the learned Judges of the Calcutta High Court in that decision reported in A.I.R. 1935 Cal. 659.<sup>2</sup>

[22] I may, however, observe that the question which had to be considered by the learned Judges of the Calcutta High Court there was whether the reservation which had been made under the terms of the two assignments which were before the Court, viz. that the mortgagor, i. e. the lessee, was to continue to be liable for payment of the rent and royalties to the lessor, did make any difference to the position of the mortgagee as it was contended on behalf of the plaintiff therein. That being the sole question for the determination of the Calcutta High Court, the Court, on a construction of the various provisions of the indentures of assignment before it, came to the conclusion that even though an English mortgagee might be held to be, by reason of the absolute transfer of the interest in the property by the mortgagor to him, liable for the rent and royalties, on the facts of the particular case, the learned Judges did not feel themselves satisfied about the mortgagee being liable for the payment of the rent and royalties under the terms of the indentures of assignment that came for construction before them. This is essentially, in my opinion, a construction of the document as it was before the Court, and it does not lay down any general principle for construction of similar documents which might come for construction before any other Court.

[23] On the other hand, there are these considerations which have got to be borne in mind before I arrive at a conclusion that the document before me is not an English mortgage. *Prima facie* the provision in the indenture of mortgage which I have referred to before shows that there was an absolute conveyance and transfer of all the interest of the mortgagors in the mortgaged property to the mortgagees only subject to the proviso for redemption, which, however, is allowed by the very terms of S. 58 (e), T. P. Act. *Prima facie* absolute ownership would include also the right to possess, the right to realise the rents and profits of the property, the right to sell, etc. If any authority were needed for this proposition, it is to be found in the observations of Mahmood J. in the Full Bench decision reported in 7 All 553<sup>5</sup> at p. 556. If there was an absolute transfer of ownership of this property by the mortgagors to the mortgagees, the mortgagees would no doubt be entitled to possession as a necessary corol-

3. ('27) 14 A.I.R. 1927 Cal. 725 : 54 Cal. 813 : 104 I. C. 484, Bengal National Bank Ltd. v. Janoki Nath Roy.

4. ('32) 19 A.I.R. 1932 Cal. 775 : 59 Cal. 1314 : 140 I. C. 788, Falakrisat Pal v. Jagannath Marwari.

5. ('85) 7 All. 553 (FB). Indar Sen v. Naubat Singh.



lary of the right of ownership which was transferred to them. Would the stipulation contained in the indenture of mortgage in this behalf that the mortgagor would until he committed default in payment of the principal or the interest as stipulated therein, remain in possession of the mortgaged property, make any difference to the position? Would the stipulation also as regards the rates and taxes being payable by the mortgagor, even though the absolute ownership in the property was transferred to the mortgagee in which event the mortgagee would be the person liable to pay the rates and taxes of the property, make a difference to the position? Would these two provisions as contained in the indenture of mortgage detract from the absolute transfer of the property from the mortgagors to the mortgagees and constitute something less than an absolute transfer which is required for an English mortgage under S. 58 (e), T. P. Act?

[24] If once we start with this position that there was an absolute transfer by the very terms of the indenture of mortgage of the property from the mortgagors to the mortgagees, there is nothing in these two provisions which are contained therein, viz. the mortgagors' retaining possession of the property until default committed and being liable to pay the rates and taxes to the proper authorities, which detracts from the absolute nature of the transfer. The possession would be the possession of the mortgagee, but under the terms of the indenture of mortgage the mortgagee would allow the mortgagors to retain possession of the property only until default was committed by the mortgagor in payment of the principal and the interest stipulated in the indenture of mortgage. The right was reserved to the mortgagee in the event of such default committed to enter into possession of the property which would merely be a confirmation of his right to possession which he had for the time being parted with in favour of the mortgagor. If the mortgage was an English mortgage whereby the mortgagee became the absolute owner of the property, he might be in certain events liable to pay the rates and taxes himself to the proper authorities; but that does not mean that if under the terms of the mortgage, the mortgagor also remained or continued liable to pay the rates and taxes to the proper authorities, the liability of the mortgagee to pay these rates and taxes was thereby in any manner diminished.

[25] What we are concerned with here are the stipulations as between the mortgagor and the mortgagee, and in so far as the mortgagee envisaged the possibility of the mortgagor on

and after the due date trying to redeem the property from him on payment of the monies due under the indenture of mortgage, it was a provision for the benefit of the mortgagor himself that the amount payable by the mortgagors should remain at as low a level as possible, that in the meantime the mortgagor should pay and continue to pay the rates and taxes which, if the mortgagee paid would have been charged on the same immoveable property which was the subject-matter of the security and would be recoverable by the mortgagee from the mortgagor in the same manner as the principal and the interest secured thereby. This provision, therefore, in my opinion, does not make any difference to the actual position. There are observations to be found in the commentary of Sir Dinshah Mulla under S. 58 (e), T. P. Act, at p. 346, viz.:

[26] "The mortgagee acquires the right to take possession as soon as the mortgage is executed, whether a right of entry is expressly covenanted for or not. If the mortgagee allows the mortgagor to remain in possession, the latter is at law merely a tenant on sufferance liable to be ejected at any time. But as long as the mortgagor is in possession, he, i. e., the mortgagor, is entitled to take for his own benefit the rents and profits of the land and is not liable to account for them to the mortgagee."

[27] In support of this proposition that the mortgagor is at law merely a tenant on sufferance liable to be ejected at any time, the learned commentator has relied on the decision in (1895) 1 Q. B. 375<sup>6</sup>. A reference to that decision, however, does not in terms support this statement of the law. The case, there, was the case of a mortgagor having attorned tenant to the mortgagee and having been treated as a tenant at will or a tenant on sufferance under the terms of that clause of attornment contained in the deed of mortgage. In that case the mortgagor had since died, his son had entered into and continued in possession of the mortgaged property and it was sought to be argued that the son of the mortgagor who had continued in possession was also a tenant on sufferance in the same manner as his father who had attorned tenant to the mortgagee. That argument was, however, negatived by the Court. In the absence of any circumstances which would point to the conclusion that the mortgagee had accepted the mortgagor's son as a tenant, no such position could avail the mortgagee, and the Court therefore held that as the original tenancy was determined by the death of the mortgagor, and a new tenancy was not created between the mortgagee and the heir-at-law (the son of the mortgagor) by mere pay-

6. (1895) 1 Q. B. 375 : 64 L. J. Q. B. 10 : 71 L. T. 775, *Scobie v. Collins*.



ment of interest, the distress was illegal, and that the trustee in bankruptcy was entitled to the proceeds of the distress, and that therefore the distress warrant which was taken out at the instance of the mortgagee in that case was illegal. There are, however, certain general observations made by Vaughan Williams J. at p. 377 of that report which are :

[28] "A mortgagor in possession is not necessarily more than a tenant on sufferance, and occupation and payment of interest necessarily connected with the mortgage is not necessarily referable to a tenancy other than a tenancy on sufferance."

[29] These are the remarks which appear to have been relied upon by the learned commentator when he at p. 346 of his commentary under S. 58 (e), T. P. Act, made the statement, which I have quoted above. The further statement, however, that as long as the mortgagor is in possession, he, i. e. the mortgagor, is entitled to take for his own benefit the rents and profits of the land and is not liable to account for them to the mortgagee, affords really a clue to the second provision that is contained in this indenture of mortgage, viz. that the mortgagor should continue to pay the rates and taxes to the proper authorities. If the position in law is that the mortgagor who was in possession of the property and recovered the rents and profits is not accountable to the mortgagee for the rents and profits, the mortgagee would, if by stipulation in that behalf he allowed the mortgagor to continue in possession of the property, reasonably stipulate that the mortgagor would pay the rates and taxes to the proper authorities in respect of that property out of the rents and profits which he recovered even though he was not liable to the mortgagee in connection with the same. The payment of the rates and taxes, therefore, in my opinion, is the necessary adjunct or a corollary of the possession of the property being retained by the mortgagor.

[30] That being the position, I do not see anything detracting from the absolute nature of the transfer of the property from the mortgagors to the mortgagee in the stipulation contained in the indenture of mortgage in that behalf, viz. the mortgagors retaining possession of the property until default was committed by the mortgagors in payment of the principal sum or interest thereon, and being in receipt of the rents and profits thereof, paying all the rates and taxes, assessments, dues and duties payable in respect of the property. These provisions, in my opinion, do not make any difference to the position that the mortgage was an English mortgage within

the meaning of S. 58 (e), T. P. Act. If there is anything which can be said to have been laid down by the learned Judges of the Calcutta High Court in the decision in A. I. R. 1935 Cal. 659<sup>2</sup> contrary to what I have stated above, I respectfully beg to differ from the same.

[31] This indenture of mortgage dated 17th November 1922, therefore, being an English mortgage, the next question that I have to consider is what is the period of limitation prescribed therefor? It has been contended by Mr. S. M. Shah for the plaintiff that the article of the second schedule to the Indian Limitation Act which is applicable in the case of a mortgagee filing a suit under an English mortgage of the type we have here is art. 147 which prescribes sixty years' period commencing from the due date for repayment of the monies due under that mortgage. He, therefore, contended that the suit as filed by the plaintiff for realisation of that mortgage is not barred by the law of limitation. In this connection Mr. S. M. Shah relied upon the decision of the Privy Council reported in 30 Mad. 426<sup>7</sup> where their Lordships held that a suit on a simple mortgage bond to enforce payment of the amount due on the bond by sale of the mortgaged property is governed by art. 132 of the sch. II to the Indian Limitation Act and not by art. 147, and that the latter article is limited in its application to the one class of mortgages in which alone the suit can be, and always is, brought for foreclosure or sale, that is to mortgages in the English form. It is not disputed that this was the law before the amendment of the Transfer of Property Act by Act XX (20) of 1929. The only instance in which you could have a suit brought by a mortgagee for foreclosure or sale within the meaning of art. 147 of sch. II to the Indian Limitation Act was in the case of an English mortgage. It was, however, contended that by the Act XX (20) of 1929 an amendment was made in S. 67, T. P. Act, which curtailed the rights of an English mortgagee so far as his right to sue for foreclosure of the mortgaged property was concerned. Section 91 (c), T. P. (Amendment) Act, XX (20) of 1929, substituted for the original cl. (a), of s. 67 the following :

[32] "to authorise any mortgagee, other than a mortgagee by conditional sale or a mortgagee under an anomalous mortgage by the terms of which he is entitled to foreclose, to institute a suit for foreclosure, or an usufructuary mortgagee as such or

7. ('07) 30 Mad. 426 ; 34 I A 186 (P C), Vasudeva Mudaliar v. Srinivasa Pillai.



a mortgagee by conditional sale as such to institute a suit for sale, or."

[33] in place of the provisions which there-  
before obtained, viz.,

[34] "to authorise a simple mortgagee as such to institute a suit for foreclosure or an usufructuary mortgagee as such to institute a suit for foreclosure, or sale or a mortgagee by conditional sale as such to institute a suit for sale, or"

[35] It was argued that after the enactment of this amendment in S. 67 (a) by this Act XX (20) of 1929 the English mortgagee was deprived of his right to sue for foreclosure of the mortgaged property. This proposition was not disputed by Mr. S. M. Shah. He relied for his contention as to the applicability of art. 147 of the sch. 2 to the Limitation Act on the provisions of S. 63 of the Act XX (20) of 1929 which says that:

[36] "Nothing in any of the following provisions of this Act, namely, Ss. 3, 4, 9, 10, 15, 18, 19, 27, 30, cl. (c) of Ss. 31, 32, 33, 34, 35, 46, 52, 55, 57, 58, 59, 61 and 62 shall be deemed in any way to affect—

(a) the terms or incidents of any transfer of property made or effected before the 1st April 1930.

(b) the validity, invalidity, effect or consequences of any thing already done or suffered before the aforesaid date,

(c) any right, title, obligation or liability already acquired, accrued or incurred before such date, or

(d) any remedy or proceeding in respect of such right, title, obligation or liability . . . etc."

[37] He contended that the indenture of mortgage in suit was executed on 17th November 1922, and therefore the transfer of property effected by the said indenture of mortgage dated 17th November 1922, having been effected before 1st April 1930, the terms or incidents of such transfer were not affected by the amendment of S. 67 (a). He contended that in any event any remedy or proceeding in respect of such right, title, obligation or liability was saved by the last cl. (d) of this S. 63 and that therefore the remedy by way of suit which could be filed by him within sixty years from the date of the accrual of the cause of action and the commencement of the period of limitation within the meaning of art. 147 was not at all affected by Act XX (20) of 1929. In support of this position Mr. S. M. Shah drew my attention to a decision of the Calcutta High Court reported in ILR (1942) 1 Cal 326<sup>8</sup> where it was held:

[38] "By the amendment made by S. 31 (c) of Act XX (20) of 1929 in the T. P. Act, S. 67, cl. (a), the right of an English mortgagee to sue for foreclosure was taken away and his suit on the mortgage could no longer be regarded as a 'suit for foreclosure or sale' within the meaning of Art. 147 of the Indian Limitation Act. Such a suit would, therefore, now be governed not by

S. (142) 29 AIR 1942 Cal 153; ILR (1942) 1 Cal 326: 201 I C 353, *Saradindu Mukerji v. Jahar Lal*.

Art. 147, but by Art. 132. But under the saving clause in S. 63, Amending Act, a suit on an English mortgage executed prior to 1st April 1930, is outside the scope of such amendment and will be governed by Art. 147."

[39] The Privy Council case in 30 Mad. 426<sup>7</sup>, which I have referred to earlier, was referred to by the learned Judges of the Calcutta High Court in arriving at this decision of theirs. This decision of the Calcutta High Court is on all fours with the present case and I would be justified in following it and in coming to the conclusion as contended by Mr. S. M. Shah.

[40] I may, however, deal with the argument which was advanced by Mr. Desai in this connection, and which was based on the provisions of the next amending Act, viz. Act XXI (21) of 1929 which was an Act called The Transfer of Property (Amendment) Supplementary Act, 1929. Mr. Desai pointed out that S. 9 of this Supplementary Act XXI (21) of 1929 added "the advances secured by mortgage by deposit of title deeds" within the provisions of Art. 132 of the sch. 2 to the Indian Limitation Act. He further pointed out S. 15 of the same Act, sub s. (1) whereof is in identical terms with the terms of S. 63 of Act XX (20) of 1929, which, however, did not merely rest with this saving clause therein contained but went on to provide in sub-s. (2) that a suit by a mortgagee for foreclosure or sale on a mortgage by deposit of title-deeds may be instituted within two years from the date of the commencement of the Act (Act XXI (21) of 1929) or within sixty years from the date when the money secured by the mortgage became due, whichever period expires first. Mr. Desai therefore contended that there being no such provision in the case of the English mortgagee whose right to foreclose was brought to an end by the amendment of S. 67 enacted in Act XX (20) of 1929, the Court should come to the conclusion that the period of limitation which was prescribed under art. 132 was operative even in the case of an English mortgagee, enough time having been given to the English mortgagees, viz. six months, if they wanted to file their suits on their mortgages.

[41] This argument of Mr. Desai, however, is not sound for the reason that it completely ignores the saving clause which has been enacted in S. 63 of Act XX (20) of 1929 and misreads the provisions of S. 15 (2) of Act XXI (21) of 1929. Section 15 (2) of the latter Act was considered necessary to be enacted because in spite of the provisions of S. 15 (1) of that Act which in terms did not affect the terms or incidents of any transfer made or



effected before 1st April 1930, or any remedy or proceeding in respect of such right, title, obligation or liability, etc., it did in fact curtail the rights which equitable mortgagees by deposit of title deeds had by virtue of this saving clause to file suits within sixty years for payment of the dues under their mortgages. Section 15 (2) was thus necessary because it curtailed the rights which otherwise would have been vested in the equitable mortgagees by deposit of title deeds. No such provision was considered necessary in the case of an English mortgagee whose right to foreclose was taken away by the enactment of s. 31 (c) of the Act XX (20) of 1929. This argument also, I may observe, was dealt with by the learned Judges of the Calcutta High Court in *I L R (1942) 1 Cal. 326*.<sup>8</sup> I therefore reject this argument of Mr. Desai.

[42] On these authorities I have come to the conclusion that the right of an English mortgagee to file a suit for foreclosure or sale which had vested in him in the case of an English mortgage executed before 1st April 1930, was not taken away or affected by the amending Act XX (20) of 1929 and by the amendment of s. 67(a) T. P. Act enacted therein and that art. 147 of the 2nd sch. to the Indian Limitation Act continues to be the article applicable to suits filed by English mortgagees where these mortgages have been executed prior to 1st April 1930. I hold therefore, that the suit, filed by the plaintiff to realise this mortgage security, having been filed within sixty years from the due date, viz. 1st November 1923, is in time.

[43] An argument was, however, addressed by Mr. Desai that even though that might be the position if the mortgagee wanted to prosecute his remedy as against the mortgagors, defendants Nos. 1 to 5 were not the mortgagors, the only mortgagor having been Vithal Ramchandra Parulkar, the deceased. Under the terms of the mortgage itself Vithal Ramchandra Parulkar was the mortgagor. The accident of his having been described as the manager of the joint family, according to him, not making any difference to the position because Mr. S. M. Shah for the plaintiff had given up the case altogether of the monies having been borrowed by Vithal Ramchandra Parulkar as the managing member of the joint family or for the purposes of family necessity, the only manner in which defendants Nos. 1. to 5 were sought to be held liable by the plaintiff in connection with this debt being that it was an antecedent debt of Vithal Ramchandra Parulkar.

[44] Mr. Desai contended that the pious obligation of the sons to satisfy the debts due by their father not being illegal or immoral did not extend to those cases where the mortgage was not a mortgage executed by the father either as the manager of the joint family or for any family necessity and was merely co-terminous with the liability of the father. The father might be liable to pay the mortgage debt and a suit could be filed against him within twelve years of the commencement of the period of limitation within the meaning of art. 132 of the sch. 2, of the Indian Limitation Act; but so far as the pious obligation of the sons went, they could only be held liable provided the suit had been filed by the mortgagee either within three years or within six years of the period of limitation according to certain decisions of the Madras and the Allahabad High Courts which were relied upon by Mr. Desai. He therefore contended that the suit against defendants Nos. 1 to 5 was in any event barred by the law of limitation and contended that art. 147 of the sch. 2, to the Indian Limitation Act did not apply to the suit which had been filed by the plaintiff against defendants Nos. 1 to 5 and that therefore the suit was barred by the law of limitation.

[45] At first sight this argument of Mr. Desai was very plausible and one was almost inclined to feel as if the decisions which had been referred to, laid down a position which was quite absurd and should not be easily accepted by the Court. On a full consideration of the position, however, I have come to the conclusion that the authorities cited by Mr. Desai and the passage of Sir Dinshah Mulla's *Hindu Law* in s. 293 (3) at p. 342 have no application whatever to the present case. Where the debt due by the father is a simple money debt, the liability of the sons by reason of the pious obligation to pay the debt incurred by the father, not being illegal or immoral, is co-terminous or co-extensive with the liability of the father. The debt would be barred so far as the father is concerned if more than three years had elapsed. The recovery of the debt so far as it was sought to be recovered from the sons would in one view be barred if the suit in respect thereof was filed beyond that period of three years or in another view, taking it to be a suit to recover monies due by the son to the creditor by reason of the pious obligation to discharge the debts of the father not being illegal or immoral and not being covered by any other article of the Indian Limitation Act it would be covered by art. 120 and there-



fore the suit if filed beyond six years from the due date of payment of that debt would be barred by the law of limitation.

[46] That, however, is the position in respect of a simple money debt. When you come to the case of a debt which is secured by a mortgage, there are two positions to be considered there. Has the father alienated the joint family property for the purposes of securing a present advance, or has he alienated the joint family property for the purposes of securing an antecedent debt in which event the alienation by the father of the joint family property, would be binding even on the right, title and interest of the sons in the joint family property, the subject-matter of the mortgage? In the case of a debt which is secured by a mortgage but is a present advance and not an antecedent debt the position of the sons is not at all different, as far as the recovery of the debt from their right, title and interest in other joint family properties is concerned, from what obtains in the case of a simple money debt incurred by the father. The father is a party to the indenture of mortgage and his right, title and interest whatever it is, is no doubt bound by the terms of that indenture and forms the subject-matter of the security. A suit can be filed against the father in respect of his right, title and interest in the property within the requisite period prescribed in the sch. 2, to the Indian Limitation Act.

[47] A further provision is made in the case of a decree having been obtained against the right, title and interest of the father in a mortgage suit filed by the creditor against the father during his lifetime and that is, that the decree can be executed even against the right, title and interest of the sons in the joint family property and their right, title and interest in the joint family property would be liable to be sold in execution of that decree though against the father, unless the sons were successful in proving before the Court that the debt in respect of which the security was given by the father was not binding on them by reason of its being *avyavaharik*, i.e., illegal or immoral. Where, however, no such decree is obtained against the father during his lifetime or against his right, title and interest in the property even though mortgaged by him to secure the debt of the type which I have mentioned above, the creditor would be entitled, by reason of the pious obligation of the sons to pay the father's debts not being illegal or immoral, to proceed against the sons but he could not succeed against the sons unless he filed a suit against

them either within the six years period or three years period which has been laid down by the Allahabad and the Madras decisions referred to in S. 293 (3) at p. 342 of Mulla's Hindu Law. His remedy against the sons to obtain a personal decree against them, personal not in the sense that he could attach the properties belonging to the sons themselves personally in execution of that decree, but personal in the sense that he could go against the right, title and interest of the sons in the joint family properties, would fall to be prosecuted as indicated above.

[48] When, however, we come to the cases where the alienation made by the father of the joint family property is for securing an antecedent debt, the sons under the pious obligation to pay the father's debts, have, by virtue of that debt being an antecedent debt, their right, title and interest in the joint family property also alienated by the very terms of the indenture of mortgage executed by the father. In the case of such antecedent debts, it is not open to the sons to contend that the father did not contract these debts as the manager of the joint family or for the purposes of family necessity. The debt is a debt incurred by the father, and by reason of its being an antecedent debt within the meaning of the observations of Lord Dunedin in 51 I. A. 129<sup>1</sup> the right, title and interest of the sons are bound by the alienation, it being an alienation for an antecedent debt. There is no other argument which the sons can avail themselves of, when a suit is filed by the mortgagee on a debt which was an antecedent debt and was secured by the alienation of the property by the father. In such an event, the alienation which is made by the father being deemed in law to be an alienation not only of the father's right, title and interest in the property but also of the right, title and interest of the sons in that property, what is the subject-matter of the mortgage is the whole of the joint family property including the right, title and interest of the sons therein and what the mortgagee does in filing a suit for the realisation of that mortgage is that he makes the subject-matter of that suit for realisation of the mortgage security, the whole of that property including the right, title and interest of the sons therein.

[49] It makes not the slightest difference to the position that when the suit is filed by the mortgagee the father is dead and that according to the strict position in Hindu law the right, title and interest of the father in the property has survived over to the other



members of the joint family, viz. the sons. The whole of the joint family property including the father's right, title and interest therein which has survived over to the sons and including the sons' right, title and interest in that property, is the subject-matter of that suit for realisation of the mortgage security and the whole of that property including the father's and the sons' right, title and interest therein is liable to satisfy the mortgage. This is the true position in Hindu law and the passage which has been cited by Mr. Desai from s. 293 (3) at p. 343 of Mulla's Hindu Law does not affect the position at all. I am therefore of opinion that Mr. Desai's contention in this behalf also fails, that the right, title and interest of defendants Nos. 1 to 5, the surviving members of the joint family, constituted by the deceased Vithal Ramchandra Parulkar and defendants Nos. 1 to 5 herein are also bound by the terms of this indenture of mortgage dated 17th November 1922, and the suit filed for the realisation of this mortgage security having been filed within sixty years of the due date, viz. 16th, November 1923, is within time.

[50] Mr. Gupte for the minors in this suit asks that the costs of the guardian *ad litem* of the minor defendants Nos. 3 and 4 should be provided for. I do not see any justification for making the plaintiffs pay the costs in the first instance and allowing them to take them on to the mortgage debt as is asked for by Mr. Gupte. The only order which I can make in his favour is that if there is any surplus after satisfying the claim of the mortgage in full, the guardian *ad litem* should be entitled to recover his costs out of the share of minor defendants Nos. 3 and 4 in that surplus.

V.R./D.H.

*Suit decreed.*

[Case No. 104.]

**A. I. R. (33) 1946 Bombay 510**

STONE C. J. AND LOKUR J.

J. M. D'Souza—Appellant.

v.

Reserve Bank of India—Respondent.

Appeal No. 2 of 1946, Decided on 25th January 1946, from Judgment of Kania J. in Misc. No. 5 of 1946 D/- 22nd January 1946.

(a) Reserve Bank of India Act (1934) S. 39 — High Denomination Bank Notes (Demonetisation) Ordinance. (III [3] of 1946) cl. 6—Scope of s. 39 explained — Meaning of "Exchange" in s. 39 and "be exchanged only on tender of Note for exchange" in cl. 6 stated—After commencement of ordinance holder of Bank note of high denomination cannot claim its discharge without complying with ordinance — Writ of

mandamus on Bank to make unconditional payment held could not be granted under s. 45, Specific Relief Act.

No peculiar significance or special meaning attaches to the word "exchange." (1895) 1 Q. B. 820 Ref. [P 513 C 1]

Section 39, Reserve Bank of India Act imposes on the bank an express obligation to honour its notes in coin whether they are legal tender or not and in the case of bank notes of Rs. 5 and upwards to supply coin or notes of lower denomination to the note tendered. The only discretion which the bank is given is as to the quantities of coin and notes respectively which it will give in exchange but it must give one or the other or both. The word 'exchange' is a word of wider import than the word 'pay'. [P 513 C 1]

The words "be exchanged only on tender of the note for exchange" in S. 6 of Ordinance III(3) of 1946 mean "be exchanged in satisfaction of the promise to pay." [P 513 C 1]

After the coming into operation of Ordinance III(3) of 1946 the petitioner presented to the Reserve Bank of India at Bombay a bank note of the denomination of Rs. 1000 and called upon the bank to pay him Rs. 1000 in discharge and satisfaction of the unconditional promise to pay to the bearer of the note as contained in the bank note. The bank declined to make payment and asked the petitioner to get the note exchanged by filling in the requisite declaration form as required by the Ordinance. In the petition filed by the petitioner under S. 45, Specific Relief Act, for a mandatory order on the bank to discharge and satisfy the unconditional promise to pay to the petitioner Rs. 1000 without imposing any condition,

Held that (1) Section 39, by the use of the word 'exchange' having expressly provided for the mode of discharging the obligation to pay under the bank note, and the same having been modified by Ordinance III (3) of 1946, the petitioner could not claim its discharge without making the required declaration. [P 515 C 2]

(2) That even assuming that there was an implied obligation to pay on the part of the bank apart from the provisions of S. 39, such obligation arose by virtue of the Act and could not be divorced from the Act itself. Such implied obligation was something "contained in the Act" within cl. 6 of the Ordinance which, therefore, must be deemed to have abrogated any such implied obligation in the same way as it abrogated the express one.

(3) that it could not be said in the circumstances that it was "clearly incumbent" upon the bank to make unconditional payment of the note. Hence a writ of mandamus could not be granted under S. 45, Specific Relief Act. 7 Bom.L.R. 161 Disting. [P 513 C 2; P 515 C 2; P 516 C 1]

(b) Interpretation of Statutes—Marginal notes to section—Reference to.

Marginal notes to the section of an Act cannot be referred to for construing the Act: 26 All. 393 (PC) Rel. on. [P 512 C 2]

Civil P. C.—

(144) Chitale, Pre. N. 11.

K. M. Munshi and J. M. Shelat—for Appellant. Sir Jamshedji Kanqa, F. J. Colman and G. N. Joshi—for Respondents.

**Stone C. J.** — This is an appeal from the judgment of Mr. Justice Kania dated 22nd January 1946. The appeal has been taken up at this early date because it involves a question of considerable importance and because unless



it is determined by 1 o'clock to-morrow afternoon the time for presenting certain high denominational bank notes pursuant to Ordinance III of 1946, which provides for their demonetisation, will have passed. The petitioner, the appellant in this Court, is a person who since the coming into operation of the Ordinance presented a bank note for Rs. 1,000 to the Reserve Bank of India with a demand for payment, which demand was refused by the bank. Accordingly he filed a petition to the Court under s. 45, Specific Relief Act, praying for a mandatory order on the bank to discharge and satisfy the unconditional promise to pay to the petitioner the sum of Rs. 1,000 contained in the particular bank note without imposing any condition on the petitioner. Section 45, Specific Relief Act provides:

[2] "Any of the High Courts of Judicature at Calcutta, Madras and Bombay may make an order requiring any specific act to be done or forborne, within the local limits of its ordinary original civil jurisdiction, by any person holding a public office whether of a permanent or a temporary nature, or by any corporation or inferior Court of Judicature."

[3] And then there follow a number of provisos, proviso (b) being as follows:

[4] "that such doing or forbearing is, under any law for the time being in force, clearly incumbent on such person or Court in his or its public character, or on such corporation in its corporate character."

[5] There is no doubt that the Reserve Bank is a corporation which comes within the purview of the section, but the principal questions which have been raised are: (1) Whether these proceedings for a mandatory order can be maintained under s. 45 Specific Relief Act? (2) Whether s. 9 of the Ordinance bars these proceedings being taken at all? and (3) Whether the Ordinance on its true construction does take away or affect the petitioner's right as a holder of the bank note to receive payment on demand? If any of these questions is answered adversely to the petitioner, he can obtain no relief and his petition must be dismissed. In the Court below it was question (3) which was determined and although questions (1) and (2) are in the nature of preliminary points, it will, in the circumstances and in deference to the elaborate argument addressed to us by Mr. Munshi, be proper to direct attention in the first instance to the larger question. The validity of the Ordinance is not, and in view of the decided cases, could not be challenged. But Mr. Munshi on behalf of the petitioner puts his submissions in this way. First of all he points out that a bank note has two qualities: it is legal tender and it is a promise to pay on demand. Next he submits that there is not in the Reserve Bank Act, 1934,

which sets up the Reserve Bank and empowers it to issue bank notes, any express statutory obligation to honour and pay for a note on demand but that the law will imply from the statutory power to issue notes a statutory obligation to honour and pay them when issued, and that if that be the true position, Ordinance III of 1946, whilst it has destroyed the quality of the notes as legal tender, has not abrogated or affected in any way this implied obligation of the Bank to pay which, it is said, arises from the statutory power.

[6] The Reserve Bank of India Act, 1934, as its preamble shows constitutes the Bank as a Reserve Bank for India to regulate the issue of bank notes and the keeping of reserves with a view to securing monetary stability in British India and generally to operate the currency and credit system of the country to its advantage. By s. 1 the Act extends to the whole of British India and the section is to come into force at once. Section 2 is a definition section and s. 3 is as follows:

[7] "3. (1) A bank to be called the Reserve Bank of India shall be constituted for the purposes of taking over the management of the currency from the Central Government and of carrying on the business of banking in accordance with provisions of this Act.

(2) The Bank shall be a body corporate by the name of the Reserve Bank of India, having perpetual succession and a common seal, and shall by the said name sue and be sued."

[8] The rest of the chapter, which is headed by s. 3, deals with the share capital and the management and the banking business. But s. 17 in that chapter must be observed. It is as follows: "The Bank shall be authorised to carry on and transact the several kinds of business hereinafter specified namely" and then are set out a number of sub-paragraphs, sub-para (15) being in these terms:

[9] "the making and issue of bank notes subject to the provisions of this Act and the making and issue of Burma notes in accordance with the law of Burma."

[10] Sub-paragraph (16):

[11] "generally, the doing of all such matters and things as may be incidental to or consequential upon the exercise of its powers or the discharge of its duties under this Act and the law of Burma."

[12] Chapter III commences with s. 20 and is headed "Central Banking Functions" and s. 22 gives the bank the sole right to issue bank notes in British India. Section 23 deals with the Issue Department of the Bank and provides:

[13] "The issue of Bank notes shall be conducted by the Bank in an Issue Department which shall be separated and kept wholly distinct from the Banking Department, and the assets of the Issue Department shall not be subject to any liability



other than the liabilities of the Issue Department as hereinafter defined in section 34."

[14] Sub-section (2) is as follows:

[15] "The Issue Department shall not issue bank notes to the Banking Department or to any other person except in exchange for other bank notes or for such coin, bullion or securities as are permitted by this Act to form part of the Reserve."

[16] It is s. 26 which provides for the notes being legal tender:

[17] "Subject to the provisions of sub-s. (2), every banknote shall be legal tender at any place in British India in payment or on account for the amount expressed therein, and shall be guaranteed by the Central Government."

[18] Sub-section (2) provides:

[19] "On recommendation of the Central Board the Central Government may, by notification in the Gazette of India, declare that, with effect from such date as may be specified in the notification, any series of bank notes of any denomination shall cease to be legal tender save at an office or agency of the Bank."

[20] And sub-s. (3) deals with Burma. Section 27 prevents the Bank from re-issuing bank notes which are torn, defaced or excessively soiled. Section 28 provides:

[21] "Notwithstanding anything contained in any enactment or rule of law to the contrary, no person shall of right be entitled to recover from the Central Government or the Bank, the value of any lost stolen, mutilated or imperfect currency note of the Government of India, or bank note."

[22] Section 34 provides for the liabilities of the Issue Department:

[23] "The liabilities of the Issue Department shall be an amount equal to the total of the amount of the currency notes of the Government of India and bank notes for the time being in circulation."

[24] Sub-section (2):

[25] "For the purposes of this section, any currency note of the Government of India or bank note which has not been presented for payment within forty years from the 1st day of April following the date of its issue shall be deemed not to be in circulation, and the value thereof shall, notwithstanding anything contained in sub-section (2) of section 23, be paid by the Issue Department to the Central Government or the banking Department, as the case may be; but any such note, if subsequently presented for payment, shall be paid by the Banking Department, any such payment in the case of a currency note of the Government of India shall be debited to the Central Government."

[26] The next relevant section is S. 39 around which much debate has ranged in this case. it is in these terms:

[27] "39. (1) The Bank shall issue rupee coin on demand in exchange for bank notes and currency notes of the Government of India, and shall issue currency notes or bank notes on demand in exchange for coin which is legal tender under the Indian Coinage Act, 1906.

"(2) The Bank shall, in exchange for currency notes or bank notes of five rupees or upwards, supply currency notes or bank notes of lower value or other coins which are legal tender under the Indian Coinage Act, 1906, in such quantities as may, in the opinion of the Bank, be required for circulation; and the Central Government shall supply such coins to the Bank on demand. If the Central Government

at any time fails to supply such coins, the Bank shall be released from its obligations to supply this to the public."

[28] It will be convenient at this stage to notice some of the provisions of Ordinance III of 1946, which is made under the powers conferred by s. 72, Government of India Act. Section 6, which is headed, "Exchange of high denomination bank notes held by other persons," (the previous section dealing with those held by banks), is as follows:

[29] "(1) Notwithstanding anything to the contrary contained in the Reserve Bank of India Act, 1934, (II of 1934), any high denomination bank note held by a person other than a bank or Government treasury shall after the 12th January 1946 be exchanged only on tender of the note for exchange by the owner thereof in the manner provided in this section."

[30] Then follow nine further sub-sections dealing with the manner of exchange and referring to the schedule which the holder of the note is required to fill up. The only other section which I need refer to is s. 9 headed "Bar of legal proceedings":

[31] "No suit, prosecution or other legal proceeding shall lie against any person for anything done or in good faith intended to be done under this ordinance."

[32] The argument that there is not by virtue of the Reserve Bank Act any statutory obligation to pay, proceeds by attempting to show that there is a distinction between the word "exchange" and the word "pay". Mr. Munshi relies on the use of the words "in payment" in s. 26 "to recover . . . the value" in s. 28 and "payment" and "shall be paid" in s. 34 and he also contrasts the language and the scheme of the English Bank Acts of 1833 and 1844 and submits that the statutory obligation contained in s. 39 of the Reserve Bank Act to issue rupee coin on demand in exchange for bank notes and currency notes is only for maintaining equilibrium between different forms of currency. Mr. Munshi also relies upon the marginal note to that section which is: "Obligation to supply different forms of currency." But it has been laid down by the Privy Council in 31 I.A. 132<sup>1</sup> (p. 142)

[33] "It is well settled that marginal notes to the section of an Act of Parliament cannot be referred to for the purpose of construing the Act. The contrary opinion originated in a mistake and it has been exploded long ago. There seems to be no reason for giving marginal notes in an Indian statute any greater authority than the marginal notes in an English Act of Parliament."

[34] In the judgment the learned Judge in the Court below said this (p. 367 *ante*):

1. ('04) 26 All 393 : 7 O C 248 : 31 I A 132 : 3 I C 359 (P C), *Thakurain Balraj Kunwar v. Rao Jagatpal Singh*.



[35] "The word 'exchange' means 'surrender of one thing and the receipt of another thing against the first.' The holder of the note has to surrender it, and against that receive currency notes or coins of the equivalent amount mentioned in the note.

The nature of the transaction being such, it is bound to be described as an exchange and not an obligation met by payment."

[36] And a little further on (p. 367 *ante*):

[37] "I do not agree with the contention of the petitioner that s. 39 is limited to notes which are legal tender. It covers the case of bank notes which are brought to the bank and against which the holder asks for payment. It covers the case of a note which is legal tender under s. 26 generally or limited within the meaning of s. 26 (2), as also the case of a note of which circulation in general has been stopped but which the bank is bound to receive, accept and exchange for currency notes or coins. The word 'exchange' used in S. 39 in my opinion covers the obligation of the Bank to give against notes which are legal tender other notes or coins, and also obligation to deliver currency notes and coins against bank notes which have ceased to be legal tender. I do not propose to go into the larger question which was partially discussed in respect of the implied obligation of the Bank outside the Act to make payment and whether there exists such implied obligation. In my opinion s. 39 imposes an unqualified obligation on the Bank to pay for the notes, as provided therein, irrespective of the fact whether they are legal tender or not. The question of implied obligation under the circumstances does not arise."

[38] No peculiar significance or special meaning attaches to the word "exchange": see (1895) 1 Q. B. 820<sup>2</sup> at p. 825 and I respectfully agree with the learned Judge in the Court below that s. 39 does impose on the Bank an express obligation to honour its notes in coin whether they are legal tender or not and in the case of bank notes of Rs. 5 and upwards to supply coin or notes of lower denomination to the note tendered. The only discretion which the bank is given is as to the quantities of coin and notes respectively which it will give in exchange, but it must give one or the other or both. In my opinion the word "exchange" is a word of wider import than the word "pay." Actually on tender of the note with a demand for payment the bank does effect an exchange, since it retains the tendered note against the coin or the notes of lower denominations. I think the words in cl. 6 of the Ordinance "be exchanged only on tender of the note for exchange" are relevant. They raise the question, exchange for what? The words must mean "to be exchanged in satisfaction of the promise to pay." If there be an express statutory obligation, there is no room for any implied obligation arising by virtue of the statutory powers and duties of the Bank. But even if this case could be grounded on implied obligation, there is in

2. (1895) 1 Q. B. 820, *Baynes & Co. v. Lloyd & Sons.*

my judgment a fatal objection to the petitioner's case, since in my opinion an implied obligation arising by virtue of a statute cannot be divorced from the statute itself and treated as something standing *dehors* the Act. It is part and parcel of the statute itself. So that in this case cl. 6 of the Ordinance abrogates such an implied obligation in the same way as it abrogates an express one. The words of the Ordinance are "notwithstanding anything to the contrary contained in the Reserve Bank of India Act" and an implied obligation to pay arising by virtue of the Act is in my opinion something contained in the Act. To hold otherwise would be to give a too narrow construction to the words used. But in my judgment there is another fatal objection to the petitioner's case since it cannot be said that in the circumstances it is "clearly incumbent" on the bank to make unconditional payment of this note. So that a writ of mandamus cannot be granted under section 45 of the Specific Relief Act. The circumstances of this case are wholly different from the case in 7 Bom. L. R. 161,<sup>3</sup> on which Mr. Munshi relies and which was a case in which the Commissioner of Police issued a notice which was held to be beyond his powers. Apart from any of the other reasons to which I have already referred, this appeal must in my opinion be dismissed on the preliminary ground that it does not lie for the petitioner to seek a writ of mandamus under S. 45 of the Specific Relief Act. I do not in the circumstances propose to say anything about cl. 9 of the Ordinance, since having regard to the construction placed on the Reserve Bank Act and the Ordinance, the case is not one in which a writ of mandamus can issue. In my opinion this appeal must be dismissed with costs.

[39] **Lokur J.** — I concur. The only question in this appeal is whether the Reserve Bank is absolved by Ordinance No. III of 1946 from its obligation to fulfil its "promise to pay" contained in high denomination bank-notes, unless they are presented along with the declaration required by S. 6 of the Ordinance. The primary object of the Ordinance is to demonetise such bank-notes, that is to say, bank-notes of the denominational value of Rs. 500, Rs. 1,000 and Rs. 10,000 and to collect detailed information regarding their acquisition and possession. Section 3 of the Ordinance provides:

[40] "On the expiry of the 12th day of January 1946, all high denomination bank-notes shall,



notwithstanding anything contained in S. 26 of the Reserve Bank of India Act, 1934 (Act II of 1934), cease to be legal tender in payment or on account at any place in British India."

[41] Section 4 says:

[42] "Save as provided by or under this Ordinance, no person shall after the 12th day of January 1946 transfer to the possession of another person or receive into his possession from another person any high denomination banknote."

[43] Section 5 deals with the exchange of high denomination bank notes held by banks and Government treasuries, and s. 6 deals with the exchange of high denomination bank notes held by other persons. It is with the effect of this section 6 that we are concerned in this appeal. Section 6 provides:

[44] "(1) Notwithstanding anything to the contrary contained in Reserve Bank of India Act, 1934 (II of 1934), any high denomination bank note held by a person other than a bank or Government treasury shall after the 12th day of January 1946 be exchanged only on tender of the note for exchange by the owner thereof in the manner provided in this section.

[45] Then sub-ss. (2), (6), (7) and (8) provide for the manner in which high denomination bank notes can be exchanged in the Reserve Bank. These sub-sections require a declaration in a certain form regarding the mode of acquisition etc., before such high denomination bank notes can be accepted and exchanged by the Reserve Bank. What the Reserve Bank is empowered to do by these sub-sections is to refuse to accept and exchange high denomination bank notes, unless they are accompanied by such declaration. Mr. Munshi for the appellant contends that these sections deal only with the exchange of notes for rupee coin or notes of other denominations under s. 39 of the Reserve Bank of India Act, 1934, and do not affect the bank's obligation to carry out "the promise to pay" made in such bank notes when they were issued. The issue of bank notes and the rights and liabilities arising from it are governed by the provisions of the Reserve Bank of India Act, 1934. S. 22, sub-s. (1) of that Act confers upon the Reserve Bank the sole right to issue bank notes in British India and under S. 23, sub-s. (1), the issue of bank notes is to be conducted by the bank in an Issue Department which is separated and kept wholly distinct from the Banking Department. Under s. 33, sub-s. (1), the Issue Department must maintain its assets consisting of gold coin, gold bullion, sterling securities, rupee coin and rupee securities, to such aggregate amount as is not less than the total of the liabilities of the Issue Department. By s. 26, sub-s. (1), every bank note is declared to be legal tender at any place in British India in payment or on account

for the amount expressed therein, and is guaranteed by the Central Government and s. 26, sub-s. (2), empowers the Central Government to declare that any series of bank notes of any denomination shall cease to be legal tender. The rights of the owner or holder of a bank note as against the bank are laid down expressly in s. 39, which runs as follows:

[46] "39. (1) The bank shall issue rupee coin on demand in exchange for bank notes and currency notes of the Government of India, and shall issue currency notes or bank notes on demand in exchange for coin which is legal tender under the Indian Coinage Act, 1906.

(2) The bank shall, in exchange for currency notes or bank notes of five rupees or upwards, supply currency notes or bank notes of lower value or other coins which are legal tender under the Indian Coinage Act, 1906, in such quantities as may, in the opinion of the bank, be required for circulation; and the Central Government shall supply such coins to the Bank on demand. If the Central Government at any time fails to supply such coins, the Bank shall be released from its obligation to supply them to the public."

[47] Mr. Munshi contends that this section deals only with the exchange of bank notes for coins or notes of other denomination but not with the "liability to pay" undertaken at the time of the issue of the notes. There is no provision in the Act regarding the discharge of that liability and, therefore, Mr. Munshi says that there is an implied obligation to discharge it. The payment promised in a bank note must be made by means of some legal tender, which may be coin or bank notes of other denominations. Mr. Munshi contends that the liability may be discharged also by some other means such as crediting the amount to some account in the bank. But that is not the undertaking given in the bank note. What is promised is payment of so many rupees and that means some legal tender. Hence this giving of coin or bank notes for a bank note of equivalent value is described in s. 39 as the "exchange" of the former for the latter. This is the only mode of satisfaction of the bank's liability under the bank note which is recognised by the Act. It is obvious that unless a bank note is not only tendered, but surrendered and handed over to the bank, the bank is under no obligation to give its equivalent. Hence the word "exchange" is rightly and purposely used in s. 39. Mr. Munshi referred to the definition of the word "exchange" in s. 118 of the Transfer of Property Act, which is as follows:

[48] "When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing nor both things being money only, the transaction is called an 'exchange'."

[49] From this he argues that one form of money may be exchanged for another form of



money, but after a bank note has ceased to be legal tender payment of money for it would be either a sale or a satisfaction of the obligation to pay, but not an exchange. It is pointed out by Mr. Coltman, the learned counsel for the Reserve Bank, that although by its demonetisation a high denomination bank note may have ceased to be legal tender in payment or on account, sub-s. (2) of s. 26 empowers the Central Government to declare that any series of bank notes of any denomination shall be ceased to be legal tender "save at any office or agency of the bank." From this last expression he argues that even though such bank notes may have been declared by the Ordinance to have ceased to be legal tender among the public, yet the bank must accept such notes when tendered or surrendered. But s. 3 of the Ordinance expressly declares that such bank notes shall cease to be legal tender in payment or on account at any place in British India notwithstanding s. 26 of the Reserve Bank of India Act, 1934. Assuming that such bank notes have altogether ceased to be legal tender by reason of this declaration yet the bank is under an obligation to accept them and pay their equivalent either in coin or notes of smaller denominations. Whatever name may be given to this transaction, the word "exchange" is used for it in s. 39 of the Act, in its ordinary meaning of "giving and taking of one thing for another," and the Ordinance debars the owner or holder of high denomination bank notes from claiming such an exchange from the bank without giving the required declaration.

[50] It must be remembered that the obligation does not arise out of a contract, but out of statutory provisions. As soon as a bank note is issued it becomes a legal tender and must be accepted by the public as such. There is no offer and acceptance, which are the foundation of a contract. The only obligation on the bank is to exchange it for rupee coin or bank notes of other denomination, and there can be no other implied obligation to pay as contended by Mr. Munshi. Had it been so, in the case of loss of a bank note, the owner could have proved the contract by independent evidence and recovered the amount of the note from the bank. But s. 28 of the Act expressly provides that no person shall of right be entitled to recover from the Central Government of the bank the value of any lost, stolen, mutilated or imperfect currency note of the Government of India or bank note. Section 39 is intended both to impose an obligation on the Reserve Bank and also to guard it against a demand for an excessive

quantity of rupee coin or bank notes of any particular denomination. Thus it completely provides for the claim which the owner or holder of a bank note can make against the bank, and the manner in which the bank can discharge its liability under the note. Mr. Munshi has also drawn our attention to the use of the expression "presented for payment" and "shall be paid," used in s. 34, sub-s. (2), of the Act, and contends that the Act itself has thus made a distinction between "payment" and "exchange." After providing that a bank note not presented for payment for forty years should be deemed not to be in circulation, that sub-section goes on to say:

[51] "But any such note, if subsequently presented for payment, shall be paid by the Banking Department, and any such payment in the case of a currency note of the Government of India shall be debited to the Central Government."

[52] Even in this sub-section payment necessarily means payment in rupee coin or bank notes of other denomination, which is described by the word "exchange" in s. 39, there being no other mode of payment recognised by the Act. When the mode of satisfying the obligation under the bank notes is thus expressly provided for, there is no reason to assume any other implied obligation. This statutory method of discharging the obligation has now been modified by Ordinance No. III of 1946 and no owner or holder of a high denomination bank note can claim its discharge from the bank without making the required declaration.

[53] Even if it be assumed that there is such an implied obligation to pay apart from the provisions of s. 39, then that obligation arises out of the contents of the bank note itself and cannot be enforced by mandamus under s. 45 of the Specific Relief Act. The proper remedy to enforce it is a suit against the bank. It is not necessary to express any opinion as to whether such a suit can be successfully maintained. Mr. Munshi argues that as the right to issue bank notes with a promise to pay is given by s. 22 of the Reserve Bank of India Act, the implied obligation to fulfil that promise also flows from that very section and is, therefore, a statutory liability. But the Act having provided for the mode of discharging the liability, any other implied liability, if any, cannot be said to be arising out of the statute itself. Under proviso (b) to s. 45 of the Specific Relief Act no writ of mandamus can be issued against the bank requiring it to do any act, unless that Act is, under any law for the time being, clearly incumbent upon it to do. The expression "clearly incumbent" is very significant. If one mode of doing a thing is provided



by law, then any other mode of doing it cannot be regarded as "clearly incumbent". The facts in 7 Bom. L. R. 161<sup>3</sup> on which reliance was placed were different. In that case the Commissioner of Police at Bombay, acting under s. 28 of the Bombay City Police Act, 1902, issued a notice upon the applicants requiring them to vacate the premises occupied by them, and intimating that failure to comply with the notice would render them liable to punishment under s. 129 of the Act. The applicants applied to the High Court under s. 45 of the Specific Relief Act, for a rule against the Commissioner of Police to show cause why the notice should not be cancelled and why he should not be restrained from carrying the same into effect. It was there held that if the Police Commissioner had to give notice in the manner laid down in the Act and if he failed to do so, it was open to the Court to direct him to cancel that notice by a writ of mandamus under s. 45 of the Specific Relief Act. It must be remembered that the authority of the Commissioner to issue the notice under s. 129 of the Bombay City Police Act was not challenged in that case and that authority is given by the statute itself and has not to be implied. That case has no application where an implied contractual liability as distinct from statutory liability is sought to be enforced. Hence this is not a fit case for the issue of a writ of mandamus and I agree that the appeal should be dismissed with costs.

N.S./D.H.

*Appeal dismissed.*

[Case No. 105.]

**A. I. R. (33) 1946 Bombay 516****BHAGWATI J.***Satyavart Sidhantalankar and others —  
Plaintiffs.*

v.

*Arya Samaj, Bombay — Defendants.*

Suit No. 489 of 1945, Decided on 8th November 1945.

(a) Societies Registration Act. (1860), Ss. 6, 7, and 8—Society registered under Act—Society is legal entity capable of suing and being sued in its own name.

Once a Society is registered with the Registrar of Joint Stock companies by the filing of the memorandum and certified copy of the rules and regulations thereof with the Registrar and the Registrar has certified under his hand that the society is registered under the Act, the society enjoys the status of a legal entity apart from its members constituting the same and is capable of suing or being sued. In spite of the provisions contained in Ss. 6, 7 and 8, it is competent to the society, to sue or be sued in the name of the society, to be sued in its registered name. These provisions are not inconsistent with the user of the registered name of the

Society in connection with legal proceedings. The use of the name is not compulsory but it is at least permissive: Observations of Lord Lindley in (1901) A.C. 426, *fol.* [P 521 C 2 ; P 522 C 2]

Where, therefore, a suit is brought by some members of the society on behalf of themselves and all the members of the society against the president of the society as representing the society the suit cannot be objected to on the ground that the society is the plaintiff as well as the defendant.

[P 523 C 2]

(b) Societies Registration Act (1860) S. 6—Society registered under Societies Registration Act—Principles governing relations of members of incorporated companies are applicable in case of such society—Such principles and exceptions stated—Acts of majority falling within exceptions—Members in minority can sue society without previous sanction or consent.

In all corporations and companies incorporated under the Indian Companies Act, the normal position is that the internal affairs of the corporations or companies are managed by a vote of the majority; and members join the corporations or the companies with full knowledge that the majority of the members are entitled to exercise the powers and control the operations generally. The Court will not interfere with the internal management of the companies acting within their powers and in fact has no jurisdiction to do so, and further in order to redress a wrong done to a company or to recover money or damages alleged to be due to a company the action should *prima facie* be brought by the company itself. [P 525 C 1 ; P 526 C 2]

This supremacy of the majority is, however, subject to the following exceptions, viz. (1) Where the act complained of is *ultra vires* the company; (2) Where the act complained is a fraud on the minority; and (3) where there is absolute necessity to waive the rule in order that there may be no denial of justice. [P 528 C 1]

These principles which govern the relations of the members of joint stock companies incorporated under the Indian Companies Act are also applicable in the case of a society registered under the Societies Registration Act and would govern the relations between the members of the society *inter se*.

[P 524 C 2]

Where, therefore, the acts complained of fall within the exceptions, the members of a registered society who are in the minority would be entitled to institute a suit on behalf of themselves and all other members of the society making the society and the president and members of the managing committee of the society party defendants to the suit and it would not be necessary to obtain the previous sanction and consent of the society for the institution thereof, simply because the control of the affairs of the society is in the hands of the majority whose acts are complained of and it would be futile to attempt to obtain the sanction and consent of the society for the institution of the suit, it being an absolute certainty that no such sanction or consent would ever be available to the plaintiffs: (1843) 2 Hare 461 and (1847) 1 Ph. 790 *Foll.*; *Case law discussed*.

[P 524 C 2]

(c) Civil P. C. (1908) O. 1—Parties—Same individual cannot be both plaintiff and defendant—Exception to rule stated.

It is a well recognised elementary rule of procedure that the same individual even in different capacities cannot be both a plaintiff and a defendant. This rule is, however, subject to exceptions in equity in cases



where it would be possible to ascertain the rights and liabilities of the parties in the event of all the parties being present before the Court either in the group of plaintiffs or defendants. The Courts in India are not merely Courts of law but are also courts of Equity and, therefore, in proper cases they have power to deal out justice between the parties even disregarding the elementary rules : 25 Bom. 606, ('23) 10 A. I. R. 1923 Bom. 177, ('27) 14 A I R 1927 Bom. 474 and ('36) 23 A I R 1936 Bom. 246, *Ref.* [P 531 C 1, 2]

C. P. C.—

('44) Chitaley, O. 1, (Gen.), N. 2, pts. 5 and 6; O. 34, R 1, N 20, pt. 2.

(d) Civil P C (1908), O. 1 — Parties to suit — Society registered under Societies Registration Act—Suit by members thereof in minority—Some members of managing Committee of society made defendants in their representative capacity as such members—Defendant's capacity held was not defective. (*obiter*)

Where in a suit brought by the members in minority of a society, on behalf of themselves and all the members of the society registered under the Societies Registration Act, some members were made defendants in their representative capacity as members of the Managing Committee of the society:

*Held* that the defendants were made defendants in a capacity different from that of the members of the society who were within the description of plaintiffs, and there was no defect in the frame of the suit by reason of their having been included in the category of the plaintiffs as the members of the society claiming relief against the defendants in their capacity as the members of the managing committee thereof. [P 532 C 1]

C. P. C.—

('44) Chitaley, O. 1, (Gen.), N. 2.

(e) Civil P. C (1908), O. 7, R 11 (a)— Written statement not traversing plaint allegations — Defendant cannot contend that plaint discloses no cause of action against him and that he is not necessary party.

Where the written statement does not amount to a traverse of the allegations contained in the plaint, the defendant cannot contend that the plaint discloses no cause of action against him; and if it cannot be contended that the plaint does not disclose any cause of action against him, it can certainly not be contended that he is not a necessary party to the suit. [P 532 C 2]

C. P. C.—

('44) Chitaley, O. 1, R. 9, N. 3 and 5, O. 7, R. 11, N. 3.

*M. V. Desai, and V. K. Chhatrapati —*

for Plaintiffs.

*R. S. Billimoria and Jamshedji Kanga for Nos. 1 and M. P. Amin, and K. M. Vakil for Nos. 2, 3 & 4 —* for defendants.

**Judgment.**—The plaintiffs have filed this suit, being members of the Arya Samaj, Bombay, on behalf of themselves and all other members of the said society, which is a Society registered under the Societies Registration Act XXI (21) of 1860, against the first defendant who is the President of the said society, as representing the society of the Arya Samaj, Bombay, and against defendants Nos. 2, 3 and 4 who are the members of the managing committee of the society on behalf

of themselves and all the other members of the managing committee of the society, for a declaration that the resolutions dated October 8, 1944, passed at an extraordinary general meeting of the society are *ultra vires* and in fraud of the minority, for a declaration that the resolution dated 21st January 1945, passed at the general meeting of the said society is also null and void and for further and other reliefs. The resolutions dated the 8th October 1944, enacted certain changes in the constitution of the said society and the plaintiffs allege that the said resolutions are void *inter alia* as being *ultra vires* the said society and constituting a fraud on the rights of the minority who voted against the said resolutions, and that the minority of the members of the said society was overborne by the vote of the majority who were acting in their own interests illegally, fraudulently and contrary to the interests and objects of the said society and the rights of the minority of the members of the society present at the meeting and voting against the resolutions.

[2] The resolution of 21st January 1945, sanctioned the agreement for sale of the Shenwewadi property belonging to the said society and the agreement for purchase of another property situate at Bangadwadi. The plaintiffs alleged *inter alia* that the resolution was passed by the majority in fraud of the rights of the minority and against the interests of the society. The plaintiffs further alleged that the managing committee of the said society were about to complete the sale of the property at Shenwewadi and purchase of the property at Bangadwadi and sought to restrain the defendants from completing the sale of Shenwewadi property and purchase of Bangadwadi property and from acting on the resolutions, dated 8th October 1944, and 21st January 1945, and carrying the same into effect, particularly from carrying out the sale of the Shenwewadi property and purchase of the Bangadwadi property. At the hearing of the suit before me Mr. R. S. Billimoria for the first defendant raised *inter alia* the following issues:

[3] (1) Whether the plaintiffs are entitled to maintain the suit without having obtained the sanction and consent of the society for the institution thereof.

[4] (2) Whether the society in this suit is both the plaintiff and the defendant and whether the suit as framed is maintainable.

[5] (4-a) Whether the allegations contained in paragraphs 4 (b), 4 (c) and 16 of the plaint amount to any averments of fraud.

[6] (6) Whether apart from the plea of the resolutions being *ultra vires*, the plaint deals with



matters which relate to the internal management of the society.

[7] (7) If so, whether the Court will entertain the suit in respect of such matters.

[8] Mr. M. P. Amin on behalf of defendants Nos. 2, 3 and 4 joined in the issues raised by Mr. R. S. Billimoria and raised further issues on behalf of defendants Nos. 2, 3 and 4 which were :

[9] (1) Whether the plaint discloses any cause of action against these defendants ; and

[10] (2) Whether these defendants are necessary parties to the suit.

[11] Mr. R. S. Billimoria invited me first to decide issue No. 4 (a), viz. Whether the allegations contained in paragraphs 4 (b), 4 (c) and 16 of the plaint amount to any averments of fraud. He contended that it was an acknowledged rule of pleadings that the plaintiffs must set forth the particulars of the fraud which they allege and that it was not enough to use such general words as "fraud" or "fraudulently" as has been done by the plaintiffs in the plaint. He relied upon the observations of Lord Selborne in (1880) 5 A. C. 685<sup>1</sup> where it has been observed (p. 697) :

[12] "With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice."

[13] These observations of Lord Selborne have been quoted with approval by their Lordships of the Privy Council in 15 I A 119<sup>2</sup> at p. 121 and in 42 I A 135<sup>3</sup> at p. 151. He also referred me to the later decision of the Privy Council reported in 64 I A 143<sup>4</sup> where it was held that litigants who prefer charges of fraud or other improper conduct against persons should be compelled to place on record precise and specific details of those charges even if no objection is taken on behalf of the parties who are interested in disproving the accusations. There Lordships went so far as to observe that in the case before them the petitioner ought not to have been allowed to proceed with his petition and to prove fraud unless and until he had upon such terms as the Court thought fit to impose amended his petition by including therein full particulars of the allegations which he intended to prove, and

that such cases would be much simplified if this practice was strictly observed and insisted upon by the Court even if as in the case before them no objection was taken on behalf of the parties who were interested in disproving the accusations. Relying upon these authorities, Mr. R. S. Billimoria urged that the allegations contained in the plaint with regard to the fraud alleged to have been perpetrated by the majority of the members of the society upon the minority were not enough and could not be entertained by the Court as they stood.

[14] Mr. M. V. Desai for the plaintiffs did not controvert these propositions of law which were advanced by Mr. R. S. Billimoria but submitted to the Court that no fraud as such was relied upon by the plaintiffs, the only contention of the plaintiffs being that their rights had been wrongfully or unlawfully affected and that the resolutions had been improperly procured. During the course of the argument I understood Mr M. V. Desai to mean that his clients did not rely upon fraud as such but merely relied upon the wrongful and/or illegal manner in which the resolutions had been passed by the majority of the members of the society and on that basis I then ruled that issue No. 4(a) did not survive.

[15] After the case had been opened by Mr. M. V. Desai for some time Mr. R. S. Billimoria applied to the Court that issues Nos. 1, 2, 6 and 7 raised by him should be tried first. Mr. M. P. Amin joined in this application and further applied that his issues Nos. 1 and 2 also should be tried similarly. Mr. M. V. Desai stated that he had no objection to that course being adopted by the Court and I ordered accordingly that issues Nos. 1, 2, 6 and 7 raised by Mr. R. S. Billimoria and issues Nos. 1 and 2 raised by Mr. M. P. Amin should be tried in the first instance.

[16] The issues Nos. 1 and 2 raised by Mr. R. S. Billimoria challenged the maintainability of the suit as framed. As I have already observed the Arya Samaj, Bombay, is a society registered under the Societies Registration Act, XXI (21) of 1860, under the name of the Arya Samaj, Bombay, the memorandum and articles of association of the society were filed with the Registrar of the Joint Stock Companies and the society has been in existence since then and has been functioning as such since the date of its registration. The plaintiffs are admittedly in a minority, the majority of the members of the society being of a persuasion contrary to that of the plaintiffs. The plaintiffs, however, filed this suit in a representative capacity on behalf of themselves and all other members of the

1. (1880) 5 A.C. 685; 50 L.J.Q.B. 49; 43 L.T. 258; 29 W.R. 81, Wallingford v. Mutual Society.

2. ('88) 15 Cal. 533; 15 I. A. 119; 5 Sar 1681 (P. C.). Gunge Narain Gupta v. Tiluckram Chowdhry.

3. ('15) 2 A. I. R. 1915 P. C. 7; 39 Bom. 441; 42 I A 135; 29 I. C. 639 (P. C.), Gangadhar Tilak v. Shrinivas Pandit.

4. ('37) 24 A. I. R. 1937 P. C. 146; I.L.R. (1937) All. 566; 31 S.L.R. 306; 64 I A 143; 168 I.C. 620 (P.C.), Bharat-Dharma Syndicate v. Harish Chandra.



society, which would mean that all the members of the society and therefore the society itself is in the position of the plaintiffs. The first defendant is the President of the society and has been sued as representing the society, which means that the society is the defendant in this suit. Mr. R. S. Billimoria contended that the plaintiffs being an admitted minority of the members of the society could not by any stretch of imagination purport to represent all the members of the society and could not even by availing themselves of the procedure laid down in O. 1, R. 8, of the Civil Procedure Code, claim to file this suit as representing all the members of the society, the majority of the members of the society being admittedly against their persuasion. The society had not sanctioned the filing of this suit. No meeting of the society had been called for considering the advisability or otherwise of the institution of the suit. Mr. R. S. Billimoria stated and it was not disputed that if a meeting of the society were called for the purpose of considering whether the suit which had been instituted by the plaintiffs should be continued or not, the result of such a meeting would be a foregone conclusion and the overwhelming majority of the members of the society would pass a resolution disapproving of the further prosecution of the suit.

[17] The objection of Mr. R. S. Billimoria went still further in that he contended that the consent and the sanction of the society not having been obtained by the plaintiffs prior to the institution of this suit which they have filed in a representative capacity on behalf of themselves and all other members of the said society, it was not competent to the plaintiffs to file the suit as they had done. A further objection was raised by Mr. R. S. Billimoria that on the frame of the suit as it stood the society were the plaintiffs as well as the defendants and therefore the suit as framed was not maintainable because it offended against the elementary rule of procedure that the same individual even in different capacities could not both be the plaintiff and the defendant.

[18] In dealing with these issues raised by Mr. R. S. Billimoria it is necessary to ascertain what is the legal position of a society which is registered under the Societies Registration Act XXI (21) of 1860. The society is an association of individuals which is neither a corporation nor a partnership nor an individual which apart from statute are the only entities known to law as capable of suing or being sued. The society is an association of individuals which comes into

existence with certain aims and objects. If it is not registered as a society under the Societies Registration Act, it would have the character of a club or other association which cannot sue or be sued except in the name of all members of the association or in the name of the secretary or other members of the governing body on their own behalf and on behalf of other members of the association under the provisions of O. 1, R. 8, of the Civil Procedure Code. It would not be competent to a secretary or other members of the governing body of the club or association to sue or be sued alone in respect of matters in which the association is interested even though authority in that behalf has been conferred on them by all members of the association.

[19] A partnership firm is also an association of individuals who have come together for carrying on business in partnership. Even in the case of a partnership it would not be competent to file a suit on behalf of or against a partnership as such but for the enactment of O. 30 of the C.P.C., which enables a suit to be filed by or against a partnership in the firm name. That is a statutory enactment which enables the firm name being used for the purpose of filing a suit by or against a partnership. The society of the character we have before us is, however, quite distinct from a partnership. It has nothing in common with a partnership. A corporation or a limited company which is incorporated under the Indian Companies Act has a corporate existence apart from the members constituting the same. A corporation has been defined as a collection of individuals united into one body under a special denomination having perpetual succession under an artificial form and vested by the policy of law with the capacity of acting in several respects as an individual, particularly of taking and granting properties, of contracting obligations and of suing and being sued, of enjoying privileges and immunities in common and of exercising a variety of political rights, more or less extensive, according to the design of its institution or the powers conferred upon it either at the time of its creation or at any subsequent period of its existence. (Kyd on Corporations, (1793), vol. 1, p. 13). (see Halsbury's Laws of England, Hailsham Edition, Vol. VIII, p. 1, para. 1; Adler's Law Relating to Corporations, p. 2; Grant's Law of Corporation, p. 4).

[20] The ideas inherent in the definition of a corporation are (1) that its identity is continuous, (2) that it is intangible, i.e. it is only *in abstracto* and rests only in intentment and consideration of law (Lord Coke),



and (3) it is a thing distinct from its members. Grant in his Law of Corporation predicates a continuous identity, a name and a common seal as indispensable requisites to the creation of a corporation proper and states that besides the aggregate bodies whose legal character and attributes have been above discussed, there are various other aggregate bodies, partaking in some respects, and for some purposes, of the corporate character, but which nevertheless are not complete corporations for want of some of the essentials of corporations, and which therefore have been called *quasi* corporations. He gives as an illustration of the latter category "Churchwardens" who though empowered to hold goods, etc., in succession, for the church, etc., have not power to hold lands in succession, have not a common seal, and want other characteristics of complete incorporation.

[21] As regards the companies which are incorporated under the Indian Companies Act, s. 23 of the Indian Companies Act enacts that from the date of incorporation mentioned in the certificate of incorporation the subscribers of the memorandum, together with such other persons as may from time to time become members of the company, shall be a body corporate by the name contained in the memorandum, capable forthwith of exercising all the functions of an incorporated company, and having perpetual succession and a common seal, but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is mentioned in the Act. The corporations and the companies incorporated under the Indian Companies Act have thus conferred on them a legal entity which is capable of suing or being sued.

[22] If, as stated above, associations of individuals are not capable of suing or being sued except by statutory provisions in that behalf as in the case of partnership firms, corporations or companies incorporated under the Indian Companies Act, could it be said that a society registered under the Societies Registration Act XXI (21) of 1860 becomes a legal entity such as can sue or be sued in the name in which it is registered? The Societies Registration Act XXI (21) of 1860 is an Act for the registration of literary, scientific and charitable societies, and the object of the Act as stated in the preamble is to make provision for improving the legal condition of societies established for the promotion of literature, science, or the fine arts, or for the diffusion of useful

knowledge, or for charitable purposes. Under the provisions of the Act seven or more persons associated for any literary, scientific, or charitable purpose or for any such purpose as is described in s. 20 of the Act may form themselves into a society under the Act by subscribing their names to a memorandum of association and filing the same with the Registrar of Joint Stock Companies. The memorandum of association is to contain the name of the society, the objects of the society and the names, addresses, and occupations of the governors, council, directors, committee or other governing body to whom, by the rules of the society, the management of its affairs is entrusted. A certified copy of the rules and regulations of the society has to be filed with the memorandum of association.

[23] The Registrar issues a certificate under his hand that the society is registered under the Act, upon such memorandum and certified copy being filed with him. The property belonging to the society may be vested in trustees, and if, not so vested is deemed to be vested, for the time being, in the governing body of such society and in all proceedings, civil and criminal, can be described as the property of the governing body of such society by their proper title. Provision is made for suits by and against societies in that the society may sue or be sued in the name of the president, chairman, or principal secretary, or trustees, as shall be determined by the rules and regulations of the society, and, in default of such determination, in the name of such person as shall be appointed by the governing body for the occasion. If, however, on application to the governing body no officer or person is nominated to be the defendant, it is competent for any person having a claim or demand against the society to sue the president or chairman or principal secretary or the trustees thereof. No suit or proceeding, however, is to abate or discontinue by reason of the person by or against whom such suit or proceedings shall have been brought or continued, dying or ceasing to fill the character in the name whereof he shall have sued or been sued, but the same suit or proceedings shall be continued in the name of or against the successor of such person.

[24] A judgment recovered against the person or officer named on behalf of the society is not to be put in force against the property moveable or immoveable or against the body of such person or officer, but against the property of the society. The society is given the power to recover any penalty accruing under the



bye-laws by filing a necessary suit against the person liable to pay the same. The members are liable to be sued as strangers and the property of the society is liable to process for payment of the costs of unsuccessful litigation against such member. Members guilty of offences are punishable as strangers. Provision is made for the adjustment of their affairs, but no member of the society is entitled to receive any profit upon the dissolution of a society; whatever surplus that remains after satisfaction of all its debts and liabilities is to go to some other society as may be determined by the votes of three-fifths of the members present personally or by proxy at the time of the dissolution, or, in default thereof, by the Court having jurisdiction in that behalf.

[25] Do these provisions of the Societies Registration Act XXI (21) of 1860 constitute the society as registered with the Registrar of Joint Stock Companies a legal entity capable of suing or being sued? Has the society as registered with the Registrar of Joint Stock Companies a legal existence apart from the members constituting the same? It is significant to observe that the members of the society are a fluctuating body. A member of the society is a person who having been admitted therein according to the rules and regulations thereof has paid the subscription or signed the roll of the members thereof and has not resigned according to the rules and regulations. The governing body of the society is the governors, council, directors, committees, trustees or other body to whom by the rules and regulations of the society the management of its affairs is entrusted. The members as well as the governing body are not always the same and that is the reason why it has been necessary to provide that no suit or proceeding in any civil Court shall abate or discontinue by reason of the person by or against whom such suit or proceedings may have been brought or continued dying or ceasing to fill the character in the name whereof he shall have sued or been sued, but the same suit or proceedings shall be continued in the name of or against the successor of such person.

[26] Even though the members of the society or the governing body fluctuate from time to time, the identity of the society is sought to be made continuous by reason of these provisions. The identity of the original members and their successors is one. The liability or obligation once binding on the society binds the successors even though they may not be expressly named, and in this the society savours of the character of a corporation. The resigna-

tion or the death of a member does not make any difference to the legal position of the society. The increase or decrease of the members of the society similarly does not make any difference to the position. A partnership under similar circumstances would come to an end, but not the society. The society continues to exist and to function as such until the dissolution thereof under the provisions of the Societies Registration Act. The properties of the society continue vested in the trustees or in the governing body irrespective of the fact that the members of the society for the time being are not the same as they were before nor will be the same thereafter. Could it under these circumstances be said that the society by reason of its registration with the Registrar of Joint Stock Companies becomes a legal entity apart from the members constituting the same? I am of opinion that by reason of the provisions of the Societies Registration Act, once the society is registered with the Registrar of Joint Stock Companies by the filing of the memorandum and certified copy of the rules and regulations thereof with the Registrar and the Registrar has certified under his hand that the society is registered under the Act, the society enjoys the status of a legal entity apart from the members constituting the same and is capable of suing or being sued.

[27] It may, however, be urged that there are provisions in the Societies Registration Act which would go to show that suits by or against the society have got to be filed in a particular manner, viz. every society registered under the Act may sue or be sued in the name of the president, chairman, or principal secretary, or trustees, as shall be determined by the rules and regulations of the society, and in default of such determination, in the name of such person as shall be appointed by the governing body for the occasion: Provided that it shall be competent for any person having a claim or demand against the society to sue the president or chairman, or principal secretary or the trustees thereof, if on application to the governing body some other officer or person be not nominated to be the defendant.

[28] These provisions and the provisions for the non-abatement of suits and enforcement of judgments against the society would go to show that the society even though registered with the Registrar of Joint Stock Companies would not be able to sue or be sued in the name of the society but could sue or be sued only in the name of the president, chairman, or principal secretary or the trustees thereof or some other person or officer nominated to be the defendant by the society. These pro-



visions, however, in my opinion, are not mandatory. They show a mode in which suits could be filed by or against the society. A similar situation arose in England under the provisions of the Trade Union Acts of 1871 and 1876. A trade union registered under the said Acts was sued in (1901) 1 Q. B. 170.<sup>5</sup> A summons was taken out on behalf of the trade union to strike out their names as defendants on the ground that they were neither a corporation nor individual and could not be sued in a *quasi* corporate or any other capacity. The summons came on for hearing before Farwell J. The learned Judge stated that it was undoubtedly true that a trade union was neither a corporation nor an individual nor a partnership between a number of individuals but that was by no means conclusive of the case. He proceeded to observe (p. 429) :

[29] "Now, although a corporation and an individual or individuals may be the only entity known to the common law who can sue or be sued, it is competent to the legislature to give to an association of individuals which is neither a corporation nor a partnership nor an individual a capacity for owning property and acting by agents, and such capacity in the absence of express enactment to the contrary involves the necessary correlative of liability to the extent of such property for the acts and defaults of such agent.... It is beside the mark to say of such an association that it is unknown to the common law. The legislature has legalised it, and it must be dealt with by the courts according to the intention of the Legislature."

[30] He accordingly dismissed the summons. An appeal was filed against this decision of Farwell J. and the decision of the Appeal Court is reported in 1901 A. C. 426.<sup>6</sup> The Appeal Court held that a trade union, registered under the Trade Union Acts, 1871 and 1876, could not be sued under its registered name and reversed the decision of Farwell J. A. L. Smith M. R. observed (pp. 173, 175, 176):

[31] "There can, in my judgment, be no doubt that at common law the defendants could not be sued in the name in which they are sued in this action, any more than a tradesman could sue a defendant in the name of a West-end club for goods supplied by him to that club, for the simple reason that the name of a club is not the name of a corporation nor of an individual nor of a partnership, which, apart from statute, are the only entities known to the law as being capable of being sued. In order, therefore, that this action can be maintained against the defendants in the name of 'The Amalgamated Society of Railway Servants' there must be some statute enabling this to be done either by creating the society a corporation, or enacting that it may be sued in its registered name; and this, as the learned judge states—and in this I also agree—depends upon the true construction of the Trade Union Acts of 1871 and 1876.

[32] When once one gets an entity not known to the law, and therefore incapable of being sued, in our judgment, to enable such an entity to be sued, an enactment must be found either express or implied enabling this to be done, and it is incorrect to say that such an entity can be sued unless there be found an express enactment to the contrary. Where in the Trade Union Acts is to be found any enactment, express or implied, that a trade union is to be sued in its registered name? Express there is none, and it is clear that a trade union is not made a corporation, as the Acts above referred to shew is constantly the case with other societies.

[E. G. Companies Act, 1862, S. 6, Building Society Act, 1874, s. 9, Industrial and Provident Societies Act, 1893, S. 21.] That the Legislature has omitted to enact this in the Trade Union Acts of 1871 and 1876 is clear;...Moreover, by s. 9 of the Act, of 1871 it is expressly enacted that the trustees of a trade union registered under the Act, or any other officer of the union who may be authorized to do so by the rules, may bring or defend any action in any Court of law touching the property of the trade union—a most remarkable section if, as is argued for the plaintiffs and held by the learned judge, the purview of the Act is that a trade union can be sued in its registered name. If this were so, what is the good of this section expressly enabling the trustees or other officer of the union to sue or be sued in respect of property? We can find nothing in the Acts wherefrom the inference is to be drawn that the Legislature has enacted that a trade union can be sued in its registered name; but, by reason of the language of the Acts and what is omitted therefrom, if necessary, we should find the exact contrary."

[33] An appeal was filed to the House of Lords from this decision of the Appeal Court and the decision of the House of Lords is reported in (1901) A C 426.<sup>6</sup> The House of Lords reversed the decision of the Appeal Court and restored the decision of Farwell J. and held that a trade union, registered under the Trade Union Acts, 1871 and 1876, can be sued in its registered name. I need not refer at length to the speeches of the noble Law Lords there. It is necessary only to refer to the speeches of Lord Brampton and Lord Lindley in this behalf. Lord Brampton observed (p. 442) :

[34] "I think that a legal entity was created under the Trade Union Act, 1871, by the registration of the society in its present name in the manner prescribed, and that the legal entity so created, though not perhaps in the strict sense a corporation, is nevertheless a newly created corporate body created by statute, distinct from the unincorporated trade union, consisting of many thousands of separate individuals, which no longer exists under any other name. The very omission from the statute of any provision authorizing and directing that it shall sue and be sued in any other name than that given to it by its registration appears to me to lead to no other reasonable conclusion than that in so creating it, it was intended by the Legislature that by that name and by no other it should be known, and that for all purposes that name should be used and applied to it in all legal proceedings unless there was any other

5. (1901) 1 Q. B. 170, Taff Vale Railway v. Amalgamated Society of Railway Servants.

6. (1901) 1901 A. C. 426: 70 L.J.K.B. 905: 85 L.T. 147:50 W.R. 44, Taff Vale Railway v. Amalgamated Society of Railway Servants.



provision which militated against such a construction, as, for instance, in the case of trustees, by S. 9 of the same Act, who hold real and personal property of the society."

[35] Lord Lindley observed (pp. 444, 445):

[36] "The act does not in express terms say what use is to be made of the name under which the trade union is registered and by which it is known. But a trade union which is registered under the Act must have a name... It may acquire property, but not being incorporated, recourse is had to the old well-known machinery of trustees for acquiring and holding such property, and for suing and being sued in respect of it (Ss. 7, 8, 9). The property so held is, however, the property of the union: the union is the beneficial owner... The Act appears to me to indicate with sufficient clearness that the registered name is one which may be used to denote the union as an unincorporated society in legal proceedings as well as for business and other purposes. The use of the name in legal proceedings imposes no duties and alters no rights: it is only a more convenient mode of proceedings than that which would have to be adopted if the name could not be used. I do not say that the use of the name is compulsory, but it is at least permissive..."

[37] "...to avoid misconception, I will add that if a judgment or order in that form is for the payment of money it can, in my opinion, only be enforced against the property of the trade union, and that to reach such property it may be found necessary to sue the trustees."

[38] Even though in the speech of Lord Brampton there are observations which would go to show that the provision, which we have enacted in s. 6 of the Societies Registration Act as regards suits by and against societies, is capable of being construed as the only mode in which suits by or against the societies could be brought, the observations of Lord Lindley which I have quoted above go to show that the registered name is one which may be used to denote the union as an unincorporated society in legal proceedings as well as for business and other purposes and that even though the use of the name is not compulsory it is at least permissive. I prefer to be guided by the observations of Lord Lindley which I have referred to above and hold that in spite of the provisions contained in Ss. 6, 7 and 8 of the Societies Registration Act as regards suits by and against societies, non-abatement of suits and enforcement of judgment against the societies, which I have already referred to above, it is competent to the society to sue or be sued in the name of the society, to be sued in its registered name, the society on its registration under the Societies Registration Act having come into existence as a legal entity apart from the members constituting the same. If it were necessary to do so, I would adopt the terminology which has been adopted in this connection by

Cozens-Hardy M. R. in (1909) 1 Ch. 163.<sup>7</sup> Where he describes a registered trade union as a "species of *quasi* corporation." (See also note (q) in Halsbury's Laws of England, Hailsham Edition, Vol. VIII, p. 2, "Registered Trade Union is not a Corporation but a legal entity governed by special rules," and also Halsbury's Laws of England, Hailsham Edition, Vol. XXXII, p. 486, para. 776, "A registered trade union is not a corporation nor an individual nor a partnership; but it becomes by registration a legal entity distinct from an unregistered trade union. Its registered name is to be used and applied in all legal proceedings, unless there is any provision inconsistent with such use.")

[39] I am of opinion that the provisions contained in Ss. 6, 7 and 8 of the Societies Registration Act are not inconsistent with the use of the registered name of the society in connection with legal proceedings. As Lord Lindley observed in (1901) A C 426.<sup>6</sup> "I do not say that the use of the name is compulsory but it is at least permissive." If this is the true legal position of a society registered under the Societies Registration Act, the objection of Mr. R. S. Billimoria that the plaintiffs and the defendants are one and the same and that the suit as framed is not maintainable by reason of the society being the plaintiffs as well as the defendants disappears. The plaintiffs are suing on behalf of themselves and all the members of the society. The first defendant is the president of the society and represents the society. As I have already observed the society on its registration which the Registrar of Joint Stock Companies becomes a legal entity apart from its members; it would be therefore idle to contend that the society are the plaintiffs as well as the first defendant in this action. In my opinion, therefore, this objection of Mr. R. S. Billimoria fails.

[40] The next question to consider is how far the plaintiffs are entitled to maintain this suit without having obtained the sanction and consent of the society for the institution thereof. In this connection it must be noted that the plaintiffs are an admitted minority. The affairs of the society are conducted by the majority which for the purposes of this argument may even be assumed to be an overwhelming majority. The resolutions which are sought to be challenged have been passed by that majority in the general meetings of the society convened for the purpose of passing

7. (1909) 1 Ch. 163. *Osborne v. Amalgamated Society of Railway Servants*.



the same. The complaint of the plaintiffs, however, is that in the matter of the passing of the said resolutions the majority has been guilty of oppressing or overbearing the minority and that the acts of the majority complained of are *ultra vires* the society, are a fraud on the minority, or that in any event, there is an absolute necessity to waive the rule as to the supremacy of the majority in order that there may not be a denial of justice. It is contended on behalf of the plaintiffs that the principles of the company law which are enunciated in the well-known decisions in (1843) 2 Hare 461,<sup>8</sup> (1847) 1 Ph. 790<sup>9</sup> and the well recognized exceptions thereto should be applied to this case and it should be held that the plaintiffs are entitled to institute this suit in the manner they have done and without obtaining the sanction and consent of the society before instituting the same. I accept this contention of the plaintiffs.

[41] The society is neither a corporation nor a limited company incorporated under the Indian Companies Act. It is a registered society of individuals which has acquired a legal status by reason of its registration with the Registrar of Joint Stock Companies under the provisions of the Societies Registration Act. Every member of a corporation or an incorporated company joins the same on the basis that *prima facie* the majority of the members is entitled to exercise its powers and control its operations generally. The same would be the position in the case of unincorporated associations of individuals whether the same be registered under the Societies Registration Act or not. The rule of the majority is the normal basis of these associations. The members of these associations do join these associations whether incorporated or unincorporated, whether registered or unregistered, knowing full well that the affairs of these associations would be conducted normally by the vote of the majority of the members thereof. In the absence of any specific rules and regulations governing the conduct of these affairs, this would be the normal presumption, and no member who joins any association would be heard to contend to the contrary.

[42] If unanimity of opinion were needed for the passing of any proposition, it would have to be expressly provided for. In the absence of any such provision the normal state of affairs would be that the opinion of the majority would be binding on the whole

association. In the present case, however, the matter does not rest merely with this presumption which I have enunciated above. It has been expressly enacted in the rules and regulations of this society, certified copy of which has been filed with the Registrar of Joint Stock Companies, that "All matters in the meetings and subcommittees of the Samaj will be decided according to the majority of votes of the members present at the meeting." This being the position, I have no doubt that the principles applicable to cases of corporations and companies incorporated under the Indian Companies Act would govern the relations between the members of this society *inter se* and the principles enunciated in the well-known cases in (1843) 2 Hare 461<sup>8</sup> and (1847) 1 Ph. 790<sup>9</sup> and the exceptions thereto would be applicable to the facts of this case. I am fortified in this conclusion of mine by the observations of Kania J. in 43 Bom. L. R. 562<sup>10</sup> where the learned Judge held that (p. 565) :

[43] "The position of a society registered under the Societies Registration Act [XXI (21) of 1860] is like that of a club or a joint stock company. . . In my opinion the position of the members of this society is similar to that of shareholders of the company."

[44] In that case the learned Judge applied the principles of the company law to the case of a society registered under the Societies Registration Act, the type of which I have before me. I am therefore of opinion that the principles governing the relations of members of joint stock companies, i. e. companies incorporated under the Indian Companies Act, are the principles which are applicable in the case of a society registered under the Societies Registration Act.

[45] Applying those principles to the present case, it appears to me that the issues 1, 6 and 7 raised by Mr. R. S. Billimoria can be dealt with together. Whether the acts which are complained of are matters of internal management of the society or constitute acts which fall within the well recognized exception to the rules enunciated in the cases in (1843) 2 Hare 461<sup>8</sup> and (1847) 1 Ph. 790<sup>9</sup> would be the determinative factor in deciding not only issues Nos. 6 and 7 but also issue No. 1 raised by Mr. R. S. Billimoria. According to my reading of the authorities if the Court came to the conclusion that the acts complained of fall within the latter category, the plaintiffs would under those circumstances be entitled to institute a suit on behalf of themselves and all other members of the society except the defendants making the society and the defendants party defendants to this suit and it would

8. (1843) 2 Hare 461 *Foss v. Harbottle*.

9. (1847) 1 Ph. 790 : 16 L. J. C. H. 217, *Mozley v. Alston*.

10. ('41) 28 A. I. R. 1941 Bom. 312; I. L.R. (1941) Bom. 497; 197 I.C. 308; 43 Bom. L.R. 562, *Krishnan v. Sundaram*.



not be necessary to obtain the previous sanction and consent of the society for the institution thereof, simply because the control of the affairs of the society is in the hands of the majority whose acts are complained of and it would be futile to attempt to obtain the sanction and consent of the society for the institution of the suit, it being an absolute certainty that no such sanction and consent would ever be available to the plaintiff.

[46] Two principles emerge clearly from the authorities and they are (1) that the Court will not interfere with the internal management of the companies acting within their powers and in fact has no jurisdiction to do so, and (2) that in order to redress a wrong done to a company or to recover money or damages alleged to be due to a company the action should *prima facie* be brought by the company itself. The leading cases on this subject are (1843) 2 Hare 461<sup>8</sup>, (1847) 1 Ph 790<sup>9</sup> and (1848) 2 Ph 740<sup>11</sup>. In (1843) 2 Hare 461<sup>8</sup> two members of an incorporated company filed a bill against the directors and others praying that the defendants might be compelled to make good the loss sustained by the company by reason of the fraudulent acts of such directors. The defendants demurred. The Court held that upon the facts stated the continued existence of the Board of Directors *de facto* must be intended, that the possibility of convening a general meeting of proprietors capable of controlling the acts of the existing Board was not excluded by the allegations of the bill, that in such circumstances there was nothing to prevent the company from obtaining redress in its corporate character in respect of the matters complained of, that therefore the plaintiffs could not sue in a form of pleading which assumed the practical dissolution of the corporation and that the demurrers must be allowed. The Court was further of opinion that the acts of the directors complained of were capable of confirmation by the majority of the members of the company and declined to interfere. In the course of his judgment Sir James Wigram V. C. observed (pp. 491, 494) :

[47] "The first objection taken in the argument for the defendants was that, the individual members of the corporation cannot in any case sue in the form in which this bill is framed. During the argument I intimated an opinion, to which, upon further consideration, I fully adhere, that the rule was much too broadly stated on behalf of the defendants. I think there are cases in which a suit might properly be so framed. Corporations like this, of a private nature, are in truth little more than private partnerships; and in cases which may easily be suggested, it would be too much to hold, that a society of private persons associated together in undertakings, which, though

11. (1848) 2 Ph. 740 : 18 L. J. C. H. 65 Lord v. The Governor and Company of Copper Mines.

certainly beneficial to the public, are nevertheless matters of private property, are to be deprived of their civil rights *inter se*, because in order to make their common objects attainable the Crown or the legislature may have conferred upon them the benefit of a corporate character. If a case should arise of injury to a corporation by some of its members, for which no adequate remedy remained, except that of a suit by individual corporators in their private characters, and asking in such character the protection of those rights to which in their corporate character they were entitled. I cannot but think that the principle so forcibly laid down by Lord Cottenham in *Wallworth v. Holt*<sup>12</sup> and other cases, would apply, and the claims of justice would be found superior to any difficulties arising out of technical rules respecting the mode in which corporations are required to sue.

[48] But, on the other hand, it must not be without reasons of a very cogent character that established rules of law and practice are to be departed from,—rules, which, though in a sense technical, are founded on general principles of justice and convenience, and the question is, whether a case is stated in this bill, entitling the plaintiffs, to sue in their private character . . .

[49] . . . but the majority of the proprietors at a special general meeting assembled, independently of any general rules of law upon the subject, by the very terms of the incorporation in the present case, has power to bind the whole body, and every individual corporator must be taken to have come into the corporation upon the terms of being liable to be so bound. How then can this Court act in a suit constituted as this is, if it is to be assumed, for the purposes of the argument, that the powers of the body of the proprietors are still in existence, and may be lawfully exercised for a purpose like that I have suggested? Whilst the Court may be declaring the acts complained of to be void at the suit of the present plaintiffs, who in fact may be the only proprietors who disapprove of them, the governing body of proprietors may defeat the decree by lawfully resolving upon the confirmation of the very acts which are the subject of the suit. The very fact that the governing body of proprietors assembled at the special general meeting may so bind even a reluctant minority, is decisive to shew that the frame of this suit cannot be sustained whilst that body retains its functions."

[50] In (1847) 1 Ph 790<sup>9</sup> two members of an incorporated railway company filed a bill in their individual characters against the corporation and twelve other members, who were alleged to have usurped the office of directors and to be exercising the functions thereof, as a majority of the governing body, injuriously to the company's interests, and praying that the twelve might be restricted from acting as directors, and be ordered to deliver the company's common seal, property and books to six other persons, who were alleged to be the only duly constituted directors. Lord Cottenham L. C. allowed a demurrer to the bill. In the first place, he pointed out that if there had been no other objection to the bill, the fact of its having

12. (1840) 4 Myl. and Cr. 619, 635; see also (1810) 17 Ver. 320, *Adley v. Whitstable Co.* (per Lord Eldon).



been brought by shareholders, not on behalf of themselves and others but in their individual characters only, was fatal. Then he said that a more important objection was that *the injury alleged was not to the plaintiffs personally but to the corporation*, without any reason being assigned by the bill *why the corporation did not put itself in motion to seek a remedy*. After observing that (1843) 2 Hare 461<sup>8</sup> was identical in principle with the case before him, Lord Cottenham said that the Vice Chancellor's observations in that case applied with greater force to the present case because there (p. 800) :

[51] "the bill expressly alleges that a large majority of the shareholders are of the same opinion with them (the plaintiffs); and, if that be so, there is obviously nothing to prevent the company from filing a bill in its corporate character to remedy the evil complained of."

[52] Finally he relied on the ground that it was without precedent for the Court to interfere :

[53] "solely on the ground of the supposed invalidity of the title of persons claiming to be corporate officers."

[54] In (1848) 2 Ph. 740<sup>11</sup> a demurrer of a bill by one of the shareholders of an incorporated mining company on behalf of himself and all other shareholders except the members of the governing body who were the defendants, impeaching several transactions of that body which it appeared had been sanctioned by majorities at general meetings of the shareholders and amongst which was a project to vest all the property of the company in trustees for the purpose of liquidating its affairs was allowed notwithstanding some vague and general charges of fraud and misconduct on the part of the defendants and an allegation that by the constitution of the company no one but the governing body could convene a general meeting the specific acts complained of not being clearly such as in the opinion of the Court it was incompetent to a majority of shareholders to sanction. Lord Cottenham L. C. observed (p. 751) :

[55] "I find all the complaints made by the individual shareholders to consist of acts within the powers of the corporation, and all sanctioned by general meetings of the shareholders and no allegation raising any case for the interference of a Court of Equity with the exercise of such rights."

[56] A Court of Equity could not assume jurisdiction in such a case, without opening its doors to all parties interested in corporations or joint stock companies or private partnerships, who, although a small minority of the body to which they belong, may wish to interfere in the conduct of the majority. This cannot be done, and the attempt to introduce such a remedy ought to be checked for the benefit of the community.

[57] In (1843) 2 Hare 461<sup>8</sup> Sir James Wigram

acted on this principle, because the acts were capable of confirmation; and in (1847) 1 Ph. 790<sup>9</sup> I expressed my strong approbation of Sir James Wigram's decision in that case."

[58] These authorities lay down the general principles which I have above enunciated. These principles have been uniformly followed by the Courts in England and in India. The principle that the Court will not interfere with the internal management of the companies acting within their rights and in fact has no jurisdiction to do so is based on the supremacy of the majority. As I have already observed in all corporations and companies incorporated under the Indian Companies Act the normal position is that the internal affairs of the corporations or the companies are managed by a vote of the majority; and members join the corporations or the companies with full knowledge that the majority of the members are entitled to exercise the powers and control the operations generally. This power which has been conferred on the majority has however, got to be exercised *bona fide* and the Court interferes only to prevent unfairness or oppression. But subject to that each member of the corporation or company may vote with regard to his individual interests though these interests may be peculiar to himself and not shared by the company. This is the limitation on the power conferred on the majority which has been laid down in (1912) 2 Ch. 324<sup>13</sup> which has been approved by the Judicial Committee of the Privy Council in 1927 A. C. 369<sup>14</sup>. In the latter case Viscount Haldane observed (pp. 371, 373) :

[59] "There is however, a restriction of such powers, when conferred on a majority of a special class in order to enable that majority to bind a minority. They must be exercised subject to a general principle, which is applicable to all authorities conferred on majorities of classes enabling them to bind minorities; namely, that the power given must be exercised for the purpose of benefiting the class as a whole, and not merely individual members only. Subject to this, the power may be unrestricted."

[60] . . But their Lordships do not think that there is any real difficulty in combining the principle that while usually a holder of shares or debentures may vote as his interest directs, he is subject to the further principle that where his vote is conferred on him as a member of a class he must conform to the interest of the class itself when seeking to exercise the power conferred on him in his capacity of being a member. The second principle is a negative one, one which puts a restriction on the completeness of freedom under the first, without excluding such freedom wholly."

13. (12) 2 Ch. 324 : 81 L. J. Ch. 564 : 107 L. T. 344, *Goodfellow v. Nelson Line (Liverpool) Ltd.*

14. (27) 14 A. I. R. 1927 P. C. 62; 101 I. C. 897 : 1927 A. C. 369; 96 L. J. P. C. 57 : 136 L. T. 615, *British America Nickel Corporation v. M. J. O'Brien*.



[61] In this connection I may as well refer to the case in (1919) 1 Ch. 290<sup>15</sup> where Astbury J. discussed what constitutes the benefit of the company as a whole. In that case company was in great need of further capital. The majority representing 98% of the shares were willing to provide this capital if they could buy up the two per cent. minority. Having failed to effect this by agreement, they proposed to pass an article enabling them to purchase the minority shares compulsorily on certain terms therein mentioned, but were willing to adopt any other mode of ascertaining the value that the Court thought fit. It was held in the circumstances that the proposed article was not just or equitable or for the benefit of the company as a whole, but was simply for the benefit of the majority. It was not therefore an article that the majority could force on the minority under S. 13 of the Companies (Consolidation) Act, 1908. Astbury J. observed (pp. 295, 296):

[62] "In (1900) 1 Ch. 656<sup>16</sup> at p. 671 the majority of the Court of Appeal sanctioned, as against the only holder of fully paid shares, a new article imposing a lien on fully paid shares. Lindley, M. R. said: 'The power thus conferred on companies to alter the regulations contained in their articles is limited only by the provisions contained in the statute and the conditions contained in the company's memorandum of association. Wide, however as the language of S. 50 (now S. 13) is, the power conferred by it must like all other powers be exercised subject to those general principles of law and equity which are applicable to all powers conferred on majorities and enabling them to bind minorities. It must be exercised, not only in the manner required by law, but also *bona fide* for the benefit of the company as a whole, and it must not be exceeded.'

[63] The question therefore is whether the enforcement of the proposed alteration on the minority is within the ordinary principles of justice and whether it is for the benefit of the company as a whole. I find it very difficult to follow how it can be just and equitable that a majority, on failing to purchase the shares of a minority by agreement, can take power to do so compulsorily.

[64] ... in default of further capital the company might have to go into liquidation. The plaintiff is willing to risk that. ... It is merely for the benefit of the majority. If passed, the majority may acquire all the shares and provide further capital. That would be for the benefit of the company as then constituted. But the proposed alteration is not for the present benefit of this company."

[65] This discussion as to the power of the majority to bind the minority contains within itself the limitations on the power of the majority. Subject to those limitations, however, the powers of the majority are supreme in matters of internal management of the company. As was observed by James L. J. in

(1875) 1 Ch. D. 13<sup>17</sup>:

[66] "I think it is of the utmost importance in all these companies that the rule which is well known in this Court as the rule in (1847) 1 Ph 790<sup>9</sup> and (1848) 2 Ph 740<sup>11</sup> and (1843) 2 Hare 461<sup>8</sup> should be always adhered to; that is to say, that nothing connected with internal disputes between the shareholders is to be made the subject of a bill by some one shareholder on behalf of himself and others, unless there be something illegal, oppressive, or fraudulent—unless there is something *ultra vires* on the part of the company *qua* company, or on the part of the majority of the company, so that they are not fit persons to determine it; but that every litigation must be in the name of the company, if the company really desire it."

[67] Mellish L. J. also observed in same case (p. 24):

[68] "I think it is a matter of considerable importance rightly to determine this question, whether a suit ought to be brought in the name of the company or in the name of one of the shareholders on behalf of the others. It is not at all a technical question but it may make a very serious difference in the management of the affairs of the company. The difference is this:—Looking to the nature of these companies, looking at the way in which their articles are formed, and that they are not all lawyers who attend these meetings, nothing can be more likely than that there should be something more or less irregular done at them—some directors may have been irregularly appointed, some directors as irregularly turned out, or something or other may have been done which ought not to have been done according to the proper construction of the articles. Now, if that gives a right to every member of the company to file a bill to have the question decided, then if there happens to be one cantankerous member, or one member who loves litigation, everything of this kind will be litigated; whereas, if the bill must be filed in the name of the company, then, unless there is a majority who really wish for litigation, the litigation will not go on. Therefore, holding that such suits must be brought in the name of the company does certainly greatly tend to stop litigation."

[69] "In my opinion, if the thing complained of is a thing which in substance the majority of the company are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority of the company are entitled to do legally, there can be no use in having a litigation about it, the ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes. Is it not better that the rule should be adhered to that if it is a thing which the majority are the masters of the majority in substance shall be entitled to have their will followed? If it is a matter of that nature, it only comes to this, that the majority are the only persons who can complain that a thing which they are entitled to do has been done irregularly; and that, as I understand it, is what has been decided by the

17. (1875) 1 Ch. D. 13 : 45 L. J. Ch. 27, MacDougall v. Gardiner.

15. (1919) 1 Ch. 290 : 88 L. J. Ch. 143 : 120 L. T. 529, *Brown v. British Abrasive Wheel Co.*

16. (1900) 1 Ch. 656 : 69 L. J. C. H. 266 : 82 L. T. 210 : 48 W. R. 452, *Allen v. Gold Reefs of West Africa, Limited.*



cases in (1847) 1 Ph 790<sup>9</sup> and (1843) 2 Hare 461.<sup>8</sup> In my opinion that is the rule that is to be maintained. Of course if the majority are abusing their powers, and are depriving the minority of their rights, that is an entirely different thing, and there the minority are entitled to come before this Court to maintain their rights; but if what is complained of is simply that something which the majority are entitled to do has been done or undone irregularly, then I think it is quite right that nobody should have a right to set that aside, or to institute a suit in Chancery about it, except the company itself."

[70] This supremacy of the majority is therefore subject to the following exceptions which are laid down in the authorities, viz. (1) where the act complained of is *ultra vires* the company; (2) where the act complained of is a fraud on the minority; and (3) where there is absolute necessity to waive the rule in order that there may be no denial of justice. (Palmer's Company Precedents, Vol. I, p. 1246). As was observed by Lord Davey in (1902) A. C. 83<sup>18</sup> (p. 93) :

[71] "It is an elementary principle of the law relating to joint stock companies that the Court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so. Again, it is clear law that in order to redress a wrong done to the company or to recover moneys or damages alleged to be due to the company, the action should *prima facie* be brought by the company itself. These cardinal principles are laid down in the well-known cases in (1843) 2 Hare 461<sup>8</sup> and (1847) 1 Ph. 790<sup>9</sup> and in numerous later cases which it is unnecessary to cite. But an exception is made to the second rule, where the persons against whom the relief is sought themselves hold and control the majority of the shares in the company, and will not permit an action to be brought in the name of the company. In that case the Courts allow the shareholders complaining to bring an action in their own names. This, however, is mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress, and it is obvious that in such an action the plaintiffs cannot have a larger right to relief than the company itself would have if it were plaintiff, and cannot complain of acts which are valid if done with the approval of the majority of the shareholders, or are capable of being confirmed by the majority. The cases in which the minority can maintain such an action are, therefore, confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the company. A familiar example is where the majority are endeavouring directly or indirectly to appropriate to themselves money, property, or advantages which belong to the company, or in which the other shareholders are entitled to participate, as was alleged in the case of (1874) 9 Ch. A. 350.<sup>19</sup> It should be added that no mere informality or irregularity which can be remedied by

the majority will entitle the minority to sue if the act when done regularly would be within the powers of the company and the intention of the majority of the shareholders is clear. This may be illustrated by the judgment of Melish L. J. in (1875) 1 Ch. D. 131<sup>7</sup> at p. 25 :

[72] There is yet a third principle which is important for the decision of this case. Unless otherwise provided by the regulations of the company, a shareholder is not debarred from voting or using his voting power to carry a resolution by the circumstance of his having a particular interest in the subject-matter of the vote. This is shewn by the case before this Board of the (1887) 12 AC 589.<sup>20</sup> In that case the resolution of a general meeting to purchase a vessel at the vendor's price was held to be valid, notwithstanding that the vendor himself held the majority of the shares in the company, and the resolution was carried by his votes against the minority who complained."

[73] This position is further emphasised by another decision of their Lordships of the Privy Council reported in (1912) A C 546.<sup>21</sup> In that case Lord Macnaghten observed (p 551):

[74] "The principles applicable to cases where a dissatisfied minority of shareholders in a company seek redress against the action of the majority of their associates are well settled—In order to succeed it is incumbent on the minority either to show that the action of the majority is *ultra vires* or to prove that the majority have abused their powers and are depriving the minority of their rights. It would be pedantry to go through the line of decisions by which those principles have been established. But there is a passage in a recent judgment of this Board in (1902) A C 83<sup>18</sup> which has the high authority of Lord Davey, so opposite to the circumstances of the present case that it may be useful to cite it at length."

[75] and Lord MacNaghten cites the passage from the speech of Lord Davey which I have herein above referred to. These are really the principles which govern the actions which may be brought by a dissatisfied minority in respect of the acts of the majority which normally are the governing factors in the internal management of the companies. The second principle that in order to redress a wrong done to the company or to recover moneys or damages alleged to be due to the company, the action should *prima facie* be brought by the company itself, does not require much elaboration. It is a salutary rule the reason of which is to be found in the observations of Sir James Wigram V. C. in (1843) 2 Hare 461<sup>8</sup> and the observations of Mellish L. J. in (1875) 1 Ch. D. 13.<sup>17</sup> This is however general rule. As was observed by Sir George Jessel M. R. in (1875) 20 E. Q. 474<sup>22</sup> (pp. 479, 480, 482):

20. (1887) 12 A.C. 589 : 50 L.J.P.C. 102 : 57 L. T. 426 : 36 W. R. 647, North-West Transportation Co. v. Beatty.

21. (1912) 1912 A. C. 546 : 81 L.J.P.C. 233 : 106 L.T. 934, Dominion Cotton Mills Co. Ltd. v. Amyot.

22. (1875) 20 E. Q. 474 : 44 L.J.Ch. 496 : 32 L. T. 685 : 23 W. R. 887, Russell v. Wakefield Water-Works Co.

18. (1902) 1902 A.C. 83 : 71 L.J. P. C. 1 : 85 L. T. 553 : 50 W. R. 241, Burland v. Earle.

19. (1874) 9 Ch. A. 350 : 43 L.J. Ch. 330 : 30 L. T. 209 : 22 W. R. 396, Menier v. Hopper's Telegraph Works.



[76] "But the general rule being that the *cestui que trust* must sue, and not the individual corporator who has only an ultimate beneficial interest, the only point remaining to be considered is, whether there are any exceptions to the general rule . . . when you want to find the rule you must look to (1843) 2 Hare 461<sup>8</sup> here you will find the general rule is that which I have stated. But that is not a universal rule; that is it is a rule subject to exceptions and the exceptions depend very much on the necessity of the case; that is, necessity for the Court doing justice."

[77] After quoting the remarks of Sir James Wigram V. C. in (1843) Hare 46<sup>8</sup> Sir George Jessel M. R. proceeded to observe (p. 480):

[78] "That I take to be the correct law on the subject.

[79] It remains to consider what are those exceptional cases in which for the due attainment of justice such a suit should be allowed. We are all familiar with one large class of cases which are certainly the first exception to the rule. They are cases in which an individual corporator sues the corporation to prevent the corporation either commencing or continuing the doing of something which is beyond the powers of the corporation. Such a bill, indeed may be maintained by a single corporator, not suing on behalf of himself and of others, as was settled in the House of Lords in (1860) 8 HLC 712.<sup>23</sup>

[80] ...But that is not the only case. Any other case in which the claims of justice require it is within the exception.

[81] Another instance occurred in (1867) 5 Eq. 464<sup>24</sup> in which the corporation was controlled by the evil doer, and would not allow its name to be used as Plaintiff in the suit. It was said that justice required that the majority of the corporators should not appropriate to themselves the property of the minority, and then use their own votes at the general meeting of the corporation to prevent their being sued by the corporation, and consequently in a case of that kind the corporators who form part of the minority might file a bill on their own behalf to get back the property or money so illegally appropriated. It is not necessary that the corporation should absolutely refuse by vote at the general meeting, if it can be shewn either that the wrong-doer had command of the majority of the votes, so that it would be absurd to call the meeting; or if it can be shown that there has been a general meeting substantially approving of what has been done: or if it can be shewn from the acts of the corporation as a corporation, distinguished from the mere acts of the directors of it, that they have approved of what has been done, and have allowed a long time to elapse without interfering, so that they do not intend and are not willing to sue. In all those cases the same doctrine applies, and the individual corporator may maintain the suit. As I have said before, the rule is a general one, but it does not apply to a case where the interests of justice require the rule to be dispensed with. I do not intend by the observations I have made in any way to restrain the generality of the terms made use of by the learned Judge who decided the case in (1843) 2 Hare 461.<sup>8</sup>

[82] These observations of Sir George Jessel M. R. go to show that the general principle as to the action having to be brought *prima facie*

by the company itself in order to redress a wrong done to the company or to recover moneys or damages alleged to be due to the company, is subject to exceptions, which are well recognised. The position is thus summarized in Halsbury's Laws of England, Hailsham Edition, Vol. V, p. 408, para. 675:

[83] "To redress a wrong done to the company or to recover money or damages due to it the action must *prima facie* be brought by the company itself. Where, however, the persons against whom relief is sought hold and control the majority of the shares, and will not permit an action to be brought in the company's name shareholders complaining may bring an action in their own names and on behalf of the others, and they may do so also where the effect of preventing them so suing would be to enable a company by an ordinary resolution to ratify an improperly passed special resolution. In such an action the plaintiffs have no larger right to relief than the company would have, if plaintiff; they cannot complain of acts which are valid if done with the approval of the majority of shareholders or are capable of being confirmed by the majority, and can only maintain their action when the acts complained of are of a fraudulent character or are *ultra vires* of the company, mere irregularity or informality which can be remedied by the majority being insufficient."

[84] The reason for this exception is very forcibly brought out in the observations of Sir W. M. James L. J. in (1874) 9 Ch A 350<sup>19</sup> (p 353):

[85] "It is said, however that this is not the right form of suit, because, according to the principles laid down in (1843) 2 Hare 461<sup>8</sup> and other similar cases, the Court ought to be very slow indeed in allowing a shareholder to file a bill, where the company is the proper plaintiff.

This particular case seems to me precisely one of the exceptions referred to by Vice-Chancellor Wood in (1867) 5 Eq 464<sup>24</sup> a case in which the majority were the Defendants, the wrong-doers, who were alleged to have put the minority's property into their pockets. In this case it is right and proper for a bill to be filed by one shareholder on behalf of himself and all the other shareholders."

[86] and also in the observations of Lord Davey in (1902) AC. 83<sup>18</sup> (p. 93) above quoted. I may also refer to the observations of Lindley M. R. in (1900) 2 Ch. 56<sup>25</sup> (p. 69):

[87] "It is necessary, however, to consider the form of the action, and the relief which can be given. The breach of duty to the company consists in depriving it of the use of the money which the directors ought to have paid up sooner than they did. I cannot regard the case as one of mere internal management which, according to (1843) 2 Hare 461<sup>8</sup> and numerous other cases, the Court leaves the shareholders to settle amongst themselves. It was ascertained and admitted at the trial that, when this action was commenced, the defendants held such a preponderance of shares that they could not be controlled by the other shareholders. Under these circumstances an action by some shareholders, on behalf of themselves and the others against the defendants is in accordance with the authorities,

25. (1900) 2 Ch. 56 : 69 L.J.C.H. 428 : 82 L. T. 400 : 48 W.R. 546, *Alexander v. Automatic Telephone Co.*

23. (1860) 8 H. L. C. 712 : 2 L. T. (N S) 707. *Simpson v. Westminster Palace Hotel Co.*

24. (1867) 5 Eq 464 N. *Atwool v. Merryweather.*  
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and is unobjectionable in form : see (1874) 9 Ch. A 350.<sup>19</sup> An action in this form is far preferable to an action in the name of the company, and then a fight as to the right to use its name. But this last mode of procedure is the only other open to a minority of shareholders in cases like the present."

[88] As a matter of fact where the majority is overbearing the minority it was held in (1879) 11 Ch. D 97<sup>26</sup> that it was not necessary that a meeting of shareholders should first be called before the bill could be filed by one shareholder on behalf of the others against the company. Jessel M. R. observed there (p. 107) :

[89] "As a general rule the company must sue in respect of a claim of this nature, but general rules have their exceptions, and one exception to the rule requiring the company to be the Plaintiff is, that where fraud is committed by persons who can command a majority of votes, the minority can sue. The reason is plain, as unless such an exception were allowed it would be in the power of a majority to defraud the minority with impunity."

[90] These are thus the well-recognised exceptions to the second principle, viz. that in order to redress a wrong done to the company or to recover moneys or damages alleged to be due to the company, the action should *prima facie* be brought by the company itself. I shall now turn to the facts of the present case, having regard to the principles enunciated above. The resolutions dated October 8, 1944, and January 21, 1945, which are complained of by the plaintiffs have been challenged *inter alia* on the ground that the same have been passed in fraud of the rights of the minority and against the interests of the said society. Even though when arguing issue No. 4 (a) at the commencement Mr. M. V. Desai gave me to understand that he was not relying upon fraud as such in support of his contentions as regards the said resolutions, it became abundantly clear whilst arguments proceeded, that the statement which he made to me on the earlier occasion was due to some misapprehension. He made it clear that he was relying upon fraud alleged to have been perpetrated by the majority of the members of the society upon the minority consisting of the plaintiffs and several others in the matter of the passing of the said resolutions and expressed his willingness to furnish particulars of the fraud alleged in paragraphs 4 (b), 4 (c) and 16 of the plaint if the Court thought that the particulars of fraud contained in the plaint were insufficient. I shall, therefore, deal with this part of the case on the basis that the plaint contains

averments of fraud against the majority of the members of the said society.

[91] If the majority of the members of the society were guilty of any act which was *ultra vires* the company or which was in fraud of the minority as has been alleged, it would not constitute merely an infringement of the rights of the minority but would within the meaning of the authorities I have discussed above be a wrong perpetrated by them on the society itself. In the exercise of their power the majority have got to look to the benefit of the society as a whole and not merely to the benefit of the individual members thereof who constitute the majority. The resolutions as passed must be for the benefit of not only the majority of the members who support the same but also the minority who are a dissentient minority and who obviously would be entitled to demonstrate before the Court that the said resolutions are in fraud of their rights. It would therefore be not merely a wrong perpetrated on the minority but the society as a whole which is an aggregate of members consisting of the majority as well as the minority. That being the position, the society would be the only person entitled to institute this suit. In so far, however, as the majority of the members of the society are in charge of the affairs of the society, and are also in a position to outvote the minority in any meeting of the society which may be called for the purpose, it would be impossible for the society to pass a resolution sanctioning the institution of this suit or the further continuance thereof, and it would be futile to expect the plaintiffs who are an admitted minority to obtain the sanction or consent of the society to institute this suit even though as I have already observed it is a suit for redressing a wrong done to the society. Under these circumstances, I am of opinion that the case as it stands at present is covered within the well-recognised exceptions to the rule in (1849) 2 Hare 461<sup>8</sup> and (1847) 1 Ph. 790<sup>9</sup> and the plaintiffs are entitled to maintain this suit in the form which they have done, viz. on behalf of themselves and all other members of the society.

[92] I may observe that for the purposes of this decision of mine I am not discussing any further the nature of the fraud which is alleged to have been perpetrated by the majority on the plaintiffs and the other members who constitute the minority of the members of the society. The fraud alleged is not particularised with such detail as it

26. (1879) 11 Ch. D. 97 : 48 L. J. C. H. 589 : 40 L.T. 644 : 27 W.R. 699, *Mason v. Harris*.



should have been done and it is necessary that the plaintiffs should furnish to the defendants the particulars of the fraud alleged by them in paras. 4 (b), 4 (c), and 16 of the plaint. I may nonetheless refer to the observations of Marten J. in 27 Bom.L.R. 48<sup>27</sup> (p. 52):

[93] "... where fraud is alleged and where consequently it is alleged that the suit is within one of the recognised exceptions to the principles laid down in (1843) 2 Hare 461<sup>8</sup> it will, I think in general be found that the case is allowed to go to trial to ascertain the facts before it is finally determined whether the action of the majority can in fact bind the minority. This is because until the facts are ascertained with some distinctness, it is difficult to say what is the precise action of the majority, and whether it only amounts on the one hand to those matters of internal management where the majority of the shareholders can rightly impose their will upon the minority, or whether on the other hand it is one of those cases in which the assets of the company are being improperly distributed by an attempt to pay them into the pockets of the majority of shareholders of the company or their friends at the expense of the minority."

[94] The only thing which remains to be considered as regards the frame of the suit is whether the plaintiffs would be entitled to bring this suit on behalf of themselves and all other members of the society when defendants Nos. 2, 3 and 4, even though they are sued in their capacity as members of the managing committee of the society are also members of the society. Defendants Nos. 2, 3 and 4 are sued in a representative capacity as members of the managing committee of the society which consists of 33 members. These 33 members therefore are within the category of defendants and by reason of the description of the plaintiffs in the title of the plaint would also be included within the category of the plaintiffs. It is, therefore, contended that the same persons cannot be plaintiffs as well as defendants even though they might be impleaded in the suit in different capacities. I am of opinion that the objection is good to the extent that it goes. It is a well-recognised elementary rule of procedure that the same individual even in different capacities cannot be both a plaintiff and a defendant, and this principle has been followed by our Court in 25 Bom. 606,<sup>28</sup> 47 Bom. 349,<sup>29</sup> 51 Bom. 771<sup>30</sup> and 38 Bom. L. R. 486.<sup>31</sup> This rule is, however, subject to exceptions in

equity in cases where it would be possible to ascertain the rights and liabilities of the parties in the event of all the parties being present before the Court either in the group of plaintiffs or defendants. Procedure as has been well said is but the hand-maiden of justice and no rules of procedure as such can be allowed to thwart the ends of justice. As a matter of fact the Courts in Chancery allowed various exceptions to this mere rule of procedure. One finds in Mitford (Lord Redesdale) on The Pleadings in Chancery, 5th edition (1847), at p. 414, instances where suits were allowed to be filed even though the defendants were also included in the category of the plaintiffs, as for example:

[95] "Where a suit is instituted for the payment of a sum of money, in the nature of a debt, due to the whole body of the shareholders of a company, the suit may be instituted by one of the shareholders on behalf of himself and all the other shareholders. And in such a case, although the payment may be claimed from the directors, who are made defendants for that purpose, it is correct not to except them out of the number of shareholders on whose behalf the bill is expressed to be filed; because they are not sued as shareholders, but as directors, and, in their character of shareholders, they would be entitled to participate in the fruits of the suit. (1836) 5 L.J.Ch. (NS) 145.<sup>32</sup> And in like manner where two or more shareholders in a numerous joint-stock company sue on behalf of themselves and all other shareholders, and one of the shareholders has acted as the agent of the company, the plaintiffs may sue on his behalf in his character as shareholder, although they may make him a defendant in his character of agent. (1838) 4 Myl. & Cr. 134."<sup>33</sup>

[96] The above mentioned passage goes to show that the Courts in Chancery did not allow the ends of justice to be thwarted by being trammelled by the rules of procedure like this in proper cases. The Courts in India are not merely Courts of Law but are also Courts of Equity. Order XXX, R. 9, of the Civil Procedure Code has enacted an equitable exception to the elementary rule of procedure which I have stated above, in that it allows suits between a firm and one or more of the partners therein and suits between firms having one or more partners in common to be filed. In proper cases the Courts would, in spite of that elementary rule of procedure, have the power to deal out justice between the parties even disregarding the elementary rule of procedure which requires that the same individual even in different capacities cannot be both a plaintiff and a defendant. If it were necessary I would, following the passage from Mitford which I

32. (1836) 5 L. J. C. H. (NS) 145, *Mocatto v. Ingilby*.

33. (1838) 4 Myl. & Cr. 134, *Taylor v. Salmon*.

27. ('25) 12 A. I. R. 1925 Bom. 188 : 49 Bom. 291 :

89 I. C. 35 : 27 Bom. L.R. 48, *Vadilal v. Maneklal*.

28. ('01) 25 Bom. 606, *Rustomji v. Purshotamdas*.

29. ('23) 10 A. I. R. 1923 Bom. 177 : 47 Bom.

349 : 77 I. C. 83, *Dadabhoy Framjee v. Cowasji Dorabji*.

30. ('27) 14 A. I. R. 1927 Bom. 474 : 51 Bom.

771 : 104 I. C. 794, *Ratanbai v. Narayandas*.

31. ('36) 23 A.I.R. 1936 Bom. 246 : 163 I. C. 579:

38 Bom.L.R. 486, *Chandulal v. Keshavlal*.



have quoted above, hold that defendants Nos. 2, 3 and 4 in their representative capacity as members of the managing committee of the society are made defendants in a capacity different from that of the members of the society who are within the description of the plaintiffs, and there is no defect in the frame of the suit by reason of their having been included in the category of the plaintiffs as members of the society claiming relief against the defendants in their capacity as the members of the managing committee thereof. The defect such as this in the frame of the suit by reason of the 33 members of the managing committee of the society being included in the category of the plaintiffs as members of the society can however be remedied by allowing to the plaintiffs an amendment by describing the plaintiffs in the title of the plaint as members of the Arya Samaj, Bombay, on behalf of themselves and all other members of the Arya Samaj, Bombay, being a society registered under the Societies Registration Act XXI of 1860, *except the defendants*. In that event whatever objection there is to the frame of the suit based on the same parties being plaintiffs as well as defendants to the suit would disappear.

[97] There now remain to be considered the two issues which have been raised by Mr. M. P. Amin on behalf of the defendants Nos. 2, 3 and 4, viz. whether the plaint discloses any cause of action against them and whether they are necessary parties to the suit. In this connection it may be observed that in para. 1 of the plaint they have been described as "some of the members of the managing committee of the said society," and are stated there to have been sued on behalf of themselves and all members of the managing committee of the society. In para. 16 of the plaint it is alleged that the managing committee are about to complete the sale of the Shenwewadi property and purchase of the Bangadwadi property, and in para. 17 of the plaint the plaintiffs have submitted that defendants Nos. 2 to 4 should be restrained from completing the said sale of Shenwewadi property and purchase of Bangadwadi property and from acting on the said resolution dated October 8, 1944, and carrying the same into effect. The prayer (c) of the plaint is based on these allegations against defendants Nos. 2, 3 and 4. When one turns to the written statement of defendants Nos. 2 to 4, they merely aver that the plaint discloses no cause of action against them and that they are unnecessarily made parties to the suit. There is no denial of the allegat-

ions which have been made in para. 16 of the plaint that the managing committee is about to complete the sale of the Shenwewadi property and purchase of the Bangadwadi property. In the absence of a specific denial in that behalf, I would be entitled to assume that the allegations in that behalf are admitted by defendants Nos. 2, 3 and 4. Mr. M. P. Amin, however, pointed out para. 2 of the written statement of the defendants Nos. 2 to 4 where they joined in all and singular the defences raised by the 1st defendant in his written statement as their own. When one turns to the written statement of the 1st defendant the only traverse which he has made of the allegations in para. 16 of the plaint is contained in the last sentence of para. 21 thereof which runs :

[98] "This defendant admits that the society is about to complete the sale of Shenwewadi property and the purchase of the property at Bangadwadi and the same will be completed in a few days."

[99] This statement even though it has been adopted in its entirety by defendants Nos. 2, 3 and 4 in their written statement, does not, in my opinion, amount to a traverse of the allegations contained in para. 16 of the plaint that the managing committee are about to complete the sale of the Shenwewadi property and the purchase of the Bangadwadi property. Under these circumstances, I do not see how defendants Nos. 2, 3 and 4 can contend that the plaint discloses no cause of action against them. If it cannot be contended that the plaint does not disclose any cause of action against them, it can certainly not be contended that they are not necessary parties to the suit. On this preliminary objection therefore I am not prepared to hold that the plaint discloses no cause of action against defendants Nos. 2, 3 and 4 or that they are not necessary parties to the suit. In the result I answer the issues which have been argued before me in the first instance as under : Issues raised by Mr. R. S. Billimoria. (1) In the affirmative. (2) The plaintiffs to be at liberty to amend the plaint by describing themselves as members of the Arya Samaj, Bombay, on behalf of themselves and all other members of the Arya Samaj, Bombay, being a society registered under the Societies Registration Act 21 (XXI) of 1860, *except the defendants*. The suit as framed would then be maintainable. (6) In the negative. (7) In the negative. Issues raised by Mr. M. P. Amin. (1) In the affirmative. (2) In the affirmative.

[100] As regards issue No. 4 (a) it is clear that the defendants are entitled to the particulars



of the fraud which has been pleaded by the plaintiffs, and I cannot allow the suit to proceed in the absence of such particulars furnished by the plaintiffs. Mr. M. V. Desai strenuously urged that the various allegations which had been made by the plaintiffs in the plaint were sufficient to constitute fraud and that there were sufficient particulars of fraud available in the plaint itself. A careful perusal of the relevant paragraphs of the plaint, however, reveals that there are no sufficient particulars of fraud which could be culled out from the various allegations contained therein and that on the very statement of the case made by Mr. M. V. Desai in his opening there were various facts which were relied upon by him as constituting fraud which did not find their place in the various paragraphs of the plaint relied upon by him for the purpose. I have therefore come to the conclusion that the plaintiffs are bound to furnish to the defendants the particulars of the fraud which they want to rely upon in support of their contentions set out in the plaint. I accordingly order that the plaintiffs do make an affidavit giving particulars of the fraud alleged by them in paras. 4 (b), 4(c) and 16 of the plaint and furnish a copy thereof to the defendants' attorneys within fourteen days. The defendants will be at liberty to plead to the same and file a supplemental written statement or written statements as they might be advised within fourteen days of such affidavit of particulars made by the plaintiffs. The cost of the issues disposed of by me above and the cost of the supplemental written statement or written statements will be reserved.

V.R./D.H.

*Order accordingly.*

[Case No. 106]

\* A. I. R. (33) 1946 Bombay 533

FULL BENCH

SEN, WESTON AND GAJENDRAGADKAR JJ.

*Ujamshi Govindji Sanghadia —**Applicant.*

v.

*Emperor.*

Criminal Revn. Appln. No. 455 of 1945, Decided on 8th January 1946, from order of Dist. Magistrate, Ahmedabad, D/- 27th August, 1945.

(a) Criminal P. C. (1898), S. 435—Proceeding — word "proceeding" has no reference to commission of offence.

A "proceeding" within the meaning of S. 435 cannot be said to have any reference, by itself, to the commission or trial of an offence.

[P 534 C 1]

Cri. P. C.

('46) Chitaley, S. 435, N. 10, Pt. 5.

('41) Mitra, p. 1380, para. 1169.

(b) Criminal P. C. (1898), Ss. 435 and 439 —

Criminal Court — District Magistrate requiring person to let part of house to specified person under R. 81 (2), Defence of India Rules— Order is not one made by court : 47 Bom. L. R. 357 : ('45) 32 A. I. R. 1945 Bom. 385 Crim. Revn. Appln. No. 23 of 1945 and Crim. Revn. Appln. No. 303 of 1945, *overruled*.

An order by a District Magistrate exercising the powers under R. 81 (2), Defence of India Rules requiring a person to let a part of his premises to the person specified is not a judicial order or an order made by a Court and is not, therefore, revisable by the High Court: 47 Bom. L. R. 357 : ('45) 32 A.I.R. 1945 Bom. 385, Criminal Reven. Appln. No. 23 of 1945, and Criminal Revn. Appln. No. 303 of 1945, *overruled*. *Case law referred*.

[P 535 C 2]

Cri. P. C. — ('46) Chitaley, S. 435 N. 7, Pt. 9. ('41) Mitra, 1382, para. 1171.

N. C. Shah — for Applicant.

S. B. Jathar Assistant Govt. Advocate —

for the Crown.

**Sen J.**—This is an application in revision against an order made by the District Magistrate, Ahmedabad, on 27th August 1945, requiring the appellant to let the second floor of his house at Vadvali Pole, Shahapur, Ward No. 1, Ahmedabad, to one Mr. B. S. Patel, District Inspector of Land Records, with effect from 28th, August 1945. This order was made under sub-r. (2) of R. 81 of the Defence of India Rules, 1939, read with Government Order H.D. (Political War) No. S. D. II/370 dated 15th September, 1944. There was an earlier order made by the District Magistrate dated 22nd August 1944, requiring the applicant to let the whole of the above-mentioned house to the said Mr. B. S. Patel. He protested against that order contending that he required the whole of his house for his family and his religious preceptor who also lived in the said premises. Thereupon the order complained against now was passed. It is the contention of the appellant that the order passed by the District Magistrate is *ultra vires* and void. This application has come before a Full Bench because the question has been raised whether this Court, sitting as a Criminal Revision Bench, has jurisdiction to interfere with the order complained against.

[2] It seems to us that at least three previous matters were decided by this Court in which orders of a similar kind were concerned. They are: 47 Bom. L.R. 357<sup>1</sup> Cri. Revn. Appln. No. 23 of 1945<sup>2</sup> and Cri. Revn. Appln. No. 303 of 1945.<sup>3</sup> The question of jurisdiction was raised, in

1. ('45) 32 A.I.R. 1945 Bom. 385 : 4 Bom. L.R. 357, Motichanda Balubhaji v. District Magistrate Sura.

2. Cri. Revn. 23 of 1945, decided on 11th April 1945 by Divatia and Bedekar JJ. Governbha Ambar v. Kandanmai Shobhagchanda.

3. Cri. Revn. No. 303 of 1945, decided on 12th July 1945, Diotri Rajadhyaksha JJ. Emperor v. Amrittal Manilal Shah.



forms somewhat different to that raised in the present application, in all those three cases. In the first case it was contended that the District Magistrate who had passed the order was a *persona designata* and that, therefore, this Court had no jurisdiction to interfere. The point raised in the second case appears to have been similar, while in the third case, the order having actually been passed by the Collector of the District, the point that was taken was that the Collector's order was not a judicial order and not, therefore, subject to revision by this Court. In that case, which was decided by Divatia and Rajadhyaksha JJ., it was held that as the notification which empowered the authority which passed the order stated that the officers empowered to requisition properties were the Collector and the District Magistrate in the mofussil, the order should have been passed by the Collector and District Magistrate, and that, therefore, the order must be deemed to be a judicial order. In all those three cases, it seems to have been assumed or conceded that if the order was made by the District Magistrate it was one that could be revised under S. 439 Criminal P.C.

[3] The objection as to jurisdiction raised in this case, however, goes deeper. It has been contended by the learned Assistant Government Pleader that in a case for revision under S. 439 the order complained against must come within the scope of the words "any proceeding before any Criminal Court" in S. 435 of the Code, that the order in question cannot be described either as a "proceeding" or as having been passed by a Criminal Court and that the order must be deemed not to be a judicial but an executive order and as such not revisable by this Court. He has argued that a "proceeding" within the meaning of S. 435 must have some reference to the commission of an offence and that such was not the case here. We are unable to accept this argument. It seems to us that there are some provisions in the Criminal Procedure Code itself which are not concerned, or not necessarily concerned, with the commission or the prevention of an offence, for instance, Ss. 488, 144 and 139, C. P. C. It seems to us obvious that the word "proceeding" cannot be given such a restrictive significance as contended for by the learned Assistant Government Pleader; a proceeding cannot be said to have any reference, by itself, to the commission or trial of an offence.

[4] The second argument that the order in question passed by the District Magistrate cannot be regarded as an order passed by a Court appears to us to be important. This

argument in its present form was not urged in any of the three previous matters already referred to which were decided by this Court. The District Magistrate is, no doubt, appointed by the Local Government under S. 10 Criminal P. C.; and the classes of Criminal Courts which are recognised by the Code are mentioned in S. 6. It has been strenuously contended by Mr. Shah for the applicant that a District Magistrate must for all purposes be deemed to be a Court as he is one of the Magistrates mentioned in S. 6 which describes the different kinds of Courts constituted under the Code. It seems to us, however, fairly obvious that a District Magistrate does not always or necessarily act as a Court. There have been decisions in which it has been held that a particular act of, or order made by, a District Magistrate was not that of a Court. For instance, in 12 Bom. L. R. 1029<sup>4</sup> it was held that an order passed by a District Magistrate under S. 44 Bombay District Police Act, 1890, was a mere executive police order, and could not, therefore, be interfered with by the High Court in its criminal revisional jurisdiction.

[5] In Ratanlal's Unreported Criminal Cases there are two further instances, Rat. Un. Cr. C. 540<sup>5</sup> and Rat. Un. Cr. C. 672<sup>6</sup>, where this Court decided that the High Court had no jurisdiction to interfere with orders made by a District Magistrate under Ss. 43 and 46 Bombay District Police Act, 1890. The District Police Act gives the District Magistrate large powers for making orders in different matters, for instance, as to licences for the control of theatres, blasting and excavation, brothels, prevention of disorders, prevention of riots or grave disturbance of the peace, maintenance of order at religious ceremonies, prevention of the out-break of epidemic diseases at fairs (Ss. 39 A, 40, 41, 42, 43, 44, 45); and it seems to us impossible to regard any such orders as anything but executive orders. The Magistrate when making such orders cannot be regarded as functioning as a Court. Under S. 13 District Police Act, the District Magistrate is the controlling authority of the police force of the District and his acts as such cannot obviously be those of a Court. Similarly under the Indian Arms Act, 1878, the District Magistrate has been given powers to issue licences for the possession of arms; and there

4. ('10) 8 I.C. 747; 12 Bom. L.R. 1029, In re Pandurang Shidrao.

5. ('91) Rat. Un. Cr. C. 540, Queen-Empress v. Kaji Sultan.

6. ('93) Rat. Un. Cr. C. 672, Queen-Empress v. Louis Frances.



also his powers must be regarded as purely executive and not judicial. The word "Court" has not been defined in the General Clauses Act, but it has been defined in S. 3, Indian Evidence Act, and in Ss. 19 and 20 Penal Code we find definitions of "Judge" and "Court of Justice." It seems to us hardly necessary to refer to these definitions because if it cannot be said that the District Magistrate must inevitably be a Court, as is clearly shown by the decision in 12 Bom. L. R. 1029<sup>4</sup> it has to be seen in every case whether the order challenged has been passed by a Court or not. Instances of decisions of other High Courts regarding acts of District Magistrates which have not been held to be acts of a Court may be found in 36 Cal. 433<sup>7</sup> and 38 Mad. 581<sup>8</sup>.

[6] That the order in question cannot be regarded as the order of a Court can be further seen from the fact that in the present instance the District Magistrate has exercised merely the authority delegated by the Provincial Government which in its turn derived its authority from the Central Government under the Defence of India Rules. Under the Defence of India Act, S. 2 (2), rules may be made providing for a large number of matters including the subject of requisitioning of houses. Rule 81 (2) made under the said provisions gives the Provincial Government powers under cl. (bb) to provide for requiring accommodation to be let either generally, or to specified persons or classes of persons, or in specified circumstances. Government Order H. D. (Pol. War) No. S. D. II/370 dated 15th September 1944, under which the District Magistrate's order purports to have been made, appears to have been passed under S. 2 (5), Defence of India Act, by which the Provincial Government

may by order direct that any power or duty which by rule made under Sub-s. (1) is conferred or imposed on the Provincial Government, shall in such circumstances as may be specified in the direction, be exercised or discharged by any officer or authority, not being an officer or authority subordinate to the Central Government. The use of the expression "officer or authority" suggests that the delegation of powers is not to a Court but to a person who can be entrusted with the powers of exercising the specific authority in question. As the Central Government is manifestly not a Court, it seems to us impossible to hold that either its agent or delegate can be regarded in any sense as such.

[7] It seems to us clear that in this case it is not possible to hold that the powers exercised by the District Magistrate requiring the applicant to let a part of his premises to the person specified was a judicial order or an order made by a Court. Mr. Shah on behalf of the applicant, besides contending that the very fact that the order was made by a District Magistrate shows that it was made by a Court, has further argued that as the District Magistrate having heard the applicant's objections and after hearing them passed his final order, the order should be regarded as a judicial order, i.e. an order revisable by this Court. But the real point in this case is whether the order has been passed in a "proceeding before an inferior criminal Court" within the meaning of S. 435, Criminal P. C. and in the view that we have taken we must hold that the three matters I have referred to, which were decided in 1944 and 1945 by this Court and wherein it was held that this Court, sitting in its criminal jurisdiction, had jurisdiction to interfere with the orders in question, were wrongly decided. The rule will, therefore, be discharged, as also the stay order.

V.R./D.H.

*Rule discharged.*

7. (1909) 36 Cal. 433 : 2 I.C. 436, Clarke v. Brojendra Kishore.

8. (1915) 2 A. I. R. 1915 Mad. 360 : 38 Mad. 581 : 25 I. C. 345, Vijayaraghavalu Pillai v. Theagaroya Chetti.

E N D



*J. N. Das*  
Advocate High Court  
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